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FDIC Removes Disparate Impact Theory from Compliance Exam Manual

Before the Labor Day holiday weekend, the Federal Deposit Insurance Corporation (FDIC) updated the fair lending and unfair, deceptive act or practices (UDAP) chapters of its Consumer Compliance Examination Manual to remove references to the disparate impact theory. These changes became effective August 29, 2025.

Prior to the recent update, the exam manual described a policy or practice as having a “disparate impact” when a lender applies a racially or otherwise neutral policy or practice equally to all credit applicants, but the policy or practice disproportionately excludes or burdens certain persons on a prohibited basis under the Equal Credit Opportunity Act (ECOA) or the Fair Housing Act (FHA). The UDAP chapter in the exam manual had explained that a UDAP that targets or has a disparate impact on consumers on a prohibited basis may also violate ECOA or the FHA. These explanations and other guidance no longer appear in the exam manual.

The FDIC’s update to the exam manual follows the Office of the Comptroller of the Currency (OCC)’s removal of disparate impact liability from the fair lending booklet of the *Comptroller’s Handbook* in April 2025. The FDIC and OCC took these actions in response to Executive Order 14281 (“Restoring Equality of Opportunity and Meritocracy”), which directed federal agencies to eliminate the use of disparate impact liability in all contexts.

However, disparate impact is still a legally recognized theory under the FHA pursuant to the U.S. Supreme Court ruling in *Texas Department of Housing v. Inclusive Communities Project Inc.*, 576 U.S. 519, 524 (2015), as well as under other state and federal laws. For example, in July 2025, the Massachusetts attorney general entered into an Assurance of Discontinuance with a private

student loan lender that settled allegations that the lender's artificial intelligence models could lead to disparate outcomes against Black, Hispanic, and non-citizen applicants and borrowers. The Massachusetts attorney general challenged the outcomes of the lender's AI model using Massachusetts' UDAP prohibition. The lender agreed to pay \$2.5 million.

The Massachusetts Assurance of Discontinuance signals that states may continue to enforce disparate impact theory. These federal and state developments on disparate impact are also a discrete example of how states are starting to fill in the gaps as federal regulators pull back.

The FDIC's and OCC's positions not to pursue enforcement actions based on disparate impact do not change underlying antidiscrimination or consumer protection laws, which may include a private right of action. Thus, lenders should continue to monitor their practices and policies for evidence of disparate impact on a prohibited basis.

Contact us

If you have questions about disparate impact or would like to discuss other fair lending concerns, please contact Susan Seaman, Leslie Sowers, or your Husch Blackwell attorney.