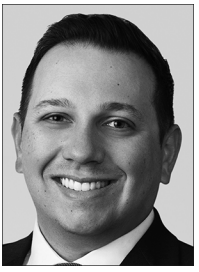
Revisiting Disparate Impact Liability in Financial Services Under Executive Order 14281

Peter N. Cubita & Michael R. Guerrero



Peter N. Cubita



Michael R. Guerrero

Peter N. Cubita is a senior counsel in the consumer financial services practice group of Hinshaw & Culbertson LLP. A long-time member of the American College of Consumer Financial Services Lawyers and the Governing Committee of the Conference on Consumer Finance Law, Mr. Cubita has won distinguished legal writing awards from The Burton Awards for his articles titled "The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There" and "Auto Finance and Disparate Impact: Substantive Lessons Learned from Class Certification Decisions." He is a graduate of St. John's University School of Law, where he served as an Articles Editor of the St. John's Law Review.

Michael R. Guerrero is a partner in the consumer financial services practice group of Hinshaw & Culbertson LLP. A member of the Governing Committee of the Conference on Consumer Finance Law and former Co-Chair of the California Lawyers Association's Consumer Financial Services Committee, Mr. Guerrero advises banks, fintech companies, and other financial services clients on regulatory compliance matters, including fair lending. He is recognized in Chambers USA for Financial Services Regulation: Consumer Finance, Compliance (Up and Coming, 2026) and has presented on fair lending developments at industry conferences, including the American Bar Association's Consumer Financial Services Committee and the Conference on Consumer Finance Law. Mr. Guerrero is a graduate of California Western School of Law, where he received the Faculty Award for Outstanding Law Review Article on the Fair Credit Reporting Act.

Originally recognized by the United States Supreme Court in the employment discrimination context,[1] the disparate impact theory of liability has had a contentious path in the credit and housing discrimination contexts.[2] The disparate impact theory of liability establishes a framework for establishing unlawful discrimination based on the effects of a facially neutral policy or practice, without regard to intent. A plaintiff asserting a disparate-impact claim challenges facially neutral policies or practices "that have a disproportionately adverse effect on [a prohibited basis] and are otherwise unjustified by a legitimate rationale."[3] The Supreme Court has found the theory to be valid under the Fair Housing Act ("FHA")[4] and, until recently, the theory was expressly recognized in the Equal Credit Opportunity Act's ("ECOA") Regulation B and its Official Staff Commentary.[5] Recently, however, the cognizability of disparate impact claims under the ECOA has become increasingly uncertain as a result of the Executive Order 14281 of April 23, 2025, titled "Restoring Equality of Opportunity and Meritocracy" (the "Executive Order").[6]

1. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the United States Supreme Court held that disparate impact claims are cognizable under Section 703(a)(2) of Title VII of the Civil Rights Act of 1964.
2. Equal Credit Opportunity Act (Regulation B), 91 Fed. Reg. 21620, 21621 (Apr. 22, 2026) (to be codified at 12 C.F.R. pt. 1002 and Supplement I to pt. 1002) [hereinafter CFPB Final Rule] (first citing Smith v. City of Jackson, 544 U.S. 228 (2005) (plurality op.) (Age Discrimination Employment Act); and then citing Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (Fair Housing Act)).
3. *Id.* at 21621 (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 524).
4. *See* Alan S. Kaplinsky et al., *Divided U.S. Supreme Court Holds Disparate Impact Claims Cognizable Under FHA, but Subject to Safeguards Against Abusive Disparate Impact Claims*, 68 Consumer Fin. L. Q. Rep. 472, 474 (2015).
5. 12 C.F.R. § 1002.6(a) (2025) ("The legislative history of the Act indicates that [] Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."); *see also* Regulation B, cmt.1002.6(a)-2 (2025) (stating, based solely on the aforementioned House and Senate Reports, that "[t]he Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor . . . has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact"); *id.* cmt.1002.2(p)-4 ("[N]eutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test. (See comment 6(a)-2 for a discussion of the effects test).").
6. Executive Order No. 14281, *Restoring Equality of Opportunity and Meritocracy*, 90 Fed. Reg. 17537 (Apr. 28, 2025) [hereinafter Executive Order].

The Executive Order declares that "[i]t 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."[7] The Executive Order's policy of eliminating the use of disparate impact liability is premised on the view that it is inconsistent with the bedrock principle of equal protection under the law, which "guarantees equality of opportunity, not equal outcomes."[8] The Executive Order asserts that the requirement to establish the existence of unlawful discrimination by looking initially at disparities in outcomes creates "a near insurmountable presumption of unlawful discrimination."[9] This presumption, the Executive Order further asserts, may arise where "there are any differences in outcomes . . . even if there is no facially discriminatory policy or practice or discriminatory intent involved and everyone has an equal opportunity to succeed."[10] In this connection, the Executive Order states that the prospect of disparate impact liability is itself discriminatory and "all but requires individuals and businesses to consider [prohibited bases] and engage in [prohibited bases] balancing to avoid potentially crippling legal liability."[11] For these reasons, the Executive Order withdrew prior Presidential approvals of Justice Department regulations that recognized disparate impact liability under Title VI of the Civil Rights Act of 1964[12] and ordered federal agencies and the Attorney General to

7. *Id.*§ 2.
8. *Id.*§ 1.
9. *Id*. *Cf.* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 589 (2015) ("In the Court's words, it is 'paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing.' Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).") (Alito, J., dissenting) (citation omitted).
10. Executive Order § 1, 90 Fed. Reg. at 17537.
11. A discussion of the equal protection concerns underlying the Executive Order is beyond the scope of this Article. We note, however, that the United States Supreme Court has discussed at length "limitations on disparate impact liability that 'are necessary to protect potential defendants against abusive disparate impact claims'" and liability based solely on statistical disparities. Kaplinsky et al., *supra* note 4, at 474 (quoting *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 540) (stating that disparate impact liability "has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of statistical disparity").
12. Title VI prohibits recipients of federal funding from discriminating based on race and other characteristics. Section 3 of the Executive Order revokes: (i) the Presidential approval of July 25, 1966 of the DOJ Title VI regulations as applied to 28 C.F.R. § 42.104(b)(2) in full; and (ii) the Presidential approval of July 5, 1973 of the DOJ Title VI regulations as applied to the words "or effect"

take specific actions to implement the Administration's policy of "eliminat[ing] the use of disparate-impact liability in all contexts to the maximum degree possible."[13]

While controversial, the Executive Order was not issued in a vacuum. From a fair lending perspective, the Executive Order might be understood as the culmination of a decade-plus trajectory, throughout which the theory's legitimacy and statutory basis were called into question in high-profile cases premised on questionable applications of the doctrine under the Fair Housing Act ("FHA") and the Equal Credit Opportunity Act ("ECOA"). Viewed from this historical perspective, the policy reset put in motion by the Executive Order is not a complete surprise and might be viewed as a less controversial attempt by the Administration to restore what it perceives as the originally intended boundaries of anti-discrimination law and regulatory regimes. In this Article, we provide historical background regarding the disparate impact theory of liability, including how it became a controversial fair lending topic, analyze the Executive Order, discuss the key fair lending actions taken to implement the Executive Order directives, and provide an update on challenges to these actions and state actions taken in response to the Executive Order.

I. Historical Background

Disparate impact was not firmly established as a means of proving unlawful discrimination until it was litigated in *Griggs v. Duke Power Company*[14] and recognized by the Supreme Court in 1971 under Title VII. Although *Griggs* has been criticized as "poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress,"[15] the "effects test" recognized in *Griggs* subsequently was extended to the ADEA by a plurality of the Supreme Court in *Smith v. City of Jackson*[16] and to the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[17] While no counterpart ECOA case has yet to make it to the Supreme Court, the CFPB's at-

in both place they appear in 28 C.F.R. § 42.104(b)(3), and as applied to 28 C.F.R. §§ 42.104(b)(6)(ii), (c)(2). Executive Order § 3, 90 Fed. Reg. at 17538; *see also* Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 90 Fed. Reg. 57141 (Dec. 10, 2025) (codified at various paragraphs of 28 C.F.R. § 42.104).

13. Executive Order §§ 4–7, 90 Fed. Reg. at 17538–39.

14. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

15. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 550 n.3 (Thomas J., dissenting) (quoting W. Eskridge, Dynamic Statutory Interpretation 78 (1994)).

16. Smith v. City of Jackson, 544 U.S. 228 (2005) (plurality op.).

17. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (Fair Housing Act).

tempt to further institutionalize the framework under the ECOA in its Bulletin 2013-02 titled "Indirect Auto Finance and Compliance with the Equal Credit Opportunity Act" resulted in the first regulatory guidance document disapproved by Congress pursuant to the Congressional Review Act.

A. In the Beginning There Was *Griggs.*

While still criticized, the seminal case of *Griggs v. Duke Power Co.* is among the least controversial disparate impact cases. In *Griggs*, the Supreme Court addressed the question of:

> [W]hether an employer is prohibited by . . . Title VII [of the Civil Rights Act of 1964] from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [African Americans] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[18]

The district court found that, while the employer had previously overtly discriminated on the basis of race in the hiring and assigning of employees prior to the effective date of Title VII, such overt discrimination had ceased after the law became effective and there was no showing of a discriminatory purpose in the adoption of the facially neutral requirements.[19]

After "only a brief nod" in a footnote to the statutory text, the Supreme Court tied the then-"novel theory of discrimination to 'the statute's perceived *purpose*' and the EEOC's view of the best way of effectuating it."[20] The two statutory provisions at issue in *Griggs* read as follows:

> Subsection 703(a)(2) of Title VII, which declares it an unlawful employment practice for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individ-

18. *Griggs*, 401 U.S. at 425–26.

19. *Id.* at 426–27, 429, 432.

20. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 553 (Thomas, J., dissenting) (emphasis in original) (citations omitted); *see id.* at 577–78 (Alito, J., dissenting) ("Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which the plaintiffs' claims were based"; the footnote "reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim."). In his dissent in *Inclusive Communities*, Justice Thomas noted that statutory provisions should not be replaced by perceived statutory purposes because "statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution." *Id.* at 553 (Thomas, J., dissenting). Foreshadowing the demise of *Chevron* deference, Justice Thomas further stated, "[N]or should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking rulemaking authority." *Id.* (citations omitted).

> ual of employment opportunities ***or otherwise adversely affect*** his status as an employee, because of such individual's race, color, religion, sex or national origin[;]" and
>
> Section 703(h) of Title VII, which states that "it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action on the results is *not designed, intended or used to discriminate* ***because of*** *race, color, religion, sex or national origin. . . .*"[21]

In a conclusory fashion, the Court stated that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute . . . to achieve equality of employment opportunities" and to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[22]

Neither the high school completion nor the general intelligence test requirement had been shown to bear "a demonstrable relationship to successful performance of the jobs for which it [is] used" and "the Company's judgment that they generally would improve the overall quality of the work force" alone was insufficient.[23] The Court thereupon held that Title VII prohibits giving testing or measuring procedures controlling force "unless they are demonstrably a reasonable measure of job performance" because "[w]hat Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[24] In a

21. *Griggs*, 401 U.S. at 426 n.1 (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)(2), (h)).
22. *Griggs*, 401 U.S. at 429, 431; *see also id.* at 430–31 (further stating that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group" in that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"). Section 703 of Title VII subsequently was amended by the Civil Rights Act of 1991 to expressly address disparate impact claims by codifying the burden of proof in disparate impact cases arising Title VII. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k)).
23. *Griggs*, 401 U.S. at 431–32. The Court rejected the employer's argument that Section 703(h) expressly authorized its use of the general intelligence tests, noting that the EEOC had issued guidelines interpreting the exception for professionally developed ability tests to permit only the use of job-related tests and that those guidelines comport with the congressional intent as reflected in legislative history that the Court discussed at length. *Id.* at 433–36. Notably, there was evidence indicating that employees who had not completed high school or taken the general intelligence tests performed satisfactorily and made progress in departments for which the high school and test requirements were subsequently used. *Id.* at 431–32, 432 n.7.
24. *Id.* at 436.

nutshell, the takeaway from *Griggs* was that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" with business necessity being the touchstone for determining the lawfulness of such facially neutral policies or practices.[25] This being the case, the Court held that "[i]f an employment practice which operates to exclude . . . [persons on a prohibited basis] cannot be shown to be related to job performance, the practice is prohibited [by Title VII]."[26]

Griggs' purported predication[27] on statutory text proscribing an adverse "effect" is what causes it to be less controversial and viewed as a more straightforward, or prototypical, disparate impact decision. Moreover, as a factual matter, the disparate impact claim involved specific employment practices that had a readily demonstrable adverse effect on African Americans and could be eliminated without any adverse consequence to the employer going forward because they were not job related or otherwise based on a business necessity.

B. From *Griggs* to "Something Has Gone Badly Awry" and the Safeguards Against Abusive Disparate Impact Claims.

Following *Griggs*, disparate impact claims began to be asserted under other discrimination statutes. After a plurality of the Supreme Court de-

25. *Id*. at 431.

26. *Id*. The business justification requirement under Title VII subsequently was codified by the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. 102-166, § 105(a), 105 Stat. 1071, 1074–75 (codified at 42 U.S.C.§ 2000e-2(k)(1)(A)(i)) (requiring a demonstration that the challenged practice is job related for the position in question and consistent with business necessity).

27. In *Inclusive Communities*, Justice Thomas, a former chairman of the EEOC, wrote a separate dissenting opinion "to point out that the foundation upon which the Court builds it latest disparate-impact regime—*Griggs v. Duke Power Co*.—is made of sand." Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015) (Fair Housing Act) (Thomas, J., dissenting) (citations omitted). For reasons explained in his illuminating dissenting opinion, Justice Thomas concludes that *Griggs* "shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation that we should expect from a court of law." *Id*. at 557. *See generally* Memorandum Opinion for the Chair of the U.S. Equal Employment Opportunity Commission, 50 Op. O.L.C. _, 2026 OLC LEXIS 16, at *37 (June 9, 2026) (DOJ Office of Legal Counsel memorandum opinion concluding that "[d]isparate-impact liability as currently interpreted by EEOC is unconstitutional" because its regulations and guidance fail to incorporate in key respects safeguards on disparate impact liability that the Supreme Court has indicated are constitutionally required "and the validation-study and affirmative-action regulations conflict with Title VII and the Constitution"). That said, while occasionally criticized, *Griggs* remains the seminal Title VII disparate impact decision and Section 703 subsequently was amended by the Civil Rights Act of 1991 to expressly address disparate impact claims by codifying the burden of proof in disparate impact claims arising thereunder. *See* 42 U.S.C. § 2000e-2(k).

termined in *Smith v. City of Jackson* that disparate impact claims were cognizable under Section 4(a)(2) of the ADEA because of its similar effects-related statutory language, defense counsel began to question the previously accepted wisdom that disparate impact claims were cognizable under the FHA which has no effects-related language in Section 805(a) and more debatable "otherwise make unavailable" language in Section 804(a).[28] The result was that the issue of whether disparate impact claims were cognizable under the FHA would ultimately be addressed by the Supreme Court in its 2015 *Inclusive Communities* decision. However, in the years leading up to the Supreme Court decision in *Inclusive Communities*, Supreme Court review of the FHA's discrimination proscriptions was twice thwarted by settlements reached by the defendants after petitions for writs of certiorari had been granted and the cases had been scheduled for oral argument.[29]

The disparate impact claim in the first of these FHA cases, *Magner v. Gallagher*,[30] illustrates how disparate impact theories of liability came to be used in questionable factual contexts that were conceptually far afield from the more traditional claim alleged in *Griggs*. In *Magner*, the plaintiffs were current and former owners of private rental properties whose customers were mainly low-income tenants a large percentage of whom were African-American. They alleged that City of St. Paul officials and the housing code enforcement agency had a facially neutral practice of aggressively enforcing the Housing Code that increased costs for the property owners, which resulted in less affordable low-income housing and impacted racial mi-

28. The nine courts of appeals that had addressed the question prior to the Supreme Court decision in *Inclusive Communities* unanimously held that disparate impact claims were cognizable under the FHA. However, as Justice Alito noted in his dissenting opinion in *Inclusive Communities*, the "text-free reasoning [in *Griggs*] caused confusion . . . and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* court, often made little effort to ground their decisions on statutory text." *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 578 (Alito, J., dissenting). Notably, however, prior to the Supreme Court decision in *Inclusive Communities*, a federal district court invalidated the 2013 HUD disparate impact rule after finding that disparate impact claims were not cognizable under the FHA. Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d 30, 32 (D.D.C. 2014), *vacated and remanded for consideration in light of Inclusive Communities*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. 2015) (per curiam), *on remand*, 693 F. Supp. 3d 20 (D.D.C. 2023) (granting HUD's cross-motion for summary judgment).

29. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 565 U.S. 1013 (2011), *cert. dismissed*, 565 U.S. 1187 (2012); Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 570 U.S. 904 (2013), *cert. dismissed*, 571 U.S. 1020 (2013). *See Inclusive Cmtys. Project, Inc.*, 576 U.S. at 548 n.1 (Alito, J., dissenting).

30. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 565 U.S. 1013 (2011), *cert. dismissed*, 565 U.S. 1187 (2012).

norities disproportionately because such minorities comprised a disproportionate percentage of individuals or households that rely on low-income housing. While the challenged enforcement practices may have been objectionable in other respects,[31] the plaintiff was making the peculiar assertion that the enforcement of a municipal housing code was the allegedly unlawful policy or practice.

Magner nevertheless made its way to the docket of the United States Supreme Court after the Eighth Circuit issued a decision with respect to the disparate impact claim that was adverse to the City of St. Paul officials and the housing enforcement agency. Approximately two weeks before oral argument, the parties filed an Agreed Motion to Dismiss pursuant to a settlement that subsequently became the subject of a highly critical joint congressional staff report titled "DOJ's *Quid Pro Quo* with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law."[32] The certiorari petition in *Magner* was therefore dismissed in 2012. The certiorari petition in the second FHA case to reach the Supreme Court, *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, was dismissed in 2013.[33]

The United States Supreme Court finally was afforded the opportunity, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, to determine whether disparate impact claims were cognizable under the FHA. *Inclusive Communities* involved a challenge to the administration of federal tax credits for low-income housing developers by a Texas agency that allegedly resulted in a disproportionate allocation of tax credits to predominantly minority inner-city areas and too few in predominantly white suburban neighborhoods. When a divided Supreme Court ultimately resolved the issue of whether disparate impact claims are cognizable under the FHA, the odd nature of the facially neutral practice challenged in *Magner* prompted comments from Supreme Court justices reflecting their misgivings about how disparate impact theories of liability had come to be used. Justice Alito began the principal dissenting opinion

31. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 547–48 (Alito, J., dissenting) (citations and footnote omitted).

32. Joint Staff of H. Comm. on Oversight & Gov't Reform, S. Comm. on the Judiciary, and H. Comm. on the Judiciary, 113th Cong., DOJ's *Quid Pro Quo* with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law 1–2 (Comm. Print 2013). This congressional staff report is discussed by Justice Thomas in his dissenting opinion in *Inclusive Communities*, wherein he notes that the Assistant Attorney General "allegedly promised [various officials of St. Paul, Minnesota] that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the dismissal of" *Magner. Inclusive Cmtys. Project, Inc.*, 576 U.S. at 552 n.4 (Thomas, J., dissenting).

33. Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 570 U.S. 904 (2013), *cert. dismissed*, 571 U.S. 1020 (2013).

in *Inclusive Communities* with a pointed introduction which asserted that "[s]omething has gone badly awry" with respect to disparate impact claims:

> No one wants to live in a rat's nest. Yet in *Gallagher v. Magner*, 619 F.3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act . . . could be used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i.e.*, there was a "disparate impact." The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.
>
> Today, the Court embraces the same theory that drove the decision in *Magner*. This is a serious mistake. . . . *Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit*.[34]

In what was tantamount to an implicit acknowledgement that something had in fact gone seriously awry, the Court in its *Inclusive Communities* opinion stated: "Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability."[35]

During the oral argument in *Inclusive Communities*, the Chief Justice asked the Solicitor General what would constitute a disparate impact with respect to the low-income housing tax credit allocation—not promoting housing in the low-income area or not promoting housing integration.[36]

---

34. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 557–58 (Alito, J., dissenting) (emphasis added) (citations and footnote omitted).

35. *Id.* at 544. Lest the point be lost that this was perceived as an abusive disparate impact claim, the Court stated that governmental entities "must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Id.*

36. The Chief Justice initially framed his question as follows:

> CHIEF JUSTICE ROBERTS: . . . one concern about disparate impact is that it's very difficult to decide what impact is—good and bad. Take two proposals. One is a proposal to build new housing in a low income area, it would benefit primary—primarily minorities; new housing, good thing. The other proposal is to build housing in a more affluent area. It would help promote integration of housing; also a good thing.
> Which one gets credit [in] . . . trying to decide [whether there has been a

The Solicitor General did not answer this question directly, stating instead that: (i) HUD has determined that "disparate impact is the right policy judgment;" (ii) the question needed to answered in the context of the standards for establishing disparate impact liability; (iii) there may be a sufficient justification for the challenged practice; and (iv) unlike the particular claim in *Inclusive Communities*, the case before the Court, the typical FHA disparate impact cases "are really pretty straightforward."[37] The Chief Justice repeatedly returned to his question regarding what would constitute a disparate impact without receiving a satisfactory response before Justice Kennedy intervened and reframed the question as whether the Solicitor General's position was that a *prima facie* case of disparate impact might be established regardless of how the administrative agency chose to allocate the low-income housing tax credits.

The Solicitor General ultimately responded that the respondent's claim "may not be a good disparate-impact claim, Mr. Chief Justice" and confirmed that Justice Kennedy "may be right" that the position of the Solicitor General and the respondents was that a *prima facie* case of disparate impact liability may be established regardless of how the administrative agency chose to allocate the low-income housing tax credits.[38]

The remarkable concession by the Solicitor General that the claim in *Inclusive Communities* "may not be a good disparate impact claim" and his acknowledgement that, essentially, either hypothetical means of administering the low-income housing tax credits could be used to establish a *prima facie* case of disparate impact liability captured the attention of the Court. Justice Kennedy aptly characterized the ultimate response as "very odd to me." This meant the state administrative agency could be challenged under a disparate impact theory no matter how it chose to administer the tax credits and then left with the burden of demonstrating a legally sufficient justification for its policy or practice. In other words, a state housing agency could be sued if it did and sued if it did not.

This illuminating oral argument exchange, coupled with the principal dissenting opinion of Justice Alito noting that "something [had] gone badly awry" with disparate impact theories of liability, yielded an extensive discussion in *Inclusive Communities* of the limitations on disparate impact liability necessary to protect potential defendants against abusive disparate impact claims. While a complete discussion of those safeguards is beyond the scope of this Article,[39] we note that one of the safeguards identified was

---

disparate] . . . impact? The one that is revitalizing a low-income area or the one that is integrating a high-income area?

Transcript of Oral Argument at 39, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (No. 13-1371).

37. *Id*. at 39–40, 42–44.

38. *Id*. at 39–45.

39. For a discussion of the safeguards against abusive disparate impact claims, *see* Kaplinsky et al., *supra* note 4, at 474.

a "robust causality requirement" that protects defendants "from being held liable for racial disparities they did not create."[40] The robust causality requirement is a safeguard against conflating causation and with correlation.

The pointed admonition against abusive disparate impact claims set the stage for the Executive Order's observation that disparate impact liability has been used in ways that create "a near insurmountable presumption of unlawful discrimination . . . where there are any differences in outcomes in certain circumstance among different races, sexes, or similar groups."

C. Disparate Impact and ECOA: The CFPB Indirect Auto "Lending" Bulletin.

Perhaps the most controversial, high-profile example of a questionable application of disparate impact liability is that outlined in CFPB Bulletin 2013-02, titled "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" (the "Bulletin")[41] and described in the Consent Orders entered into in the years after its adoption.[42] This Bulletin states that

40. The statement regarding the need for a robust causality requirement to ensure that defendants are not held liable for disparities that they did not create should be borne in mind when analyzing an asserted "markup and compensation policy" of a motor vehicle RISC assignee that "allows" dealerships to determine the APR under their RISCs, given that any rate spread disparities ultimately are based on the retail credit pricing decisions made by independent dealerships.

41. CFPB, CFPB Bull. 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (2013) [hereinafter CFPB Bulletin 2013-02], *disapproved pursuant to the Congressional Review Act by* Pub. L. No. 115-172, 132 Stat. 1290 (2018).

42. CFPB Bulletin 2013-02 was the precursor to four joint CFPB and Department of Justice ("DOJ") consent orders providing for more restrictive percentage limits on the finance charge rate spreads in RISCs purchased from dealerships by the respondent banks and sales finance companies. *See, e.g.*, Kevin M. McDonald & Kenneth J. Rojc, *Accelerating Regulation of Automotive Finance*, 72 Bus. Law. 559, 559–61 (2017); Kevin M. McDonald & Kenneth J. Rojc, *Automotive Finance, The Regulatory Cap Spilleth Over*, 71 Bus. Law. 713, 716–18, 719 (2016). The CFPB consent orders were based upon the same legal theory of disparate impact liability that had been asserted in class action lawsuits settled years earlier. *See generally* John L. Ropiequet & Nathan O. Lundby, *Dealer Rate Participation Class Actions Under the ECOA: Have We Reached the End of the Road?*, 62 Bus. Law. 663 (2007); Peter N. Cubita & Michelle Hartman, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There*, 61 Bus. Law. 829, 829 n.1 (2006) (citing N. Munro, J. Noonan & R. Topoluk, *Recent Developments in Fair Lending and the ECOA: A Look at Housing Finance and Motor Vehicle Dealer Participation*, 60 Bus. Law. 627, 635–44 (2005)); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002) (holding that compensatory damages under the ECOA are not recoverable by a Rule 23(b)(2) class).

Relatedly, in January 2014 the National Automobile Dealers Association

it was issued to provide "guidance about compliance with the fair lending requirements of the . . . ECOA and its implementing . . . Regulation B . . . for indirect auto lenders that permit dealers to increase consumer interest rates and that compensate dealers with a share of the increased interest rates."[43]

It was, in essence, an explanation of an ill-conceived disparate impact theory of liability under which purchasers of motor vehicle retail installment sale contracts ("RISCs") such as banks and sales finance companies might be held liable under the ECOA for allegedly "allowing" subjective pricing of retail motor vehicle financing by independent, unaffiliated dealerships pursuant to an asserted finance charge "markup and compensation policy" of the bank or sales finance company. More specifically, the Bulletin asserted that unlawful discrimination could be established through statistical disparities in the difference (the "finance charge rate spread") between the wholesale buy rate established by the RISC purchaser and the retail APR agreed upon by independent, unaffiliated dealerships and their customers, the retail buyers.[44] The ECOA compliance concern identified by the

("NADA"), in collaboration with the National Association of Minority Automobile Dealers and the American International Automobile Dealers Association, released to their members a voluntary Fair Credit Compliance Policy and Program for dealerships modeled on consent orders that the DOJ had entered into in 2007 to resolve allegations of disparate impact discrimination by two automobile dealerships in the pricing of credit. *See NADA Fair Credit Guidance*, NADA, https://www.nada.org/regulatory-compliance/nada-fair-credit-guidance.

43. CFPB Bulletin 2013-02, *supra* note 41, at 1.

44. The Bulletin describes the risk-based buy rate as "a minimum interest rate at which a lender is willing to purchase the retail installment sales contract executed by the [buyer] for the purchase of the automobile" and describes the asserted "mark-up" policy of the RISC purchaser as follows:

> The indirect auto lender may also have a policy that allows the dealer to mark up the interest rate above the indirect auto lender's buy rate. In the event that the dealer charges the consumer an interest rate that is higher than the lender's buy rate, the lender may pay the dealer what is typically referred to as "reserve" (or "participation"), compensation based upon the difference in interest revenues between the buy rate and the actual note rate charged to the consumer in the retail installment contract executed with the dealer. Dealer reserve is one method lenders use to compensate dealers for the value they add by originating loans and finding financing sources.
>
> . . .
>
> The supervisory experience of the CFPB confirms that some indirect auto lenders have policies that allow auto dealers to mark up lender-established buy rates and that compensate dealers for those markups in the form of reserve (collectively, "markup and compensation policies"). Because of the incentives these policies create, and the discretion they permit, there is a significant risk that they will result in pricing disparities

Bulletin was that the discretionary "markup and dealer compensation policy" of an assignee of RISCs could subject the assignee to disparate impact liability if its "mark-up" policy resulted in portfolio wide (or dealership specific) rate spread disparities on a prohibited basis.[45]

The Bulletin's disparate impact theory of liability based on such a "markup and dealer compensation policy" was heavily criticized for its numerous potentially fatal legal and factual flaws. An *Unsafe at Any Bureaucracy* trilogy of investigative reports regarding the CFPB indirect auto finance enforcement actions prepared by the Republican Staff of the House Financial Services Committee discusses many of these flaws in detail.[46] Ultimately, Congress agreed, and the Bulletin became the first regulatory

---

on the basis of race, national origin, and potentially other prohibited bases.

Id. at 1–2.

45. *Id*. at 3 & n.5 ("An indirect auto lender's markup and compensation policies may alone be sufficient to trigger liability under the ECOA if the lender regularly participates in a credit decision and its policies result in discrimination. The disparities triggering liability could arise either within a particular dealer's transactions or across different dealers within the lender's portfolio. Thus, an indirect auto lender that permits dealer markup and compensates dealers on that basis may be liable for these policies and practices if they result in disparities on a prohibited basis.").

46. Majority Staff of H.R. Comm. on Fin. Servs., 114th Cong., Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending (2015) [hereinafter Unsafe at Any Bureaucracy, Part I]; Majority Staff of H.R. Comm. on Fin. Servs., 114th Cong., Unsafe at Any Bureaucracy, Part II: How the CFPB Removed Anti-Fraud Safeguards to Achieve Political Goals (2016); Majority Staff of H.R. Comm. on Fin. Servs., 115th Cong., Unsafe at Any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders (2017) [hereinafter Unsafe at Any Bureaucracy, Part III]. Part III of the trilogy includes the following executive summary of the conclusions reflected in each part of the trilogy:

> Part I showed, using internal CFPB documents, that the CFPB's ECOA actions against auto financers were knowingly premised on a suspect legal theory and a fundamentally flawed statistical methodology for estimating the race of borrowers. Part II showed, again using internal CFPB documents, that the CFPB's theory of liability for auto financers cannot meet the legal test for disparate impact.
>
> Part III . . . makes additional CFPB documents available to the public. These documents discuss the CFPB's disparate-impact methodology in more detail. . . .
>
> Part III also demonstrates that under recent Supreme Court precedent, if the CFPB were to rely upon the legal theory it deployed in previous enforcement actions against auto financers, its claims would not survive judicial scrutiny.

Unsafe at Any Bureaucracy, Part III, *supra*, at 1. In commenting on the first

guidance document to be disapproved by Congress pursuant to the Congressional Review Act.[47]

II. The Executive Order

The Obama and Biden Administrations embraced the disparate impact theory of liability. CFPB Bulletin 2013-02 was issued during the Obama Administration, which also presided over the issuance of the first HUD disparate impact rule in the aftermath of the grant of the certiorari petition

---

part of this trilogy, a preeminent fair lending lawyer offered the following apt observations:

> The CFPB documents cited in the report paint a picture of a staff that is well aware of the weakness of its legal theory and of the fact that its evidence is based on a seriously flawed methodology. . . . From my many years of enforcing the ECOA at the Federal Trade Commission, I know the Commission would have refused to authorize an enforcement action if presented with staff admissions of such a flimsy case.

L. Jean Noonan, *Congressional Staff Report Reveals Sad Inner Workings of CFPB Fair Lending Attack on Dealer Compensation*, Hudson Cook (Dec. 1, 2015), at 1, https://www.hudsoncook.com/temp/congressional-staff-report-reveals-sad-inner-workings-of-cfpb-fair-lending-attack-on-dealer-compensation.pdf.

Additionally, a study prepared for the American Financial Services Association by Charles River Associates included a series of key findings that "demonstrate errors and omissions in the CFPB's . . . approach and offer measures that can improve regulatory reviews." Arthur P. Baines & Marsha J. Courchane, Charles River Assocs., Fair Lending: Implications for the Indirect Auto Finance Market 2 (2014), https://afsaonline.org/wp-content/uploads/2023/03/Charles-River-Study-Executive-Summary.pdf. There are also thought-provoking articles: (i) analyzing the substantive lessons to be learned from seminal appellate decisions involving the class action commonality requirement and disparate impact claims based on an asserted policy of "allowing" subjective decision-making by managers and loan officers; and (ii) explaining why the threshold question of whether disparate impact claims are cognizable under the ECOA should be examined in light of the statutory construction analysis set forth therein given that "[c]ourts concluding that the ECOA prohibits disparate impact discrimination that is not business justified generally have done so without scrutinizing the text of the ECOA discrimination proscription." Peter N. Cubita et al., *Auto Finance and Disparate Impact: Substantive Lessons Learned from Class Certification Decisions*, 18 Cons. Fin. Servs. L. Rep., May 1, 2015, at 6, 7–11 (discussing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) and Rodriguez v. Nat'l City Bank, 726 F.3d 372 (3d Cir. 2013)); Cubita & Hartmann, *supra* note 42, at 829–830 & n.2.

47. Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Bureau of Consumer Financial Protection Relating to "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act," Pub. L. No. 115-172, 132 Stat. 1290 (2018), https://www.govinfo.gov/content/pkg/PLAW-115publ172/pdf/PLAW-115publ172.pdf.

in *Magner.* After the HUD disparate impact rule was amended during the first Trump Administration, it was resurrected during the Biden Administration. The CFPB requested information regarding disparate impact and the ECOA and Regulation B in 2020,[48] but no action of consequence was taken in response. The issuance of the Executive Order declaring it is the policy of the United States to eliminate the use of disparate impact liability in all contexts to the maximum extent possible thus represented a complete turnaround relative to the policy of these prior administrations.

A. Key Executive Order Directives.

In addition to announcing a federal policy of eliminating disparate impact liability to the maximum extent possible, the Executive Order directs the Attorney General and federal agencies to take specific actions. The key Executive Order directives from a consumer financial services regulatory perspective are as follows:

- *Deprioritize Enforcement* (Sec. 4): "[A]ll agencies shall deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability. . . ."
- *Existing Regulations* (Sec. 5): Within 30 days, the Attorney General shall report to the President:
  - "all existing regulations, guidance, rules or orders that impose disparate impact liability . . . and detail agency steps for their amendment or repeal, as appropriate under applicable law"; and
  - "other laws and decisions, including at the state level that impose disparate-impact liability and any measures to address their constitutional or other legal infirmities."
- *Review of Current Matters* (Sec. 6):
  - Within 45 days, the heads of all agencies responsible for enforcing the ECOA, the FHA or UDAAP laws to evaluate all pending proceedings that rely on theories of disparate impact liability and take appropriate actions consistent with the policy of the Executive Order.
  - Within 90 days, evaluate existing consent orders and permanent injunctions that rely on theories of disparate impact liability and take appropriate action consistent with the policy of the Executive Order.
- *Future Agency Action* (Sec. 7): In coordination with other agencies, the AG shall determine whether any Federal authorities preempt State

48. Request for Information on the Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46600, 46601 (Aug. 3, 2020) (asking, "Should the Bureau provide additional clarity regarding its approach to disparate impact under ECOA and/or Regulation B? If so, in what ways?").

> laws and regulations that impose disparate impact liability based on a federally protected characteristic or whether they have constitutional infirmities that warrant Federal action.

As discussed below, with the apparent exception of the Federal Reserve Board, the federal agencies have followed these directives and implemented them to the extent it was within their power to do so. While in most cases that has meant no longer examining disparate impact risk or bringing enforcement actions based on disparate impact theories of liability, the CFPB also has adopted a final rule providing that disparate impact claims are not cognizable under the ECOA and HUD has proposed to repeal its disparate impact rule.

B. Supervisory and Enforcement Responses.

In the aftermath of the Executive Order, the Office of the Comptroller of the Currency ("OCC"), National Credit Union Administration ("NCUA"), and the Federal Deposit Insurance Corporation ("FDIC") issued bulletins and letters informing supervised entities of the steps that they had taken in response to the Executive Order.

In OCC Bulletin 2025-16 (July 14, 2025), the OCC informed its institutions that it had removed references to supervising banks for disparate impact liability from the "Fair Lending" Booklet of the Comptroller's Handbook and commenced removing disparate impact liability references in other issuances. Additionally, the OCC Bulletin states that the supervisory process for fair lending compliance no longer includes examining for disparate impact liability. Finally, the Bulletin states that OCC examiners will no longer request, review, conclude or follow-up on: (i) matters related to a bank's disparate impact risk; (ii) internal disparate impact risk analysis; and (iii) disparate impact risk assessment processes or procedures.[49] The NCUA did likewise in NCUA Letter to Credit Unions No. 25-CU-04 (Sept. 2025).[50]

The actions taken by the FDIC in response to the Executive Order are summarized in FDIC Financial Institution Letter No. 41-2025 (Aug. 29, 2025).[51] This FIL indicates that the FDIC *Consumer Compliance Examination Manual* has been updated to reflect that the FDIC will evaluate potential

49. Off. of the Comptroller of the Currency, OCC Bulletin 2025-16, Fair Lending: Removing References to Disparate Impact (July 14, 2025), https://www.occ.gov/news-issuances/bulletins/2025/bulletin-2025-16.html.
50. Nat'l Credit Union Admin., Letter 25-CU-04 to Federally Insured Credit Unions, Removal of Disparate Impact (Sept. 2025), https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/removal-disparate-impact.
51. FDIC, Financial Institutions Letter 41-2025, Update to the FDIC's Consumer Compliance Examination Manual (Aug. 29, 2025), https://www.fdic.gov/news/financial-institution-letters/2025/update-fdics-consumer-compliance-examination-manual.

discrimination under the ECOA and the FHA only through evidence of disparate treatment. To this end, all references to disparate impact and how to evaluate disparate impact risk have been removed from Sections 1.1, 2.1, and 4.1 of Section IV-Fair Lending Laws and Regulations. Additionally, references to disparate impact have been removed from Section VII-1.1 Unfair, Deceptive, and Abusive Practices—Federal Trade Commission Act/Dodd-Frank Act.

The removal of references to disparate impact also extends to the Appendix to the FDIC fair lending compliance examination procedures, which had directed examiners to consider disparate impact and provided a separate Section A in the "Special Analyses" section to assist examiners who encounter potential disparate impact violations. Finally, a footnote was added to the "References" portion of the fair lending section of the manual which reads as follows: "Certain references [in the reference materials] include references to disparate impact. Consistent with Executive Order (EO) 14281, Restoring Equality of Opportunity and Meritocracy, the FDIC evaluates fair lending for disparate treatment only and not for disparate impact."[52]

Finally, in its recent Fair Lending Report released in December 2025, the CFPB likewise stated that it "will no longer use disparate impact in its supervision and enforcement of fair lending laws" and, to that end, it had "closed all elements of open exams and investigations that relied on disparate impact liability" and "terminated CFPB orders that relied on disparate impact liability."[53]

52. To assist readers in identifying the changes to Section IV of the FDIC Consumer Compliance Examination Manual relating to Fair Lending Law and Regulations, the FDIC attached to FIL-41-2025 a redlined version of the manual that identifies the changes relative to the December 2012 version of the manual. *See* Update to the FDIC's Consumer Compliance Examination Manual, Redlined Document Identifying Changes August 2025, FDIC (2025), https://www.fdic.gov/consumer-compliance-examination-manual/redlined-document-identifying-changes-august-2025.pdf. Among other things, the redlined document identifying the changes reflects revisions to the Fair Lending Appendix, including the deletion of above-referenced Section A in the "Special Analyses" section of the Fair Lending Appendix and the above-quoted footnote to the fair lending "References." *Id.* at IV-2.18 to -2.19, IV-4.1.

53. CFPB, Fair Lending Report of the Consumer Financial Protection Bureau for 2024, at 2 (2025). In a memorandum to the CFPB Staff dated April 16, 2025, the Chief Legal Officer of the CFPB stated that the CFPB will "pursue only matters with proven actual intentional racial discrimination and actual identified victims" and "will not engage in redlining or bias assessment based solely on statistical evidence and/or stray remarks that may be susceptible to adverse inferences." Decl. of Mark Paoletta, at ¶ 9, Nat'l Treasury Employees Union v. Russell Vought, No. 1:25-cv-00381-ABJ, (D.D.C. Apr. 18, 2025), ECF No. 109.

C. Regulatory Responses.

The CFPB also proposed and finalized significant disparate impact amendments to Regulation B and its Official Staff Commentary to align them with the statutory text of the ECOA discrimination proscription.[54] The Executive Order directive was particularly apropos with respect to Regulation B, which currently[55] contains the following language regarding the "effects test": "The legislative history of the Act indicates that Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*[56]to be applicable to a creditor's determination of creditworthiness."[57]

This statement, suggesting that disparate impact claims are cognizable under the ECOA, and two additional references to the "effects test" in the Official Staff Commentary to Regulation B, are based solely on post-enactment references to the "effects test" that appeared in Congressional reports accompanying the 1976 ECOA amendments,[58] but no such effects-based

54. *See* CFPB Final Rule, *supra* note 2. CFPB Regulation B does not apply to motor vehicle dealers who are excluded from CFPB Regulation B by Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 12 C.F.R. § 1002.1(a). Although the Federal Reserve Board retains authority to issue rules under the ECOA for motor vehicle dealers covered by Section 1029(a) of the Dodd-Frank Act, it apparently has not yet proposed or finalized counterpart disparate impact amendments with respect to its version of Regulation B or the Official Staff Commentary thereto. *See* Federal Reserve Board Regulation B, 12 C.F.R. pt. 202; *see also id.* § 202.6(a) n.2; 12 C.F.R. pt. 202, supp. I, cmt. 2(p)-4, cmt. 6(a)-6. The CFPB amendments to Regulation B also included amendments relating to special purpose credit programs and discouraging applicants on a prohibited basis; a discussion of those amendments is beyond the scope of this Article.

55. As of the date of this writing, unless they are enjoined, the disparate impact, discouragement, and special purpose credit program amendments to CFPB Regulation B are scheduled to take effect on July 21, 2026. CFPB Final Rule, *supra* note 2, at 21620.

56. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

57. 12 C.F.R. § 1002.6(a) (2025); *see also* Regulation B, cmt. 1002.6(a)-2 (2025) (stating, based solely on the aforementioned House and Senate Reports, that "[t]he Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor . . . has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact."); *id.* cmt. 1002.2(p)-4 (stating that "neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test. (See comment 6(a)-2 for a discussion of the effects test).").

58. CFPB Final Rule, *supra* note 2, at 21627–30, 21635–36 ("A few commenters also noted that the committee reports relied on by the Board postdated by two years the original enactment of the operative antidiscrimination language in

language exists in the statutory text. As the CFPB explained in connection with its proposal and its final rule,[59] and as had been noted by commentators previously,[60] the ECOA does not contain language proscribing discriminatory ***effects***. The statute merely declares it "unlawful for any creditor *to* ***discriminate against any applicant***, with respect to any aspect of a credit transaction . . . ***on the basis of*** race, color, religion, national origin" or any other prohibited basis.[61]

While the effects test historically has been asserted in ECOA litigations and enforcement actions and referenced in supervisory manuals and guidance documents, scant attention has been paid to the text of the ECOA discrimination proscription and the fact that it is materially different from other federal discrimination statutes whose text the Supreme Court has specifically analyzed and found to contemplate an effects test. In this connection, the Supreme Court has held that disparate impact claims are cognizable under other federal discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Emergency School Aid Act, and the Fair Housing Act, the text of which includes "effects"-based language.[62] In its discussion of the proposed and

---

ECOA. One industry commenter explained that the Board relied on committee reports tied to the 1976 Act, which among other things expanded the list of prohibited bases under ECOA. This commenter noted that although Congress in 1976 expanded the scope of ECOA's prohibition on discrimination, it did not speak to the type of conduct (e.g., disparate treatment or disparate impact) Congress proscribed in 1974."). Distinguished scholars and jurists have criticized the prioritization of legislative history over statutory text generally. *See, e.g.*, Cubita & Hartmann, *supra* note 42, at 837, & n.28 ("[L]egislative history 'lends itself to a kind of ventriloquism' pursuant to which '[t]he Congressional record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).'") (quoting Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73–74 (2004) (Scalia, J., dissenting)).

59. Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50901, 50904–07 (Nov. 13, 2025) [hereinafter CFPB Proposed Rule]; CFPB Final Rule, *supra* note 2, at 21621, 21624–25. On February 25, 2026, the CFPB published in the Federal Register corrections to the proposed amendatory text to conform it with the public inspection copy of the proposed amendatory text that was submitted to the Federal Register on November 7, 2025. CFPB Correction to Proposed Rule, 91 Fed. Reg. 9191 (Feb. 25, 2026) (to be codified at 12 C.F.R. pt. 1002).

60. *See, e.g.*, Cubita & Hartmann, *supra* note 42, at 830–35; Kaplinsky et al., *supra* note 4, at 476; Unsafe at Any Bureaucracy, Part I, *supra* note 46, at 8–14.

61. 15 U.S.C. § 1691(a)(1) (emphasis added).

62. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Bd. of Educ. v. Harris, 444 U.S. 130 (1979); Smith v. City of Jackson, 544 U.S. 228, 235 (2005); Tex. Dep't of Hous. & Cmty Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015). The CFPB analyzed these Supreme Court disparate impact precedents in detail in

final rules, the CFPB noted that language of this nature is conspicuously absent from the ECOA.[63]

The CFPB discussion of the disparate impact jurisprudence relevant to a determination of whether disparate impact claims are cognizable under the ECOA[64] should be read in conjunction with the following tabular chart juxtaposing the discrimination proscriptions of Title VII, the ADEA, the FHA and the ECOA:

---

its discussion of the proposed and final amendments to Regulation B. CFPB Proposed Rule, *supra* note 59, at 50904–05; CFPB Final Rule, *supra* note 2, at 21630–35.

63. CFPB Proposed Rule, *supra* note 59, at 50905 (stating the "ECOA does not include any effects-based language supporting disparate-impact liability, nor any 'otherwise' language, as in [the Emergency School Aid Act], that may cloud the directness of its prohibition. ECOA section 701(a) is a straightforward, plainly stated prohibition against discrimination on the basis of certain characteristics. . . . Unlike the statutory provisions at issue in *Harris* and *Inclusive Communities*, neither section 701(a) of the ECOA nor any closely connected statutory provisions include any effects-based language supporting disparate-impact liability."); CFPB Final Rule, *supra* note 2, at 21621, 21629–30. *See also infra* note 66 (summarizing the basis on which the CFPB distinguished the ECOA discrimination proscription from FHA Section 805(a)).

64. CFPB Final Rule, *supra* note 2, at 21630–34.

65. This textual juxtaposition chart is a slightly modified version of the chart contained in Part I of the *Unsafe at Any Bureaucracy* trilogy. *See* Unsafe at Any Bureaucracy, Part I, *supra* note 46, at 14 & n.48 (citing Cubita & Hartmann, *supra* note 42, at 834). The textual juxtaposition chart in the cited article compared the Title VII and the ECOA discrimination proscriptions as originated enacted, respectively, on July 2, 1964 and October 28, 1974. The ADEA discrimination proscriptions were enacted on December 15, 1967. Age Discrimination in Employment Act, Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (1967).

66. Although the Supreme Court held in *Inclusive Communities* that disparate impact claims are cognizable under FHA Section 805(a) notwithstanding the absence therein of effects-related language, it did so based on the "otherwise make unavailable" language in FHA Section 804(a) that the Court said was "of central importance to" its statutory construction analysis. The CFPB distinguished the ECOA discrimination proscription (correctly in our view) on the ground that "[u]nlike the statutory provisions at issue in *Harris* and *Inclusive Communities*, neither section 701(a) of the ECOA nor any closely connected statutory provisions include any effects-based language supporting disparate-impact liability." CFPB Proposed Rule, *supra* note 59, at 50905 (further stating the "ECOA does not include any effects-based language supporting disparate-impact liability, nor any 'otherwise' language, as in [the Emergency School Aid Act], that may cloud the directness of its prohibition. ECOA section 701(a) is a straightforward, plainly stated prohibition against discrimination on the basis of certain characteristics"); *see also* Kaplinsky et al., *supra* note 4, at 476.

COMPARISON OF RELEVANT STATUTORY PROSCRIPTIONS[65]

Statute	Title VII	ADEA	FHA	ECOA
Supreme Court Case	*Griggs*	*Smith*	*Inclusive Communities*	None
Disparate Treatment Proscription	Sec. 703. (a) It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to ***discriminate against*** any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's race, color, religion, sex, or national origin; or	Sec. 4. (a) It shall be unlawful for an employer— (1) to fail or refuse to hire or to discharge any individual or otherwise ***discriminate against*** any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's age;	Sec. 805.[66] (a) In general It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to ***discriminate against*** any person in making available such a transaction, or in the terms or conditions of such a transaction, ***because of*** race, color, religion, sex, handicap, familial status, or national origin.	701. Prohibited discrimination (a) It shall be unlawful for any creditor to ***discriminate against*** any applicant ***on the basis of*** sex or marital status with respect to any aspect of a credit transaction.
Disparate Impact Proscription	(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, ***because of*** such individual's race, color, religion, sex, or national origin.	(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities ***or otherwise adversely affect*** his status as an employee, ***because of*** such individual's age;	Sec. 804. . . . it shall be unlawful— (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, ***or otherwise make unavailable*** or deny, a dwelling to any person ***because of*** race, color, religion, sex, familial status, or national origin.	**NO STATUTORY COUNTERPART**
Disparate Impact Cognizable	YES	YES	YES	?

Loper Bright instructs that "statutes have a single, best meaning" that is "fixed at the time of enactment."[67] As one of your authors has explained previously in an article regarding the ECOA discrimination proscription and disparate impact:

> When Congress enacted the ECOA in 1974, and amended the statute in 1976 to expand the prohibited bases, Congress was aware that the United States Supreme Court had concluded in *Griggs* that paragraph (2) of Section 703(a) of Title VII was the statutory source of the Title VII proscription against employment practices that have a disparate impact on a protected class. . . . Had Congress intended to proscribe facially-neutral credit practices that adversely affect an applicant on [a prohibited basis], it would have included in ECOA section 701(a) an additional discrimination proscription modeled on paragraph (2) of Section 703(a) of Title VII and paragraph (2) of ADEA section 4(a)(2).[68]

Yet Congress did no such thing. As a result, in the foregoing textual juxtaposition chart, "Congressional silence is all that appears in the ECOA quadrant corresponding to the Title VII, ADEA and FHA disparate impact proscriptions."[69]

In its discussion of the proposed and the final rules, the CFPB states that it has determined (preliminarily in the case of the proposed rule) "that the evidence from the legislative history is insufficient to support an effects test given the statutory language and the absence of effects-based language in section 701 or anywhere else in ECOA."[70] The amendments remove existing

67. CFPB Final Rule, *supra* note 2, at 21629 & n.52 (quoting Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018))).

68. Cubita & Hartmann, *supra* note 42, at 834–35 (footnotes omitted); *see also supra* note 66 (discussing Supreme Court construction of FHA Section 805(a) in *Inclusive Communities*).

69. Cubita & Hartmann, *supra* note 42, at 834.

70. CFPB Proposed Rule, *supra* note 59, at 50906; *accord* CFPB Final Rule, *supra* note 2, at 21629–30. *See generally* CFPB Proposed Rule, *supra* note 59, at 50906 n.48 (citing Supreme Court authorities discussing the fundamental flaw associated with relying upon legislative history to discern the intent of statutes whose text is clear). The legislative history upon which the ECOA disparate impact edifice rests is even weaker than the Bureau noted because it is post-enactment legislative history—"history" from a subsequent Congress that merely added additional prohibited bases to the existing discrimination proscription as part of the ECOA Amendments of 1976 without amending the text of the discrimination proscription in relevant part. *See* Cubita & Hartmann, *supra* note 42, at 836–39. We therefore submit that this legislative history cannot fairly be said to be probative of what the prior Congress intended when it enacted the statute proscribing discrimination "on the basis of" protected characteristics. *See* Paige Pidano Paridon, EVP, Senior Assoc. Gen. Counsel & Co-Head of Reg. Affs., Bank Pol'y Inst., Comment Letter on Proposed Rule Equal Credit Opportunity Act (Regulation B) 6 & nn.30–35 (Dec. 15, 2025), https://www.regulations.gov/comment/CFPB-2025-0039-0077.

references to the "effects test" from Regulation B and its Official Staff Commentary, and add to Section 1002.6 of Regulation B a sentence affirmatively stating that "[t]he Act does not provide that the 'effects test' applies for determining whether there is discrimination in violation of the Act." The rule also added the following comment to the Official Staff Commentary to Regulation B:

> *Disparate treatment.* The Act prohibits practices that discriminate on a prohibited basis regarding any aspect of a credit transaction. **The Act does not provide for the prohibition of practices that are facially neutral as to prohibited bases, except to the extent that facially neutral criteria function as proxies** for protected characteristics **designed or applied *with the intention of* advantaging or disadvantaging individuals based on protected characteristics.**[71]

With respect to the language relating to proxies, the CFPB explained that "consumers will remain protected under the ECOA from disparate treatment, including facially neutral policies and procedures that creditors adopt as proxies for ***intentional*** discrimination."[72]

The Department of Housing and Urban Development ("HUD") has taken a necessarily different approach with respect to the Executive Order directive to review its disparate impact regulations. In *Inclusive Communities*, the United States Supreme Court held, by a single-vote margin, that disparate impact claims are cognizable under Sections 804(a) and 805(a) of the FHA. As a result, that question has been resolved, and the HUD response to the directive to review existing disparate impact regulations was necessarily different from that of the CFPB. HUD has instead proposed to repeal its rule regarding discriminatory effects.[73]

---

71. New Comment 1002.6(a)-2 (emphasis added).

72. CFPB Proposed Rule, *supra* note 59, at 50906 (emphasis added); CFPB Final Rule, *supra* note 2, at 21636.

73. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 91 Fed. Reg. 1475, 1475 (Jan. 14, 2026) [hereinafter 2026 Proposed HUD Rule]. The back-and-forth history of the HUD disparate impact rule is itself an illustrative example of how polarizing disparate impact theories of liability became. Shortly after the Supreme Court granted the certiorari petition in *Magner v. Gallagher*, HUD proposed (and later finalized in February 2013) a rule titled "Implementation of the Fair Housing Act's Discriminatory Effects Standard." Proposed HUD Rule, 76 Fed. Reg. 70921 (Nov. 16, 2011); HUD Final Rule, 78 Fed. Reg. 11460 (Feb. 15, 2013). The 2013 rule established regulations to codify: (i) an interpretation that disparate impact claims are cognizable under the FHA; and (ii) a burden-shifting framework for FHA disparate impact claims. Subsequently, HUD issued an advance notice of proposed rulemaking requesting comment on what changes, if any, should be made to the 2013 rule as a result of *Inclusive Communities.* Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28560 (June 20, 2018).

HUD thereafter published a proposal rule in 2019 and, on September 24,

Consistent with the Executive Order directive, HUD reviewed its disparate impact regulations and related prior rulemakings and determined that they are unnecessary. Specifically, HUD noted that its "prior assertion that its disparate impact regulations provided clarity and predictability for all parties engaged in housing transactions is diminished by the facts that case law continues to develop and HUD's regulation does not provide an up-to-date picture of the legal landscape."[74] HUD further noted that, in the aftermath of the Supreme Court decision in *Loper Bright*, "a court may not simply defer to the agency's interpretation where the court finds the underlying statute to be ambiguous" but must itself determine the best interpretation of a statute.[75] Leaving questions regarding disparate impact liability standards to the courts seems like a reasonable regulatory approach given the demise of *Chevron* deference, the multiple iterations of the HUD disparate impact regulation under different administrations and the possibility that the rule may have been adopted initially to influence Supreme Court review of the question of whether disparate impact claims were cognizable under the FHA.[76]

2020, published a final rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" that amended the disparate impact regulations to implement the Supreme Court decision in *Inclusive Communities* and to clarify the application of the standard to state laws governing the business of insurance. Proposed HUD Rule, 84 Fed. Reg. 42854 (Aug. 19, 2019); Final Rule, 85 Fed. Reg. 60288 (Sept 24, 2020). Before the amended rule could take effect, however, a federal district court issued a preliminary injunction staying the implementation and postponing the effective date of the amended rule. Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev., 496 F. Supp. 3d 600, 611-12 (D. Mass. 2020), *appeal terminated*, No. 21-1003 (1st Cir. Feb. 18, 2021). The 2013 rule was subsequently reinstated in 2023 in accordance with a Presidential Memorandum issued by President Biden in January 2021. *See* 2026 Proposed HUD Rule, *supra* note 73, at 1475 (discussing Presidential Memorandum for the Secretary of Housing and Urban Development, Sec. 2, 86 Fed. Reg. 7487, 7488 (Jan. 26, 2021); Reinstatement of HUD's Discriminatory Effects Standard, Proposed Rule, 86 Fed. Reg. 33590 (June 25, 2021); Reinstatement of HUD's Discriminatory Effects Standard, Final Rule, 88 Fed. Reg. 19450 (Mar. 31, 2023)). *See generally* Nat'l Ass'n of Mut. Ins. Cos. v. U.S. Dep't of Hous. & Urban Dev., 693 F. Supp. 3d 20, 26–30, 35–38 (D.D.C. 2023) (recounting the history of the HUD disparate impact rule and granting summary judgment to HUD in challenge by the National Association of Mutual Insurance Companies to the validity of the 2023 HUD disparate impact rule), *appeal docketed*, No. 23-5275 (D.C. Cir. Nov. 27, 2023). Before the Executive Order was issued, HUD filed an Unopposed Motion to Hold Appeal in Abeyance in which it stated that "HUD's leadership have indicated the agency intends to reconsider the 2023 Rule." Unopposed Motion to Hold Appeal in Abeyance at 2, *Nat'l Ass'n of Mutual Ins. Cos.*, No. 23-5275 (D.C. Cir. Jan. 31, 2025), ECF No. 2097850.

74. 2026 Proposed HUD Rule, *supra* note 73, at 1476; *see also* 24 C.F.R. §§ 100.5(b), 100.500 (2025).

75. 2026 Proposed HUD Rule, *supra* note 73, at 1476.

76. *See* Tex. Dep't of Hous. & Cmty Affs. v. Inclusive Cmtys. Project, Inc., 576

HUD's proposal would remove the second sentence of 24 C.F.R. § 100.5(b), which states that illustrations of unlawful housing discrimination may be established by the discriminatory effect of a practice consistent with the disparate impact standards set forth in Section 100.500. Titled "Discriminatory effect prohibited," Section 100.500 currently includes a standard for determining when a practice has a discriminatory effect, establishes a standard for determining when a legally sufficient justification exists for the challenged practice and specifies how the burdens of proof are allocated among the parties in discriminatory effects cases.[77] The HUD proposal also would remove and reserve Subpart G of 24 C.F.R. Part 100, which consists of Section 100.500[78]

As is currently the case with respect to the CFPB rule discussed below, the proposed elimination of the HUD disparate impact rule likely will be challenged by housing and/or civil rights organizations if adopted in final form. In this connection, we note that HUD included in its discussion of the proposed rulemaking a separate section containing a detailed explanation for the abbreviated comment period of thirty days rather than the standard sixty days.[79]

U.S. 519, 575–76, 575 n.8 (2015) (Alito, J., dissenting) ("Given this unusual pattern, there is an argument that deference is unwarranted . . . At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*." (internal citation omitted)). During the oral argument in *Inclusive Communities*, Justice Alito had inquired about the chronology of events and asked whether the Court should be concerned about the use of *Chevron* to manipulate decisions of the Court:

> Should we be concerned about the use of *Chevron* to manipulate the decisions of this Court? . . . [T]he Fair Housing Act was enacted in 1968. For 40 years plus, there were no HUD regulations. Then we granted cert in the *Gallagher* case, and only after that and within, I think, days after that the HUD regulations were issued. And then the *Gallagher* case settled, and . . . then we granted cert. in the *Mt. Holly* case, and the *Mt Holly* case settled. So should we be troubled by this chronology?

Transcript of Oral Argument at 45–46, Tex. Dep't of Hous. & Cmty Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) (No. 13-1371); *see also* Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 74 F. Supp. 3d 30, 44 (D.D.C. 2014) (in adopting its disparate impact rule, the HUD "[d]efendants, of course, were somehow hoping that a favorable *Chevron* deference analysis would muster the judicial deference necessary to salvage their much desired Rule"), *vacated and remanded for consideration in light of Inclusive Communities*, No. 14-5321, 2015 U.S. App. LEXIS 16894 (D.C. Cir. 2015) (per curiam), *on remand*, 693 F. Supp. 3d 20 (D.D.C. Sept. 19, 2023) (granting HUD's cross-motion for summary judgment).

77. 24 C.F.R. § 100.500 (2025); 2026 Proposed HUD Rule, *supra* note 73, at 1476.

78. 2026 Proposed HUD Rule, *supra* note 73, at 1476.

79. *Id.* at 1476–77. In HUD's discussion of its proposal, HUD stated that the abbreviated comment period was justified because the proposal "does not change any requirements or affect any rights or obligations." Additionally,

III. Challenges to the Pendulum Shift

A. Challenge to the CFPB Regulation B Amendments.

Without delay, the CFPB amendments to Regulation B were challenged barely more than a month after their adoption. On May 27, 2026, a complaint for declaratory and injunctive relief was filed in the United States District Court for the District of Columbia by the National Fair Housing Alliance, another fair housing and fair lending organization and two fair lending consultancies. The case is *National Fair Housing Alliance v. CFPB*.[80]

The complaint in *National Fair Housing Alliance* alleges that the CFPB rulemaking violated the Administrative Procedure Act ("APA") by: (i) adopting a rule that is arbitrary and capricious; (ii) providing a cost-benefit analysis under Section 1022(b)(2)(A) of the Dodd-Frank Act that was arbitrary, capricious, and contrary to law; (iii) adopting a rule that was "not in accordance with law" in that the rule provisions eliminating disparate impact liability, limiting the scope of the discouragement proscription[81] and eliminating certain special purpose credit programs ("SPCPs") and restricting others are "contrary to the ECOA"; (iv) adopting a rule that exceeded the statutory authority of the CFPB in that the amendments to the Regulation B discouragement provisions "purport to create safe harbors for certain statements and render them immune from liability" under the ECOA; and (v) failing to observe procedures required by law, including convening

---

HUD noted that in connection with prior rulemakings relating to its discriminatory effects regulations, it had previously received and reviewed thousands of public comments. *But see* HUD'S Implementation of the Fair Housing Act's Disparate Impact Standard; Amendments to HUD's Title VI Regulations, 91 Fed. Reg. 51416 (Aug. 10, 2026) (reopening and extending comment period with respect to the 2026 Proposed HUD Rule through October 9, 2026 but only with respect to topics related to supplemental notice of proposed rulemaking proposing to remove provisions in HUD Tile VI regulations relating to disparate-impact liability of recipients of HUD federal financial assistance).

80. Complaint for Declaratory & Injunctive Relief, Nat'l Fair Hous. All. v. CFPB, No. 1:26-cv-01820 (D.D.C. May 27, 2026). The complaint challenges all of the amendments to Regulation B, including those relating to the discouragement of applicants and special purpose credit programs. The challenges relating to the Regulation B amendments concerning SPCPs and the discouragement proscription are beyond the scope of this Article.

81. Regulation B prohibits a creditor from making "an oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a person from making or pursuing an application." 12 C.F.R. § 1002.4(b) (2025) (pre-amended version). Under the CFPB amendments to Regulation B, the scope of the discouragement prohibition would be limited to statements "that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristics." CFPB Final Rule, *supra* note 2, at 21668.

a Small Business Regulatory Enforcement Act panel, preparing an initial regulatory flexibility analysis, preparing a Final Regulatory Flexibility Act analysis, allowing for adequate notice-and-comment and responding to significant comments. Finally, the complaint alleges that the actions of the Acting Director, Russell Vought were *ultra vires* and, hence, unlawful.[82]

On August 11, 2026, the plaintiffs filed an amended complaint where they alleged that the CFPB failed to comply with the Dodd-Frank Act requirement to "consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies."[83] While the preamble to the Final Rule states that the "Bureau consulted or offered to consult with other agencies as required by the Dodd-Frank Act and ECOA, and considered the feedback the agencies provided,"[84] the plaintiffs allege that the preamble to the Final Rule provided no description or evidence of such consultations and feedback and that the Administrative Record does not reflect sufficient evidence that the CFPB undertook the requisite consultations prior to issuing the Notice of Proposed Rulemaking.[85]

The challenge to the Final Rule will be among the most closely watched consumer financial services litigations as it plays out over the next few years; it could serve as the vehicle through which the key substantive issue presented—whether disparate impact claims are cognizable under the ECOA—ultimately is addressed by the United States Supreme Court.[86]

---

82. This *ultra vires* claim relating to the Director is based on an allegation that the Federal Vacancies Reform Act allows for a temporary appointment without the advice and consent of the Senate only when the prior holder of a Senate-confirmed office "dies, resigns or is otherwise unable to perform the duties of the office." The theory of the unlawful appointment claim is that the last Senate-confirmed Director, Rohit Chopra, was fired by President Trump and, thus, he did not die, resign or become unable to perform the functions and duties of the office. Notably, however, a DOJ guidance document regarding the Vacancies Reform Act references legislative history indicating that "an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick." Guidance on Application of the Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 61 (1999) (citations omitted), https://www.justice.gov/file/146441/dl.

83. Amended Complaint for Declaratory & Injunctive Relief, ¶ 160, Nat'l Fair Hous. All. v. CFPB, No. 1:26-cv-01820 (D.D.C. Aug. 11, 2026) (citing 12 U.S.C. § 5512(b)(2)(B)).

84. *Id.* ¶ 161 (quoting CFPB Final Rule, *supra* note 2, at 21624).

85. *Id.* ¶¶ 161, 163. Specifically, the plaintiffs alleged in their amended complaint that the Administrative Record produced by the CFPB "contains only an email from an individual at [OMB] to an individual at the CFPB that, in the body of the email, lists a number of other email addresses with domain names from several agencies, and which states: '[i]nteragency circulation for CFPB NPRM Regulation B.'" *Id.* ¶ 163 (alteration in original).

86. In the years since one of your authors wrote that scant attention has been paid to the statutory text of the ECOA in determining whether disparate impact

B. State Legislative and Regulatory Action.

The broad mandate of the Executive Order and the responsive actions of the federal agencies are likely to result in a greater focus on disparate impact liability at the state level. We have already begun to see indicia of this in state legislative and rulemaking activity, some of which have occurred in contexts other than consumer financial services. For example, New York amended its Human Rights Law to codify standards for disparate impact liability in the context of housing and employment.[87] Additionally, the New Jersey Division on Civil Rights adopted new rules under

---

claims are cognizable thereunder, the Supreme Court has stated that the effects-related language in FHA Section 804(a) was "of central importance to" its statutory construction analysis in *Inclusive Communities* given its prior interpretation of similar language in holding that disparate impact claims were cognizable under Title VII and the ADEA. *See generally* Proposed CFPB Rule, *supra* note 59, at 50904–05; CFPB Final Rule, *supra* note 2, at 21630–34 (discussing Supreme Court analysis of FHA Sections 804 and 805 and distinguishing them from ECOA Section 701).

Relatedly, we note (as did the CFPB in its discussion of the proposed and the final rules) that the United States Court of Appeals for the District of Columbia Circuit—the circuit court to which an appeal in *National Fair Housing Alliance* would be taken—has assumed without deciding that disparate impact claims are cognizable under the ECOA. In doing so, however, the D.C. Circuit underscored the absence of effects-based language in the ECOA:

> Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that "otherwise adversely affect" a protected individual. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C.§ 623(a)(2). The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228 . . . (2005) (ADEA); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 . . . (1971) (Title VII). ***ECOA contains no such language***. We express no opinion about whether a disparate impact claim can be pursued under ECOA. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 . . . (1974) (court should not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in determining class certification *vel non*).

Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (emphasis added); *see also* CFPB Final Rule, *supra* note 2, at 21635 n.100.

87. 2025 N.Y. Laws 649 (codified at N.Y. Exec. Law § 296(5-a)) (codifying disparate impact standard for housing discrimination claims); 2025 N.Y. Laws 706 (codified at N.Y. Exec. Law § 296(5-b)) (codifying disparate impact standard for employment discrimination claims); 2026 N.Y. Laws 56, § 1 (Part Q) (renumbering subdivision 5-a of the Executive Law, as added by chapter 706 of the laws of 2025, as subdivision 5-b); *see also* Introducer's Memorandum in Support, S. 8338, 2025–26 Leg. Sess. (N.Y. 2025) ("This legislation would codify disparate impact analysis for employment discrimination cases in New York State law, ensuring plaintiffs can continue to bring disparate impact cases under New York law, despite the shifting federal landscape.").

the New Jersey Law Against Discrimination that codified state guidance on disparate impact liability.[88]

More recently, Maryland amended its analogue to the FHA to expressly define and proscribe "acts that have a discriminatory effect, regardless of intent," with respect to residential housing.[89] However, a person does not violate this Maryland proscription against housing practices that have discriminatory effects if the action was without discriminatory intent and necessary to achieve "one or more substantial, legitimate, and nondiscriminatory interests" that could not have been achieved by less discriminatory means.[90] Additionally, although Colorado recently repealed and replaced

88. *See* N.J. Admin. Code § 13:16 (Rules Pertaining to Disparate Impact Discrimination); *e.g.*, *id.* §§ 13:16-2.1 (disparate impact liability pursuant to the Law Against Discrimination Act), -2.2 (burdens of proof for disparate impact employment, public accommodations and contracting claims), -2.3 (burdens of proof for disparate impact housing and housing financial assistance claims), -2.4 (evidence for disparate impact claims). *See generally Rules Pertaining to Disparate Impact Discrimination*, 57 N.J. Reg. 2849(b) (Dec. 15, 2025); Press Release, Off. of the Att'y Gen., AG Platkin Announces Division on Civil Rights Adopts Landmark Rules on Disparate Impact Discrimination Under New Jersey Law (Dec. 17, 2025), https://www.njoag.gov/ag-platkin-announces-division-on-civil-rights-adopts-landmark-rules-on-disparate-impact-discrimination-under-new-jersey-law/ ("The rules cement critical state-law civil rights protections just as the Trump Administration has moved to reverse key protections against disparate impact at the federal level."). The Mortgage Bankers Association recently filed a complaint seeking a declaration that the New Jersey rule violates the Equal Protection Clause of the Fourteenth Amendment, and is preempted by federal law including the FHA and the ECOA, and requesting that the New Jersey Attorney General and Division on Civil Rights be permanently enjoined from enforcing it or, alternatively, that the court declare invalid and permanently enjoin enforcement of the rule's housing and housing financial assistance provisions. Complaint for Declaratory & Injunctive Relief, Mortg. Bankers Ass'n v. Davenport, No. 2:26-cv-11418 (D.N.J. Sept. 3, 2026).

89. 2026 Md. Laws 778. The new Maryland law defines a "discriminatory effect" as "an effect that actually or predictably has a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates, segregated housing patterns because of race, color, religion, sex, disability, marital status, familial status, sexual orientation, gender identity, national origin, source of income, or military status." *Id.* § 1 (to be codified at Md. Code Ann., State Gov't § 20-701(b-1)); *see also id.* (to be codified at Md. Code Ann., State Gov't §§ 20-702(a)(2), 20-705(a)(6)) (declaring the policy of the state to be to prohibit acts by any person that have a discriminatory effect, regardless of intent, with respect to residential housing and providing that, except in specified circumstances, a person may not, regardless of intent, "act in a manner that has a discriminatory effect").

90. *Id.* § 1 (to be codified at Md. Code Ann., State Gov't § 20-705(b)). The law also authorizes the Maryland Department of Housing and Community Development to adopt regulations relating to its statutory obligations to affirmatively further fair housing. *Id.* § 1 (to be codified at Md. Code Ann., Hous. & Cmty. Dev. § 2-402(d)).

its Artificial Intelligence Act with a more business-friendly law, the former version of the Colorado artificial intelligence statute defined "algorithmic discrimination" to include unlawful differential impacts that disfavor an individual or a group of individuals on a prohibited basis and defined a "high-risk artificial intelligence system" to include systems that make or are a substantial factor in making a "consequential decision."[91] The original version of the Colorado artificial intelligence statute was superseded by a different regulatory regime before taking effect, but the definition of "algorithmic discrimination" initially included in the statute illustrates how proscriptions against discriminatory effects can emerge in novel contexts.

Although New York has not amended its Human Rights Law to expressly proscribe discriminatory effects in relation to credit, the New York State Department of Financial Services ("DFS") issued an Industry Letter dated April 22, 2026, "to remind all entities regulated by the Department under the New York Banking Law of their obligations under New York State's fair lending law, N.Y. Exec. Law § 296-a ('Section 296-a')." The Industry Letter references three prior consent orders against bank purchasers of motor vehicle retail instalment sale contracts and asserts that "under Section 296-a,[92] covered credit decisions that result in a disparate impact may constitute an unlawful discriminatory practice."[93] The Industry Letter

91. *See* Colo. Rev. Stat. §§ 6-1-1701(1)(a), (3), (9)(a), *repealed and reenacted with amendments by* 2026 Colo. Sess. Laws 131, § 1 (to be codified at Colo. Rev. Stat. §§ 6-1-1701 to -1709).

92. The substantive proscription cited by the DFS in the Industry Letter is Section 296-a(1)(b) of the Executive Law, which the DFS states "prohibits discrimination in, among other things, the granting, withholding, extending, or renewing, or in the fixing of the rates, terms, or conditions of any form of credit *on the basis of* statutorily established characteristics." Letter from N.Y. State Dep't of Fin. Servs. to Entities Regulated Under the N.Y. Banking Law, Regarding New York Executive Law Section 296-a (Apr. 22, 2026) [hereinafter Industry Letter] (emphasis added), https://www.dfs.ny.gov/industry-guidance/industry-letters/20260422-nys-fair-lending-law. Unlike the recent Human Rights Law amendments proscribing discriminatory effects in employment and housing contexts, the fair lending proscription cited by the DFS in its letter regarding disparate impact does not purport to proscribe discriminatory effects. The New York statutory juxtaposition dynamic thus is comparable to that which exists at the federal level with respect to Title VII, the FHA and the ECOA in that the statutory provision cited by the DFS in its industry letter contains no effects-related language.

93. Industry Letter, *supra* note 92. This Industry Letter was issued on the same day that the CFPB amendments to Regulation B were published in the Federal Register. The three prior DFS disparate impact consent orders cited in the Industry Letter were ones involving community banks: *In re Rhinebeck Bank*, Consent Order (N.Y. State Dep't of Fin. Servs.); *In re Adirondack Tr. Co.*, Consent Order Under N.Y. Banking Law §§ 9-d, 39 (N.Y. State Dep't of Fin. Servs. Apr. 29, 2021); *In re Chemung Canal Tr.*, Consent Order Under N.Y. Banking Law §§ 9-d, 39 (N.Y. State Dep't of Fin. Servs. June 21, 2021).

was styled as a reminder because the DFS and its predecessor, the New York State Banking Department, has previously issued guidance and industry letters taking the same position with respect to disparities resulting from so-called "markup and compensation policies."[94]

Additionally, the Illinois Human Rights Act was amended by Public Act 104-0744, the Civil Rights Safeguard Act, to expand the definition of "unlawful discrimination" to include discrimination against a person "whether by purpose or effect" because of any prohibited bases.[95] The amendments to the Human Rights Act prohibit a financial institution and a card issuer from "[u]s[ing] criteria or methods that have the effect of subjecting individuals to unlawful discrimination under . . . Section[s of the Human Rights Act relating to loans and credit cards] if they are not necessary to achieve a substantial, legitimate, nondiscriminatory interest or if the substantial, legitimate, nondiscriminatory interest could be served by another practice that has a less discriminatory effect."[96] To underscore the intent of these disparate impact amendments, the Illinois Civil Rights Safeguard Act defines the term "criteria or method" to include "practices, policies, and groups of practices or policies that may have the effect of subjecting individuals to discrimination under [the Human Rights] Act."[97]

Finally, the attorneys general of fourteen states recently issued a general informational document titled "Multistate Guidance on Antidiscrimination Protections" that "sets out to clarify the state of the law; ensure that our residents understand the protections to which they are entitled; and re-

94. Letter from N.Y. State Dep't of Fin. Servs. to Fin. Insts. & Sales Fin. Cos., Regarding Indirect Automobile Lending and Compliance with New York's Fair Lending Statute (Aug. 23, 2018) (stating that "[t]his guidance letter continues guidance issued by the New York State Banking Department in the February 15, 2001 Industry Letters regarding indirect automobile lending by financial institutions and sales finance companies" and that, "[f]or purposes of this guidance, the term 'loan' includes a retail installment [sale] contract"), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180823_indirect_auto_lending_and_compliance_ny_fair_lending_statute. The August 23, 2018 DFS guidance letter was issued approximately three months after the Congressional disapproval of CFPB Bulletin 2013-02 was signed into law on May 21, 2018.

95. Illinois Public Act 104-0744, §§ 1, 5 (to be codified at 775 Ill. Comp. Stat. 5/1-103(Q)).

96. *Id.* (to be codified at 775 Ill. Comp. Stat. 5/4-102(G), 5/4-103(C)). The Financial Credit Article of the Illinois Human Rights Act includes a number of existing definitional and exemption provisions. *Id.* (to be codified at 775 Ill. Comp. Stat. 5/4-101 (definitions), 5/4-104 (exemptions)).

97. *Id.* (to be codified at 775 Ill. Comp. Stat. 5/4-103(G-10)). Public Act 104-7044 also includes counterpart disparate impact amendments relating to employment and places of public accommodation that are to be codified at 775 Ill. Comp. Stat. 5/2-103.5, 5/5-102(D). *Id.* (to be codified at 775 Ill. Comp. Stat. 5/2-103.5, 5/5-102(D)).

affirm [their] commitment to defend and enforce the civil rights laws."[98] Among other things, this guidance document asserts that "[a]ll federal and state anti-discrimination laws protect against intentional discrimination, and most also prohibit effects-based discrimination in some form."[99] It does not meaningfully catalog, however, existing state discrimination laws or regulations purporting to prohibit disparate impact.

IV. Conclusion

The Executive Order represents a fundamental policy of the Trump Administration, whose macro views on equal protection, equal opportunity, and meritocracy are fundamentally inconsistent with the disparate impact theory of liability both generally and as a practical matter. In response to the Executive Order, the CFPB has rigorously analyzed whether disparate impact claims are cognizable under the ECOA discrimination proscription and squarely focused all eyes on a fundamental question that has not heretofore received the strict scrutiny it merits—whether the text of the ECOA discrimination proscription is limited to disparate treatment.

In doing so, the CFPB stated that "[t]wo Courts of Appeals have assumed without deciding that [the] ECOA authorizes disparate-impact liability; two others have found that [the] ECOA authorizes disparate-impact liability, but the decisions provide only limited discussion and do not analyze the statutory text."[100] The CFPB further observed that, "[t]o the extent

98. Att'y Gens. of Ma., Md., N.Y., Ca., Del., Haw., Ill., Mich., Minn., Nev., N.M., Or., Vt., & Wash., Multistate Guidance on Antidiscrimination Protections 1 & n.1 (2026), https://www.mass.gov/doc/multistate-guidance-on-antidiscrimination-protections-9172026/download; *see also* Mike Gibb, *14 State AGs Say Disparate-Impact Liability Still Stands as Federal Agencies Retreat*, Accts. Recovery (Sept. 23, 2026), hhttps://www.accountsrecovery.net/2026/09/23/14-state-ags-say-disparate-impact-liability-still-stands-as-federal-agencies-retreat/; Mike Gibb, *14 State AGs Say Disparate-Impact Liability Still Stands as Federal Agencies Retreat and What This Means*, From *Vishali Rao of Hinshaw & Culberston*, Accts. Recovery: Compliance Dig. (Oct. 5, 2026), https://www.accountsrecovery.net/2026/10/05/compliance-digest-october-5-2/?_bhlid=4721d4d0df557fe4481bdebf3c7aed0206d2aea.

99. Multistate Guidance on Antidiscrimination Protections, *supra* note 98, at 4.

100. CFPB Final Rule, *supra* note 2, at 21635 & nn.100–01 (footnotes omitted) (comparing Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006), and Midkiff v. Adams Cnty. Reg'l Water Dist., 409 F. 3d 758, 771–72 (6th Cir. 2005) (assuming without deciding), with Bhandari v. First Nat'l Bank of Com., 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989), and Miller v. Am. Express Co., 688 F.2d 1235, 1239–40 (9th Cir. 1982) (finding that ECOA disparate impact claims are cognizable)). In its discussion of the Final Rule, the CFPB states that the Sixth Circuit "noted that it was not attempting to resolve 'complex statutory questions' presented by construing whether [the] ECOA authorized disparate impact liability." CFPB Final Rule,

they include any analysis, the district court decisions finding that [the] ECOA authorizes disparate-impact liability do not closely analyze the statutory text and do not fully consider Supreme Court decisions emphasizing the importance or the absence in the statute of effects-based language or other textual signals indicating that disparate-impact liability is authorized."[101] With the demise of *Chevron* deference and the thoughtful legal analysis of the issue by the CFPB in its discussion of the Regulation B and Official Staff Commentary amendments, it will be more difficult to defend the prior administrative position by referring reflexively to the post-enactment legislative history and the references to it in the pre-amendment version of CFPB Regulation B and its official staff commentary.

In its discussion of the Final Rule regarding the ECOA and Regulation B, the CFPB also stated (correctly in our view) that, "[w]ith regard to comments related to policy, policy cannot override the law."[102] While policy can

---

supra note 2, at 21635 n.100 (quoting *Midkiff*, 409 F.3d at 772); *see also* Golden v. City of Columbus, 404 F.3d 950, 963, 963 n.11 (6th Cir. 2005) (dicta) (assuming, without deciding, that disparate impact claims are cognizable under the ECOA); Saint-Jean v. Emigrant Mortg. Co., 129 F.4th 124, 167 n.9 (2d Cir. 2025) (Park, J. dissenting) (stating, in a reverse redlining case involving disparate impact and disparate treatment claims under the FHA and the ECOA, that "we have yet to decide whether the ECOA provides for [disparate impact] liability. Appellants do not raise this issue on appeal, so we should 'express no opinion about whether a disparate impact claim can be pursued under ECOA.'") (citing and quoting *Garcia* and *Golden*).

101. CFPB Final Rule, *supra* note 2, at 21635, 21,635 n.102 (citing, by way of example, Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 926–27 (N.D. Cal. 2008) (finding that *Smith* does not itself bar disparate impact claims under ECOA)); *see also* John L. Ropiequet et al., *Fair Lending Developments: Is Disparate Impact Here to Stay?*, 69 Bus. Law. 609, 614, 614 nn.46, 48 (2014) (stating that arguments that the employment law decisions in *Griggs* and *Smith* cannot be extended to support disparate impact claims have been rejected by the courts). Should this question be presented to the United States Supreme Court, we submit that its statutory construction analysis is unlikely to turn on lower court decisions that did not closely analyze the text of the ECOA discrimination proscription in light of the statutory construction jurisprudence of the Supreme Court. *See generally* Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 568 (Alito, J., dissenting) ("[T]his Court has 'no warrant to ignore clear statutory language on the ground that that other courts have done so,' even if they have 'consistently' done so for '30 years' . . . [;] this Court does not interpret statutes by asking for 'a show of hands. . . .'" (internal citations omitted)).

102. CFPB Final Rule, *supra* note 2, at 21623; *see also id.* at 21635 ("This Court has explained many times over many years that, when the meaning of a statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.") (quoting Bostock v. Clayton Cnty., 590 U.S. 644, 673–74 (2020)).

be debated, statutory text and jurisprudence govern the lawfulness of an act once Congress has legislated on a subject. Our view is that the question of whether a disparate impact claim is cognizable under the ECOA is a statutory construction question the resolution of which should turn on the unambiguous statutory text adopted by the enacting Congress and not a public policy question to be effectively debated in a vacuum based upon asserted benefits or post-enactment legislative history. As a distinguished jurist once wrote, "'[t]he text of the law is not just evidence of how much one interest . . . should be preferred over another . . . ; the text is the *decision* about what to do' with respect to the accommodation of competing interests—'a decision approved by the Constitution's own means, bicameral approval and presidential signature.'"[103] We respectfully submit that the Congressional decision regarding what to do about disparate impact is reflected in the text of the ECOA discrimination proscription and that its scope and purpose are defined and limited by the words that actually are there.

The state-level legislative and regulatory responses discussed in this Article suggest that more chapters remain to be written with respect to the state law story of disparate impact in fair lending. Regardless of how the *National Fair Housing Alliance* challenge plays out, and whether private parties continue to assert purported ECOA disparate impact claims, non-mortgage creditors[104] (and housing creditors) should remain mindful of the need to monitor state discrimination laws. In addition to whatever state disparate impact laws may already exist, in response to the Executive Order a

103. Cubita & Hartmann, *supra* note 42, at 837–38, 838 n.30 (quoting Neal v. Honeywell Inc., 33 F.3d 860, 862–63 (7th Cir. 1994) (Easterbrook, J.) (emphasis in original), *abrogated on other grounds*, Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409 (2005)).

104. As noted previously, *see supra* note 54, motor vehicle dealerships are not subject to any authorities of the CFPB, including its regulatory authority. They therefore should remain mindful of the fact that, as of this writing, the Federal Reserve Board has not taken action to align its version of Regulation B and the Official Staff Commentary with their CFPB counterparts. In this connection, however, the Federal Trade Commission recently issued a Policy Statement Regarding Disparate-Impact Claims and "Unfair Discrimination" Claims. *FTC Ditches "Disparate Impact"*, FTC: Press Releases (Aug. 7, 2026), http://www.ftc.gov/news-events/news/press-releases/2026/08/ftc-ditches-disparate-impact. The Policy Statement states that the FTC will no longer pursue disparate impact claims in any context due to its lack of statutory authority to do so and "the fundamental legal and policy defects of disparate-impact liability laid out in President Trump's executive order." FTC, Policy Statement Regarding Disparate-Impact Claims and "Unfair Discrimination" Claims 2 (Aug, 7, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/disparate%20Impact-policy-statement.pdf. Additionally, the Policy Statement says that, "because Section 5 [of the FTC Act] does not create an antidiscrimination cause of action, the [FTC] will not bring *any* such claims under Section 5." *Id.* (alteration in

patchwork of state disparate impact regimes may emerge that preserves disparate impact liability in their respective jurisdictions. The resulting state law landscape will present its own compliance challenges.

original). Notably, the Policy Statement makes clear that the FTC "remains firmly committed to bringing [disparate-treatment] claims where the law allows[,]" noting that "disparate treatment does not mean the Commission cannot look behind the curtain to determine if discriminatory intent is being masked by a supposedly neutral policy." *Id.* at 2–3.