

Fair Lending

**Fighting Illegal Discrimination:
Promoting Growth for the Whole Community**



American
Bankers
Association®

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The Core Principles for Regulating the United States Financial System, enumerated in Executive Order 13772, include the following that are particularly relevant to an evaluation of current U.S. fair lending rules and regulatory practices:

- (a) empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;*
- (c) foster economic growth and vibrant financial markets through more rigorous regulatory impact analysis that addresses systemic risk and market failures, such as moral hazard and information asymmetry;*
- (f) make regulation efficient, effective, and appropriately tailored; and*
- (g) restore public accountability within Federal financial regulatory agencies and rationalize the Federal financial regulatory framework.*

The American Bankers Association¹ offers these views to the Secretary of the Treasury in relation to the Directive that he has received under Section 2 of the Executive Order.

- **Under the Fair Housing Act, Agencies should apply disparate impact consistent with the Supreme Court’s framework.**
- **Disparate impact does not apply under the Equal Credit Opportunity Act.**
- **Redlining should be assessed consistent with CRA.**
- **Purchased loans should be recognized as promoting access to credit.**
- **Keep the Bureau’s focus on consumers, not business.**

Introduction

The American Bankers Association and our members support fair, objective, and transparent enforcement of civil rights laws. The banking industry strives to make credit available to all qualified borrowers and in doing so we place emphasis on treating all similarly-situated applicants and borrowers alike. Banks dedicate significant resources to fair lending, Community

¹ The American Bankers Association is the voice of the nation’s \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend more than \$9 trillion in loans.

Reinvestment Act (CRA), and Home Mortgage Disclosure Act (HMDA) compliance to ensure that our banks fairly and equitably serve the credit needs of the communities they serve. As a result, the industry's record of compliance with fair lending law has been strong.

Despite this solid industry record of fair lending performance, Federal agencies responsible for ensuring compliance with national fair lending laws have in the last few years aggressively applied a controversial legal theory, disparate impact, to brand banks with violations of fair lending rules. Under disparate impact theory regulators rely heavily, sometimes solely, on statistical sketches to justify lawsuits or other enforcement actions. In doing so, since June 2015 they have largely ignored the analytical framework established by the Supreme Court to guard against abusive disparate impact claims.²

The disparate impact theory had a brief supervisory trial run in the mid-1990s, but it soon fell out of favor due to its lack of reliability as an identifier of actual violations of law. In recent years, the last administration once again resorted to using statistics, not just to identify possible areas where there may be illegal discrimination, but rather to *rely* upon statistics as proof of illegality in the absence of evidence of intent to violate the law, or even where there was intent to *avoid* violation.

Traditionally, by statute, regulation, and theories of enforcement, supervisory analysis has focused on disparate *treatment*, for which there is a large body of law, practice, and precedent to identify prohibited conduct. There is no such compliance clarity for the statistically-driven disparate impact approach, and no reliance on illegal intent.

In the context of the Fair Housing Act, the Supreme Court has found that the statutory language does allow consideration of disparate impact to establish violation of the FHA, but the Court also noted the real potential for abuse of the concept. To guard against that abuse, the Court in its decision held that disparate impact could only be used if applied in keeping with “cautionary standards” established by the Court.³ This cautionary framework has largely been ignored by federal agencies.⁴

The hypertrophy of consumer fair lending enforcement apparently is migrating to business lending. In December 2016, the Bureau of *Consumer* Financial Protection (BCFP) announced that small *business* lending will be among its fair lending supervision and enforcement priorities for 2017.⁵ The Bureau was given under the Dodd-Frank Act responsibility for administering the Equal Credit Opportunity Act (ECOA). There is the following prohibition

² See, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2507 (2015).

³ *Id.*

⁴ It has, however, been reinforced by more than one subsequent federal court decision, including by the district court where the *Inclusive Communities* originated, which concluded the case on remand. See, for example, *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016); see also *City of Los Angeles v. Wells Fargo & Co.*, No. 213-CV-09007-ODW (RZX), 2015 WL 4398858 (C.D. Cal. July 17, 2015).

⁵ At the same time, the Bureau is in the early stages of implementing the Dodd-Frank Act provision that will require lenders to collect data on lending to “women-owned, minority-owned and small businesses.” See 15 U.S.C. § 1691.

in ECOA: “A creditor shall not discriminate against an applicant regarding any aspect of a credit transaction.” That prohibition applies to commercial as well as consumer transactions. In practice, there have been few ECOA enforcement actions involving commercial transactions. In part, this is because with the exception of some commercial loans secured by the Small Business Administration there are no data on the sex, race, or ethnicity of a commercial borrower. In fact, except for mortgage lending, gathering such data is against the law, precisely to underline that none of these factors can be considered in lending decisions. Moreover, unlike consumer credit, where loan products and prices are more likely to be homogenous and underwriting involves the evaluation of a limited number of credit variables, commercial lending is highly tailored and underwriting and loan pricing depend on a large number of credit-related variables.

It is unclear how the *consumer* Bureau will address this small *business* task, and what business-experienced resources within the agency will be drawn upon. Judging by Bureau practices in relation to consumer fair lending supervision, questions arise as to how Bureau examiners will be defining “small business,” and in particular whether they will be applying proxies in the absence of actual information about the race, ethnicity, or gender of the small business owner (as the Bureau did—with poor success—in relation to auto lending), and whether the Bureau intends to analyze small business lending under the disparate *treatment* or disparate *impact* paradigm. Under these novel approaches to fair lending enforcement, banks have been struggling to know what is expected of them and how these theories affect their efforts to tailor lending products to reach the variety of credit-worthy borrowers in their communities. Challenged by the agencies’ failure to expose their new enforcement criteria to public notice and comment or even explain their new approaches in guidance or revised exam procedures, banks have been forced to introduce greater caution into lending practices to cope with the heightened regulatory risks.

Enforcement agencies have, instead, admonished lenders to parse enforcement consent agreements applied to other institutions to try to understand the legal theories being asserted and the statistics relied upon to assert illegal discrimination. To apply the “lessons learned” to their own lending and compliance management programs, lenders of all sizes now seek to collect extensive data, run sophisticated statistical analyses, and as necessary apply questionable proxy methodologies in an effort to identify policies or practices that a regulator might assert have a disproportionately negative impact on a protected group. The resulting impact has been significant on all banks, but particularly on community banks, whose comparative advantage in tailoring loans to local borrowers is damaged.

Creation of rules by means of novel, changing, and vague fair lending enforcement theories undermines a primary goal of the fair lending laws—expanding credit opportunity and availability. Where the costs or regulatory risks of the new enforcement and compliance theories are high, or lenders are unable to discern from enforcement actions what is expected, lending becomes more standardized and defensive, less tailored, and some programs or services are discontinued.

These problems can largely be addressed by regulatory reforms that focus on addressing genuine illegal activity, identified by intent to violate fair lending standards. Doing so will liberate more diverse lending, including opportunities for innovation and greater varieties of

lending services, reaching more credit-worthy borrowers. Local and national economies will be stimulated, and financial institutions will be able to grow in the services that they provide to all of their customers.

I. Disparate Impact

A. Recognized in FHA by the Supreme Court, within a Framework to Avoid Abuse

In a disparate treatment case a plaintiff must establish that the defendant had a discriminatory intent or motive. In contrast, a disparate impact claim challenges neutral policies or practices, challenges asserting via a statistical analysis (often controversial in itself as to methodology, quality of data, timelines, and access to the sources of information) that the policies or practices have a disproportionately negative impact on qualified members of a protected group. This can be asserted even though the defendant has no intent to discriminate (and, not infrequently, where genuinely aggrieved parties are difficult to find).

The statutory foundation for disparate impact liability under ECOA and FHA has been much debated.⁶ Even though in a 1994 interagency *Policy Statement on Discrimination in Lending* the banking agencies expressed their view that discrimination in lending under ECOA and FHA can be identified using disparate impact analysis,⁷ fair lending enforcement nevertheless continued to rely upon findings of disparate treatment. Disparate impact, where used, played a role as an identifier calling for further investigation of evidence of disparate treatment, smoke that led to a search for the fire.

On June 25, 2015, the United States Supreme Court held in *Inclusive Communities* that disparate impact claims are cognizable under the FHA. At the same time the Court significantly constrained the application of disparate impact within a framework intended to limit opportunities for abuse of the concept:

- A statistical imbalance is not enough to establish a *prima facie* case; a plaintiff must satisfy a “robust causality requirement” between a specific policy or practice and the statistical disparity, so as to “protect defendants from being held liable for racial disparities they did not create;”⁸
- A valid business or policy purpose rebuts a *prima facie* case;⁹ and

⁶ See, e.g., Buckley Sandler Legal Bulletin, “Disparate Impact under FHA and ECOA: A Theory Without a Statutory Basis” (July 13, 2012) available at

<http://www.aba.com/Compliance/Documents/DisparateImpactWhitePaper.pdf>.

⁷ Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18, 266 (Apr. 15, 1994) available at <https://www.gpo.gov/fdsys/pkg/FR-1994-04-15/html/94-9214.htm>.

⁸ 135 S. Ct. at 2507, 2512.

⁹ *Id.* at 2514.

- Before rejecting a business justification for a challenged practice, the court must find that the *plaintiff* has demonstrated that there is an “available alternative . . . practice that has less disparate impact and serves the [entity’s] legitimate needs.”¹⁰

The Supreme Court is clear that the standards articulated in its decision are critical to preventing abusive claims of discrimination. The Supreme Court specified that only “artificial, arbitrary, and unnecessary” practices should trigger liability,¹¹ to ensure that “regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”¹² The Court also endorsed the role of private discretion in lending decisions by statements such as, “[e]ntrepreneurs must be given latitude to consider market factors,”¹³ and “[c]ourts should avoid interpreting disparate impact liability to be so expansive as to inject racial considerations into every housing decision.”¹⁴

B. Agencies Have Largely Disregarded the SCOTUS Framework

Since the *Inclusive Communities* decision, examples where a federal agency has taken action to apply the Court’s framework for consideration of disparate impact are hard to find. The decision should have been reinforced by agency supervisory positions (expressed in guidance, exam procedures, and examiner training) and in the exercise of prosecutorial discretion by HUD or DOJ. There has been nothing.

For example, HUD regulations implementing the FHA still include the following language, which is at odds with the Supreme Court’s framework. “Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, *the respondent or defendant has the burden* of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”¹⁵ *Inclusive Communities* places that burden on the plaintiff.

Another example from the HUD regulations: “A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative”.¹⁶ This conflicts with *Inclusive Communities*, which calls for a rationale, not the extra burden on the defendant of evidentiary proof. The Supreme Court framework places the burden of proof on the plaintiff, not on the defendant.

And yet, a joint letter from DOJ and HUD completely disregarded these and other inconsistencies of the HUD rule with the Supreme Court’s framework: “The Supreme Court’s holding in *Inclusive Communities* is entirely consistently with the Discriminatory Effects Rule issued by HUD in 2013. . . The remainder of the Court’s opinion-which consists of a discussion regarding limitations on the application of disparate-impact liability that have long been part of

¹⁰ *Id.* at 2511.

¹¹ 135 S. Ct. at 2524.

¹² *Id.* at 2518.

¹³ *Id.* at 2523.

¹⁴ *Id.* at 2524.

¹⁵ 24 C.F.R. § 100.500 (c)(2) (emphasis added).

¹⁶ 24 CFR § 100.500 (b)(2).

the legal standard—does not conflict with HUD’s Final Rule. . . . Indeed, nothing in the Court’s opinion casts any doubt on the validity of HUD’s Final Rule.”¹⁷

As noted earlier, some defendants have succeeded in court by reference to the Supreme Court’s framework. Nevertheless, with regard to defense against illegal discrimination charges, the process is often the penalty. A win in court comes after much time and expense and public reputational damage. The specter of the costs of fighting one’s regulator is daunting to most banks, who often will choose to comply with regulatory judgment, however flawed that judgment may be. The result is disruption to the provision of financial services, perhaps suspended operations, and reluctance to develop innovative products or tailored offerings, knowing that vindication may come in court only after much cost and difficulty.

Recent fair lending enforcement actions have demonstrated that the menace of supervisory assertion of disparate impact claims without appropriate controls can exalt leverage over law and may “perpetuate race-based considerations rather than remove them,”¹⁸ undermining the statutory goal of expanding credit opportunity and the Administration’s goal of growing the economy.

C. Improperly Applied to ECOA

On April 18, 2012, the Bureau elevated the disparate impact theory to a leading and self-sufficient basis of proof of illegal discrimination. A BCFP bulletin stated that the Bureau “reaffirms that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B.”¹⁹ This statement echoed a speech made by Assistant Attorney General Thomas Perez several months earlier, in which he asserted that both the FHA and ECOA permitted disparate impact claims.²⁰

The Supreme Court’s analysis of the application of disparate impact within FHA, however, does not apply to ECOA. That limitation is appropriate, given the material textual and historical differences between the two statutes. First, in *Inclusive Communities*, the Court grounded its textual arguments on the inclusion of the phrase “otherwise make available” in section 804 of the FHA, explaining that this effects-based language is central to its analysis. ECOA, in contrast, contains no similar effects-based language. Instead, ECOA’s prohibition uses the phrase “discriminate.” Courts have traditionally read “discriminate” to require intent.²¹

¹⁷ Letter from Helen Kanovsky, General Counsel, U.S. Dep’t of Hous. & Urban Dev. and Vanita Gupta, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, Civil Rights Division to Frank Keating, President and CEO, American Bankers Ass’n (Aug. 27, 2015)..

¹⁸ 135 S. Ct. at 2524.

¹⁹ CFPB BULLETIN 2012-04 (Apr. 18, 2012) at 1, available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

²⁰ Thomas E. Perez, Speech to 15th Annual Community Reinvestment Act and Fair Lending Colloquium (Nov. 7, 2011), available at <http://www.justice.gov/crt/opa/pr/speeches/2011/crt-speech-111107.html>. It is important to note that neither the BCFP nor the DOJ statements have been withdrawn or altered since the 2015 *Inclusive Communities* decision.

²¹ See 15 U.S.C. § 1691(a) (“It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age.”).

Second, the Court’s analysis of the FHA’s amendment history is inapplicable to ECOA. The Court focused on three provisions that it characterized as “exemptions” from disparate impact liability, concluding that the exemptions only made sense if the FHA recognized disparate impact claims. ECOA lacks similar exemptions. Rather, ECOA’s legislative history strongly supports the conclusion that Congress did not intend for disparate impact claims to be cognizable under ECOA.²²

II. Other Fair Lending Issues

A. Inventing Redlining by Ignoring Intent, CRA Performance, or Purchased Loans

A new regulatory approach to consideration of redlining emerged in the last couple of years as grounds for fair lending enforcement. Previously, analysis focused on disparate *treatment*, and regulators considered the places where a bank originated loans to determine whether a bank *intentionally* avoided lending in minority neighborhoods. Recently, regulators have begun reaching beyond a bank’s geographical footprint, examining marketing and outreach efforts. This approach relies heavily on statistical analysis based on broad assumptions, rather than on-the-ground review and consideration of actual community conditions. The exercise of regulatory discretion—neighboring on the arbitrary—has been noticeable at every juncture in this process. The enforcement cases also suggest a failure by the Agencies to conform to the Supreme Court’s standards for the application of statistical disparities to avoid regulatory abuse.

Recent enforcement actions call into question the relationship between the Community Reinvestment Act (CRA) and redlining. Congress passed CRA in 1977 to encourage banks to meet local credit needs,²³ virtually eradicating redlining. It has been the regulatory practice of decades, to ensure compliance with fair lending mandates, that lenders would identify the physical location of their loans to demonstrate proper distribution of credit within their communities. Lenders would rely, with regulatory concurrence, on their CRA Assessment Area as the basis for this analysis. Under the regulations that implement CRA, an Assessment Area must include the institution’s main office, its branches, and its deposit-taking ATMs, as well as surrounding geographies in which the institution has originated or purchased a substantial portion of its loans.²⁴ A bank’s delineation of its Assessment Area is regularly reviewed during a CRA performance evaluation.

In recent redlining enforcement actions, Agencies have disregarded a bank’s CRA assessment area. Instead they have overlaid their own creation, a “reasonably expected market area” (REMA) or a “Proper Assessment Area”—an area Agencies assert that the bank *should* serve. In other words, Agencies substitute the bank’s judgment about the market area it can serve with

²² See “Disparate Impact under FHA and ECOA: A Theory Without a Statutory Basis,” *supra* note 8, at 7-10.

²³ 12 U.S.C. § 2109 (“It is the purpose of this chapter to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.”) See also S. Rep. 95–175 at p. 35 (May 16, 1977) (“[T]he Committee is aware of amply documented cases of redlining, in which local lenders export savings despite sound local lending opportunities.”)

²⁴ 12 C.F.R. § 228.41.

their own judgment, informed by a subjective use of statistical analysis. Arguably, the REMA appears designed to justify a preconceived regulatory conclusion of redlining. There has resulted the curious anomaly of banks that received high CRA marks over an extended period of time facing regulatory assertions of redlining. Which conflicting regulatory evaluations are correct and which in error?

Unlike CRA regulations, Agencies have created the REMA concept outside of public notice and comment. They have not offered guidance about how to define a REMA or when and why Agencies will disregard a bank's CRA assessment area. This practice—typically announced during the fair lending exam—handicaps a bank's ability to explain its performance, business strategy, institutional capacity and constraints, and other relevant factors involved in the bank's efforts to reach all sectors of its community. It discourages bank outreach and innovation, for fear of running afoul of an unknown statistical measure.

Compounding this problem, in some enforcement actions Agencies have been unwilling to consider purchased loans, despite the fact that under CRA banks are *encouraged* to purchase loans. It has long been recognized that purchasing loans promotes financial access, facilitates a bank's portfolio diversity, and significantly enhances a bank's reach into underserved areas and communities, while supporting local loan originators by providing market access for their loans. Regulatory disregard for purchased loans may reduce credit availability and limit local economic growth, particularly in economically stressed areas.

B. Duplicative and Excessive Bureau Collection of Small Business Data

In December 2016, the Bureau announced that small business lending will be a fair lending priority for 2017. We understand that the Bureau has begun examinations of small business lending by institutions it supervises. It is unclear how Bureau examiners are defining "small business;" whether they are applying proxies in the absence of information about the race, ethnicity, or gender of the small business owner; and whether the Bureau intends to analyze small business lending under disparate treatment or disparate impact standards.

At the same time, the Bureau is in the early stages of implementing Dodd-Frank Act section 1071, which amended ECOA and mandates the collection and reporting of data on lending to "women-owned, minority-owned and small business." The Dodd-Frank Act review seeks—

- (i) the number of the application and the date on which the application was received;
- (ii) the type and purpose of the credit applied for;
- (iii) the amount of the credit applied for, and the amount of the credit approved;
- (iv) the type of action taken on the application, and the date of that action;
- (v) the census tract in which the principal place of business of the loan applicant is located;
- (vi) the gross annual revenue of the business in the last fiscal year preceding the date of the application;
- (vii) the race, sex, and ethnicity of the principal owners of the business; and

- (viii) any additional information that the Bureau determines would aid in fulfilling the purposes of this section.

This HMDA-like data collection and reporting obligation has the potential to change small business lending dramatically, increasing the cost and limiting the availability of credit to small businesses, a key engine of growth and job creation in the U. S. economy.

Section 1071 states that the definition of small business is to have the same meaning as the term in the Small Business Act.²⁵ SBA size standards for “small businesses” are much more detailed and will encompass many more loans than the definition applied under ECOA, which covers loans to businesses with gross revenues of \$1 million or less. As a result, the data collection has the potential to expand significantly the extent of a bank’s commercial lending portfolio subject to a fair lending examination.²⁶

In addition to the challenge of defining a small business is the equally daunting task of identifying what constitutes a women-owned business or a minority-owned business. Fair lending reviews of non-mortgage consumer credit have relied on the demographics of the census tract in which the consumer lives to determine a consumer’s race or ethnicity, but the demographics of the census tract where the business is located may not be an effective way to determine the race or ethnicity of the business’ owner. Identifying the factors used will be a highly complex, controversial process, disposed to inaccuracies.

Once implemented, the data will offer increased opportunities for Agencies to rely on statistical analysis to assert discrimination in small business lending. Unlike consumer credit, where loan products and prices are typically homogenous and underwriting involves the evaluation of a limited number of credit variables, commercial lending is highly individualized, and underwriting and loan pricing depend on a large number of credit variables. The temptation to use statistical shortcuts to identify alleged discrimination will be very strong, the process vulnerable to caprice.

The Dodd-Frank Act states that the purpose of section 1071 is to “facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.” Rather than motivating financial institutions to increase their lending to meet the credit needs of small businesses and neighborhoods, the data collection and the anticipated reliance on statistics in fair lending supervision and enforcement may discourage lending to small businesses, particularly by community banks that may lack the resources to devote to expanded fair lending compliance programs to defend against allegations of disparate impact.

The mandates under section 1071 substantially duplicate existing sources of data on small business lending. Agencies implement a small business data reporting requirement from CRA regulations. Banks with assets above \$1 billion are required to submit data annually to the

²⁵ 15 U.S.C. § 632.

²⁶ SBA size standards are based on the industry in which the business is engaged (applying the North American Industry Classification System, or NAICS) and are established by revenue or number of employees, depending on the industry. Therefore, to comply with the fair lending data collection a lender will be required to look up the required NAICS code, and determine the gross revenue and number of employees for each commercial borrower.

Federal Reserve, the OCC, and the FDIC. These agencies, in turn, release the data publicly through the Federal Financial Institutions Examination Council (FFIEC). The FFIEC provides publicly available data on loans by census tract, income category, revenue size of the small business (above and below \$1 million), and by categories of dollar amount (below \$100,000, \$100,000 to \$250,000, and above \$250,000) for each depository institution. For the market, as a whole, the publicly available data disclosure is more detailed and provides information on loans for each census tract. In addition, the Small Business Administration (SBA) provides data on SBA programs, including 7(a), 504, and the microloan program, to members of the public upon request, including data on a county level and by race and gender of the small business borrower for the various SBA programs. The Community Development Financial Institutions (CDFI) Fund also provides data upon request. The data provided by the CDFI Fund is available on a county level and includes lending by type of CDFI and by loan purpose and use (financing businesses, microenterprises, or commercial and multifamily real estate).

It is also important to recognize that the Bureau of *Consumer* Financial Protection has no experience or institutional proficiencies to meet the requirements for gathering information on small businesses and understand commercial lending. This point has been publicly acknowledged by the Bureau as it is anxiously working to gather and organize resources to address this mandate.

III. Specific Recommendations

A. Focus Fair Lending Enforcement on Evidence of Intent

1. Agencies should comply fully with the Supreme Court's 2015 FHA Decision

With regard to the Fair Housing Act, Agencies should confirm in interagency guidance, updated exam procedures (and examiner training), and in the case of HUD, amended regulations, that Agencies' consideration of disparate impact claims in both the supervisory and enforcement context will be governed by standards consistent with the Supreme Court's *Inclusive Communities* framework. In so doing, Agencies should give initial focus to enforcing fair lending requirements under *disparate treatment* standards.

Agencies should consider disparate impact or effects discrimination claims only where there is demonstrable evidence that the lender is applying an artificial, arbitrary, and unnecessary barrier in its credit granting process, applying the burden of proof framework and associated cautionary standards established by *Inclusive Communities*.

To recognize the Supreme Court's articulation of the need for care when using disparate impact theory under the FHA, Agencies should incorporate in examination procedures the Court's admonition that when courts do find liability under a disparate impact theory, remedial orders must be consistent with the Constitution. "Remedial orders in disparate-impact cases should concentrate on the offending practice that arbitrarily operates invidiously to discriminate on the basis of race." To continue with the Supreme Court's language, "Remedial orders that impose racial targets or quotas might raise more difficult

constitutional questions.”²⁷ Therefore, interagency exam procedures and examiner training should clearly direct supervisory and enforcement staff to tailor any remediation to correct the offending practice, through race-neutral means.

2. *Agencies should acknowledge that disparate impact is not cognizable under ECOA*

The Agencies should acknowledge in writing that disparate impact claims are not recognized under ECOA. The Agencies should confirm that the discrimination prescription in ECOA focuses solely on the intent of the actor, and they should redirect supervision and enforcement to enforcing the disparate treatment paradigm enacted by Congress.

In particular, we urge the banking agencies to retract those parts of the 1994 interagency Policy Statement on Discrimination in Lending in which the Agencies expressed their view that discrimination in lending under ECOA can be identified using disparate impact analysis,²⁸ and the Bureau should retract the official commentary to Regulation B as well as CFPB Bulletin 2012-04 which assert the same.²⁹ In addition, the interagency examination procedures should be updated to omit references to disparate impact under ECOA.

B. Recognize Bank Efforts to Meet Local Credit Needs

Through updates to the interagency fair lending guidance and exam procedures, Agencies should redirect examiners to analyze potential redlining through a disparate treatment standard, which evaluates whether there is evidence that a bank intentionally avoided lending in minority areas. Assertions of redlining that rely solely or predominantly on a statistical analysis and peer comparisons should be rejected unless substantiated by clear evidence of intent to break the law.

Interagency fair lending exam procedures should be updated to underscore the relationship between CRA and redlining reviews. In particular, exam procedures should state that consistent with CRA, banks should be credited for purchasing loans, particularly loans in majority-minority areas.³⁰ Examiners should be directed to analyze a bank’s lending and outreach through the CRA performance context lens and within the CRA Assessment Area.

C. Keep the Bureau’s Focus on Consumers, not Business

We recommend repeal of section 1071 of the Dodd-Frank Act. As an interim step, we suggest reassigning to the Small Business Administration responsibility for implementing section 1071.

We recommend the elimination of any vestige of Bureau regulatory, supervisory, or enforcement authority over commercial credit or other commercial account and financial services:

²⁷ 15 U.S.C. § 632.

²⁸ Policy Statement on Discrimination in Lending, *supra*.

²⁹ 12 C.F.R. § 1002, Supp. I, Comment 6(a)-2; CFPB BULLETIN 2012-04, *supra* note 10.

³⁰ At the same time, it is important to ensure that purchased loans are granted holder-in-due-course status; purchasers should not be held responsible for elements of the transaction that are not readily apparent from the loan documents alone.

- Amend the Dodd Frank Act section 1002(4) definition of “consumer” by adding at the end “in connection with a consumer financial product or service.”
- Amend the Dodd-Frank Act section 1002(7) definition of “credit” to conform to ECOA’s Regulation B definition of consumer credit by adding at the end “primarily for personal, family or household purposes.”
- Amend the Dodd-Frank Act section 1002(12)(D) definition of “enumerated consumer laws,” which includes the Equal Credit Opportunity Act, to add “only to the extent that it applies to consumer credit as defined herein.”
- Amend Dodd Frank Act section 1085 to preserve Federal Reserve Board authority to prescribe regulations with respect to all non-consumer credit covered by ECOA.