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CLIENT ALERT

From Oversight to Omission: The OCC's New Stance on Disparate Impact Liability

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The Office of the Comptroller of the Currency (OCC) announced on July 14, 2025, that it will cease supervising banks for disparate impact liability.[1] Accordingly, OCC examiners will not request, review, conclude on, or follow up on matters related to a bank's disparate impact related risk, risk analysis, or assessment processes or procedures.[2] The OCC also removed references to disparate impact liability from its fair lending examination manual.

This policy shift follows President Trump's April 2025 executive order mandating the elimination of disparate impact liability across federal agencies and claiming that disparate impact liability forces companies to "engage in racial balancing to avoid potentially crippling legal liability."[3] Given the Trump administration's approach, the OCC's policy shift is unsurprising. But the change means financial services companies should reconsider how they evaluate and address disparate impact risk, not only from the perspective of this revised federal regulatory lens, but also with the understanding that state attorneys general and private litigants will continue to pursue disparate impact claims as long as such claims remain legally viable.

DISPARATE IMPACT'S LEGAL HISTORY

Disparate impact discrimination occurs when a facially neutral policy disproportionately affects a protected class and is otherwise unjustified.[4] In contrast, disparate treatment discrimination occurs when protected class members are treated less favorably *because of* their protected status.[5] Classic examples of policies resulting in actions based on disparate impact allegations include seniority-based pay raises[6] and staff reductions.[7] But federal agencies and private plaintiffs have also invoked disparate impact theories against financial institutions in cases involving mortgage pricing models[8] and allegedly predatory lending offers.[9]

The OCC's decision to stop supervising disparate impact liability departs from long-standing precedent upholding disparate impact as a method for proving discrimination. Since 1971, the United States Supreme Court has recognized disparate impact as a way to prove discrimination under multiple federal statutes, including the Fair Housing Act (FHA).[10] In fact, by the time of the Supreme Court's ruling in *Inclusive Communities*, all eleven federal courts of appeals had similarly ruled that such claims were cognizable under the FHA.[11] And, although never specifically addressed by the Supreme Court, the disparate impact theory has often been used to prove discrimination under the Equal Credit Opportunity Act.[12]

The DOJ and financial regulators have historically relied upon disparate impact theories to enforce antidiscrimination laws in the context of lending. For example, in 2015, the DOJ and the CFPB jointly alleged that a mortgage lender's loan pricing model disparately impacted African American and Hispanic borrowers, resulting in a $9 million settlement.[13] In another case, the CFPB and the DOJ required a national bank to pay $169 million in 2014 to settle allegations that its failure to extend debt relief offers to those with Puerto Rico addresses or a preferred language of Spanish disparately impacted Hispanic borrowers.[14]

Private plaintiffs' disparate impact theories are similar to those brought by the government. In 2012, the ACLU filed a class action on behalf of African American homeowners in Detroit, alleging that an investment bank violated the FHA through its "practice of purchasing and financing predatory home mortgage loans," which disparately impacted African American neighborhoods.[15] More recently, in February 2025, the Second Circuit upheld a verdict that found a mortgage lender liable for discriminatory lending practices that disparately impacted the plaintiffs, Black homeowners in New York City.[16]

WHAT DOES THE OCC'S POLICY SHIFT MEAN FOR FINANCIAL INSTITUTIONS?

Although the OCC will not pursue disparate impact enforcement actions under the current administration, financial institutions should proceed with caution before altering and/or deprioritizing systems, policies, and procedures designed to identify, limit, and mitigate disparate impact. The OCC's position does not change underlying antidiscrimination laws that remain in effect.

For example, the FHA still prohibits lenders from discriminating against any person because of race, color, religion, sex, handicap, familial status, or national origin.[17] And the Supreme Court has held that a claim to enforce the FHA's prohibitions can be based on disparate impact. Because the OCC's recently announced position changes neither the law nor years of precedent, the OCC's announcement likewise will not insulate financial institutions from disparate impact claims brought by private litigants.

Further, the instruction from President Trump will likely not apply to future administrations. Future presidents and/or Congress may reverse course, opening financial institutions to increased enforcement risks for conduct occurring during the current administration. Importantly, even though the statute of limitations for bringing a private civil action under the FHA is "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice,"[18] enforcement actions brought by federal regulators seeking civil penalties under the FHA are subject to a five-year statute of limitations based on when the claim first accrued.[19] So adopting policies now, which would take effect later, could still be challenged during a subsequent administration. As noted above, state attorneys general could also bring enforcement actions for issues that are being de-prioritized by the current administration.

For financial services–related claims, disparate impact litigation is often based on bank data, because the interpretation of various data points (e.g., population characteristics compared with mortgage approval rates) is used to develop—or rebut—evidence that a facially neutral policy has a disparate impact. And the data that exists now can still be used down the road, if and when the government reverses course.

Finally, the OCC's new approach does not currently impact its approach to supervision and enforcement of issues related to disparate treatment discrimination. So financial institutions must remain vigilant in monitoring, preventing, and addressing potential disparate treatment.

WHAT TO WATCH

As noted above, the change to the OCC's examination procedures is not shocking, given the Trump administration's actions and direction to date. But it does raise questions as to what the regulators *will* prioritize and how examinations may change going forward. Winston continues to monitor how bank examinations are staffed and are proceeding during this administration, as well as how challenges to examinations are being received by leadership at the OCC, so that we can help our clients position themselves most effectively when dealing with this era of rapidly evolving regulatory and enforcement directives.

If you have any questions regarding this or related subjects, or if you need assistance, please contact the authors of this article: Kobi Brinson (Partner and Co-Chair, Financial Services Industry Group), Elizabeth Ireland (Partner, White

Collar & Government Investigations Practice), Patrick Doerr (Partner, White Collar & Government Investigations Practice), Starling Gamble (Associate, White Collar & Government Investigations Practice), Arman Aboutarabi (Associate, General Litigation), or your Winston & Strawn relationship attorney. You can also visit our Financial Services Industry webpage and our White Collar & Government Investigations Practice webpage for more information on this and related subjects. Winston Summer Associate Rosa Gibson also assisted in preparing this article.

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[1] OCC, Bulletin 2025-16, Fair Lending: Removing References to Disparate Impact (July 14, 2025), https://www.occ.treas.gov/news-issuances/bulletins/2025/bulletin-2025-16.html.

[2] *Id*.

[3] Exec. Order No. 14281, "Restoring Equality of Opportunity and Meritocracy," 90 Fed. Reg. 17537 (Apr. 23, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/.

[4] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Comms. Project, Inc.*, 576 U.S. 519, 524 (2015). In other words, disparate impact discrimination arises from apparently neutral practices that are not intentionally discriminatory but have the effect of negatively impacting members of a protected class. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

[5] *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

[6] *Smith v. City of Jackson*, 544 U.S. 228, 231 (2005).

[7] *Meachem v. Knolls Atomic Power Lab'y*, 554 U.S. 84 (2008).

[8] *See, e.g.*, Press Release, Dep't of Just., "Justice Department and Consumer Financial Protection Bureau Reach $35 Million Settlement to Resolve Allegations of Lending Discrimination by National City Bank" (Dec. 23, 2013), https://www.justice.gov/archives/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-35-million-settlement. The press releases cited throughout this alert do not expressly use the term "disparate impact," but the context makes clear that they rely on disparate impact theories (e.g., the government's reliance on statistical models).

[9] *NAACP v. Ameriquest Mortg. Co.*, 635 F. Supp. 2d 1096, 1103–04 (C.D. Cal. 2009); *see also Hoffman v. Option One Mortg. Corp.*, 589 F. Supp. 2d 1009, 1011 (N.D. Ill. 2008).

[10] *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing the validity of disparate impact discrimination claims under Title VII); *Smith*, 544 U.S. at 228 (recognizing same under the Age Discrimination in Employment Act); *Inclusive Comms. Project, Inc.*, 576 U.S. at 519 (recognizing same under the FHA).

[11] David H. Carpenter, Cong. Rsch. Serv., R44203, "Disparate Impact Claims Under the Fair Housing Act" at 1 (Sep. 24, 2015), https://www.congress.gov/crs-product/R44203.

[12] *See generally, e.g.*, *Haynes v. Bank of Wedowee*, 634 F.2d 266 (5th Cir. 1981); *Golden v. City of Columbus*, 404 F.3d 950 (6th Cir. 2005); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062 (S.D. Cal. 2008).

[13] Press Release, Dep't of Just., "Justice Department and Consumer Financial Protection Bureau Reach Settlement with Provident Funding Associates to Resolve Allegations of Mortgage Lending Discrimination" (May 28, 2015), https://www.justice.gov/archives/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-provident. The government alleged that Provident Funding Associates gave mortgage brokers "subjective and unguided discretion" in setting fees, resulting in thousands of African American and Hispanic borrowers paying more than white borrowers.

[14] Press Release, Consumer Fin. Prot. Bureau, "CFPB Orders GE Capital to Pay $225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices" (June 19, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-

card-practices/. The CFPB terminated the associated consent order in May 2025, noting that the termination was consistent with EO 14281's mandate to eliminate the use of disparate impact liability.

[15] *Adkins et al. vs. Morgan Stanley*, ACLU, https://www.aclu.org/cases/adkins-et-al-vs-morgan-stanley (last visited July 17, 2025). Class certification was denied, and the case was voluntarily dismissed in 2017. *Wall Street's Predatory Mortgages in Detroit*, ACLU Michigan, https://www.aclumich.org/en/cases/wall-streets-predatory-mortgages-detroit (last visited July 17, 2025).

[16] *Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124 (2d Cir. 2025).

[17] 42 U.S.C. § 3605(a).

[18] 42 U.S.C.A. § 3613.

[19] 28 U.S.C.A. § 2462; *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1144 (D. Idaho 2003).
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