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FTC Abandons Disparate Impact and "Unfair Discrimination" Enforcement

Key Points

On August 7, 2026, the Federal Trade Commission (FTC) issued a policy statement announcing that it will no longer pursue claims premised on disparate impact or “unfair discrimination” theories.

The Commission stated that it lacks statutory authority to bring disparate impact claims and that such claims are inconsistent with a “colorblind Constitution.”

The FTC will continue to pursue disparate treatment claims under the Equal Credit Opportunity Act (ECOA) and will treat Section 5 of the FTC Act strictly as a consumer-protection statute.

The FTC’s statement follows related federal actions by the CFPB, HUD, and DOJ rejecting or stepping back from disparate impact theories under their respective authorities, signaling a broader federal recalibration of effects-based enforcement.

Background

On August 7, 2026, the Federal Trade Commission announced a policy statement clarifying that the Commission will not pursue claims based on disparate impact or “unfair discrimination” theories. The announcement marks a decisive shift in the agency’s civil rights and fair lending enforcement posture. It also formalizes the FTC’s implementation of Executive Order 14281, “Restoring Equality of Opportunity and Meritocracy” (April 23, 2025), which set forth the policy of the United States to eliminate the use of disparate impact liability in all contexts to the maximum degree possible. The FTC’s

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action is one piece of a broader, coordinated federal rollback of disparate impact theory under that executive order, discussed further below. For consumer finance companies, fintechs, and other businesses within the FTC's jurisdiction, the statement may materially reduce one source of federal enforcement exposure, but it does not eliminate fair lending, state law, private litigation, or reputational risk.

Disparate impact theory presumes that differences in outcomes among demographic groups reflect unlawful discrimination, even without evidence of discriminatory intent. In the policy statement, the Commission concluded that it lacks the statutory authority to bring claims under that theory and that disparate impact analysis under the FTC's authorities would require race-based analysis of outcomes, an approach the Commission described as "pernicious and contrary to fundamental constitutional values."

Chairman Andrew N. Ferguson framed the decision as a rejection of liability based on statistical disparities rather than discriminatory intent, stating that the Commission "never had authority to impose disparate-impact liability" and "will never do so again."

What the Policy Statement Does

Repudiates disparate impact theory across FTC authorities. The Commission takes the position that Congress did not grant the FTC authority to impose disparate impact liability and that "almost any conceivable policy or practice affects different groups differently," leaving no meaningful limiting principle for such claims.

Preserves disparate treatment enforcement under ECOA. The FTC will continue to pursue intentional discrimination claims under the Equal Credit Opportunity Act, focusing on evidence of discriminatory intent rather than statistical outcome disparities.

Narrows Section 5 of the FTC Act. The Commission will treat Section 5 as "the consumer-protection statute it has always been," signaling that "unfair" or "deceptive" acts and practices will not be repurposed as a vehicle for outcome-based discrimination claims.

Reopens prior consent orders. The Commission reviewed past decisions grounded in statistical analyses used to show disparate impact liability and entered into agreements modifying certain compliance-related obligations for Napleton Inc., Passport Auto Group, and an individual previously associated with Coulter Motor Company LLC.

Adopted on a 2-0 vote. The Commission vote authorizing the policy statement and approving the modified agreements was 2-0.

Taken together, the FTC's policy statement and parallel actions by other federal agencies signal a narrower federal approach to effects-based discrimination enforcement, while leaving intact important sources of exposure outside federal agency enforcement, including state attorneys general, state regulators, private plaintiffs, courts, contractual obligations, investor or counterparty expectations, and reputational risk.

What This Means for Businesses

The policy statement is likely to have immediate practical effects for auto dealers, consumer finance companies, fintechs, auto finance providers, and other businesses within the FTC's consumer-protection and ECOA jurisdiction:

> **Reduced federal disparate impact exposure at the FTC**. Companies that were previously assessing statistical disparities in pricing, underwriting, credit decisioning, servicing, collections, or marketing under the shadow of FTC disparate impact scrutiny should expect a materially different federal enforcement posture from the Commission going forward.
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> **Renewed focus on intent-based claims.** Businesses should not read the policy statement as a general safe harbor. The FTC expressly reserved the right to bring disparate treatment claims under ECOA, and enforcement will likely emphasize evidence of intent, pretext, and comparator treatment.
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> **Federal disparate impact enforcement risk is narrowing, but other risks remain.** Recent actions by the CFPB, HUD, DOJ, and FTC point in the same direction: federal agencies are stepping back from disparate impact theories under ECOA, the Fair Housing Act, and related enforcement authorities. Acting under the same executive order, DOJ finalized a rule in December 2025 rescinding disparate impact provisions from its Title VI regulations, and HUD issued a supplemental proposed rule in August 2026 (comment period open through October 9, 2026) to make parallel changes to its own Title VI regulations, alongside a separate, still-pending January 2026 proposal to remove the Fair Housing Act's disparate-impact framework entirely. The CFPB likewise finalized amendments to Regulation B, effective July 21, 2026, eliminating ECOA's "effects test" and narrowing related discouragement and special purpose credit program rules.
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> That shift may materially reduce federal regulatory risk for consumer finance and fintech companies. Notwithstanding this trend, disparate impact theory has not been eliminated: state attorneys general and state financial regulators retain independent authority, and private

plaintiffs continue to bring such disparate impact claims under statutes and state laws these federal actions do not reach.

State law, litigation, and reputational risk persist. While federal disparate impact enforcement has narrowed across the FTC, DOJ, and CFPB (and may narrow further at HUD), disparate treatment liability is unaffected, and courts continue to permit statistical and comparator evidence to prove discriminatory intent or unlawful proxies for protected characteristics, Several states also apply disparate impact or analogous principles under their own consumer protection, credit, insurance, and civil rights statutes, and state attorneys general may continue to pursue theories that differ from the emerging federal agency position. Courts and private plaintiffs may also test the scope and durability of the federal shift. Businesses should continue to evaluate outcome disparities as part of enterprise risk, litigation exposure, and reputational management, even where federal agency exposure is reduced.

Fair lending compliance, model governance and automated decisioning still matter. Companies should not dismantle fair lending compliance programs based on the FTC statement, or these other developments, alone. For companies using algorithmic or automated decisioning tools in underwriting, pricing, servicing, marketing, fraud screening, or collections, the federal shift does not necessarily mean outcome testing should stop. Rather, testing may need to be reframed as a tool for identifying disparate treatment, proxy-risk issues, model governance concerns, state-law exposure, litigation risk, and reputational concerns.

Next Steps

Clients should consider the following near-term actions in light of the FTC policy statement and the broader federal shift away from disparate impact enforcement:

Reassess fair lending and consumer-protection compliance programs to distinguish federal disparate impact obligations from state-law, contractual, litigation, reputational, and business-risk drivers.

Review whether policies, model-governance processes, fair lending testing, and remediation protocols should be recalibrated in light of the broader federal shift, while preserving controls needed for intentional-discrimination risk and non-federal exposure.

Preserve outcome monitoring where needed to detect potential disparate treatment, identify proxy-risk or model-governance issues, support litigation defense, respond to state-law requirements, and address counterparty, investor, or reputational expectations.

Monitor parallel developments at the federal agencies, track whether state agencies, private plaintiffs, or courts move to fill the gap left by federal agencies and monitor litigation challenging or interpreting the new federal rules and positions.

Contact Us

If you have questions about how these FTC policies may affect your business, please contact Chris Friedman, Alex McFall, Leslie Sowers, or your Husch Blackwell attorney.