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[Byline] Revisiting Disparate Impact Liability Under Executive Order 14281

Consumer Finance Law Quarterly Report

In The News | 2 min read
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In an article published in the current edition* of the *Consumer Finance Law Quarterly Report*, Hinshaw attorneys Peter Cubita and Michael Guerrero examine how President Trump's Executive Order 14281, seeking to eliminate the use of the disparate impact theory of liability, has impacted the financial services industry.

In their article, Peter and Michael trace the historical background of the disparate impact theory of liability from its genesis in employment discrimination law to its evolution into a controversial fair lending topic, discuss the Executive Order and key actions taken by federal agencies to implement its directives with respect to fair lending, and provide an update on a recent challenge to the responsive regulatory action taken by the CFPB and on state legislative fair lending developments.

Key Takeaways

Historical Background

The article describes how the disparate impact theory of liability originated in employment discrimination law, with the Supreme Court recognizing it under Title VII in *Griggs v. Duke Power Co.* in 1971, and traces how it came to be viewed as a controversial fair lending topic through subsequent Supreme Court jurisprudence, other litigation, and regulatory actions.

The Executive Order

Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," stands in stark contrast to the disparate impact policies of the prior Administrations. The Order directed federal agencies and the Attorney General to take specific actions to implement the Administration's policy of eliminating the use of disparate-impact liability in all contexts to the maximum degree possible.

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Challenges to the Pendulum Shift

Peter and Michael discuss the commencement of litigation under the Administrative Procedure Act challenging CFPB amendments to Regulation B that removed references to disparate impact liability on the basis that the plain language of ECOA "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." The case, *National Fair Housing Alliance v. CFPB*, was filed in the federal district court for the District of Columbia on May 27, 2026. It will be among the most closely watched consumer financial services cases over the next few years and might ultimately serve as the vehicle through which the United States Supreme Court finally addresses whether disparate impact claims are cognizable under the ECOA.

Meanwhile, some states have amended their discrimination laws and regulations to expressly authorize disparate impact claims in various contexts, and 14 state attorneys general have issued joint guidance asserting that most discrimination laws prohibit effects-based discrimination in some form. A second challenge to the CFPB disparate impact amendments to Regulation B, *National Urban League et al. v. CFPB*, was filed in the federal district court for the District of Massachusetts after the *Quarterly Report* article was published.

What's Next?

Regardless of how challenges to the CFPB's Regulation B amendments are resolved, Peter and Michael note that the state law landscape will continue to evolve as states adopt legislation or seek to enforce existing laws that preserve disparate impact liability in their respective jurisdictions.

Read the full article (PDF)

- **Consumer Finance Law Quarterly Report,* "Revisiting Disparate Impact Liability In Financial Services Under Executive Order 14281," (Vol. 79, No. 3, 2026)

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