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OCC Handbook Change is Latest Move in Administration's Shift on Lending Discrimination

Key Takeaways:

- The OCC has removed references to "disparate impact" from its Fair Lending Handbook, consistent with the broader shift in federal enforcement philosophy under the current administration.
- Executive Order 14281 and recent DOJ guidance indicate the federal government's intent to limit the use of disparate impact liability across regulatory contexts.
- While some federal agencies like the FDIC and Federal Reserve Board have not yet adopted similar changes, the DOJ and CFPB have taken steps consistent with the new policy direction.
- Despite federal shifts, disparate impact claims may remain viable under the Fair Housing Act and may still be pursued by state attorneys general or private plaintiffs, underscoring the need for continued compliance efforts.

On July 14, 2025, the Office of the Comptroller of the Currency (OCC) issued a bulletin announcing the removal of references to "disparate impact" in its *Comptroller's Handbook on Fair Lending*. See OCC Bulletin 2025-16 (July 2025), available here. This update reflects the Administration's ongoing shift in approach to how lending discrimination is assessed by federal regulators.

Overview of Lending Discrimination Theories

Generally, lending discrimination occurs when people are treated differently on a prohibited basis, and is shown in one of three theories: overt discrimination, disparate treatment discrimination and disparate impact discrimination. Prohibited bases include race or color, national origin, religion, sex, familial status and handicap.

Overt discrimination occurs when a lender openly discriminates on a prohibited basis. Disparate treatment occurs when a lender treats a credit applicant differently based on one or more prohibited bases. Such treatment does not require showing that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself; however, differential treatment (without a legitimate nondiscriminatory reason for the different treatment) may serve as indicia of

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intent.

A disparate impact analysis examines a facially-neutral policy or practice for its differential impact or effect on a particular group. To make out a claim of disparate impact under federal law, a plaintiff must first establish a *prima facie* case by showing (1) the occurrence of certain outwardly neutral practices and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices. Thus, the basis for a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy. This comparison, which lies at the core of disparate impact liability, must reveal that although neutral, the policy in question imposes a significantly adverse or disproportionate impact on a protected group of individuals.

As for the causation requirement under the disparate impact theory, the U.S. Supreme Court in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), noted that a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. Requiring a link between a defendant's policy and disparate impact therefore ensures that racial imbalance does not, without more, establish a *prima facie* case of disparate impact.

Trump Administration Shifts Policy on Disparate Impact Discrimination Theory

With any change in administration comes a change in enforcement philosophy and posture. With the second Trump Administration, the President and the Justice Department have clearly stated the Administration's shift in views. Under Executive Order 14281, 90 Fed. Reg. 17537 (Apr. 28, 2025), the President has directed: "It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws and basic American ideals." EO 14281, § 2. Further, Attorney General Bondi, in the Attorney General's Feb. 5, 2025, Justice Department (DOJ) memorandum, has concluded that "statistical disparities alone do not automatically constitute unlawful discrimination." See DOJ Memorandum on Eliminating Internal Discriminatory Practices (Feb. 5, 2025), available here.

The Federal Deposit Insurance Corporation and the Federal Reserve Board have not made comparable changes to their examination manuals regarding disparate impact. However, actions by the DOJ and the Consumer Financial Protection Bureau (CFPB) in declining to oppose motions to terminate prior redlining consent orders provide definitive evidence that the change in views as to disparate impact is permeating the Executive Branch.

Consequences for State and Private Actions

There is some question as to the reach of the Administration's change in policy. As we have seen, the President's Executive Order has certainly changed the way that the OCC views fair lending enforcement, as well as the enforcement posture of the DOJ and CFPB. However, that might not be enough to change attempted enforcement by the states or private plaintiffs. In the *Inclusive Communities* case, the Supreme Court directed: "The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose." *Inclusive Communities*, 576 U.S. 519, 545-546 (2015). The Supreme Court's recognition of the validity of disparate impact claims in Inclusive Communities was limited

to the Fair Housing Act. There has been some debate as to whether the disparate impact theory of discrimination may be asserted under the Equal Credit Opportunity Act (ECOA), or whether disparate impact is limited to Fair Housing Act claims. The federal bank regulators (at least before the OCC's recent action), all took the view that disparate impact discrimination could form the basis of an ECOA violation.

However, if challenges to the continued viability of the disparate impact theory in FHA and ECOA cases were to be brought under the current Supreme Court, it could reach a different conclusion. When the Court issued its *Inclusive Communities* decision in June 2025, the court looked very different than it does today. In 2015, Justice Kennedy authored the opinion, in which Justices Ginsburg, Bryer, Sotamayor and Kagan joined. The four liberal justices, plus Kennedy's swing vote, carried the day. Each of the dissenting justices—Thomas, Alito, Scalia and Roberts—are still on the bench, but are now joined by three additional conservatives. Whether the current court would reject the *Inclusive Communities* holding, and follow the Administration's view of disparate impact being unconstitutional remains to be seen.

Continued Vigilance is Needed to Ensure Compliance

Despite shifting federal policy, lenders and housing providers should remain cautious. The *Inclusive Communities* decision still stands, and states or private plaintiffs may continue to bring disparate impact claims. To mitigate risk, organizations should regularly review policies and practices to identify and minimize potential disparate impact claims.