

ADVISORY | Financial Institutions

April 19, 2012

CFPB FOCUSES ON CREDIT DISCRIMINATION PRACTICES

On April 18, 2012, the Consumer Financial Protection Bureau (CFPB) published Bulletin 2012-04 “to provide guidance about compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B.”¹ This Bulletin is particularly relevant to large depository and certain nondepository institutions subject to the CFPB’s supervision and enforcement authority.² The CFPB also made statements sharpening its fair lending supervisory and enforcement position³ and published a brochure alerting consumers of the “warning signs” of credit discrimination.⁴

In its Bulletin, the CFPB advises that “it will continue to adhere to the fair lending principles outlined in Regulation B,” and in particular, “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.”⁵

The CFPB also “concurs” with the 1994 Policy Statement on Discrimination in Lending by the Interagency Task Force on Fair Lending, which noted that courts have recognized three methods of proving lending discrimination under the ECOA:

- Overt evidence of discrimination;
- Evidence of disparate treatment; and
- Evidence of disparate impact.

On its face, the CFPB’s approach to the ECOA appears to be consistent with the approach previously adopted by the Board of Governors of the Federal Reserve System (FRB). Regulation B, promulgated by the FRB and adopted by the CFPB, provides that the legislative history of the ECOA “indicates that the Congress intended an ‘effects test’ concept . . . to be applicable to a creditor’s determination of creditworthiness.”⁶ Thus, the ECOA and Regulation B “may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face,

¹ Consumer Financial Protection Bureau, CFPB Bulletin 2012-04 (Fair Lending), at 1 (April 18, 2012).

² See 12 U.S.C. §§ 5514–15.

³ Richard Cordray, Consumer Financial Protection Bureau, Prepared Remarks at the National Community Reinvestment Coalition (April 18, 2012), available at <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray/>.

⁴ Consumer Financial Protection Bureau, *Credit Discrimination is Illegal* (2012), available at http://files.consumerfinance.gov/f/201204_cfpb_Credit_Discrimination_Brochure.pdf.

⁵ CFPB Bulletin 2012-04, at 1.

⁶ 12 C.F.R. § 1002.6(a) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)).

unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”⁷

At the same time, the CFPB appears to be telegraphing an especially strong stance against credit discrimination in its public statements, calling discrimination the “silent pickpocket” that “skulks among unsuspecting borrowers.”⁸ The CFPB noted that it will be examining supervised entities, including certain nondepository institutions, “in a tough but fair manner to single out the silent pickpocket and stop discrimination in its tracks.”⁹

To this end, the CFPB has released a brochure alerting consumers of the “warning signs” of credit discrimination.¹⁰ These “warning signs” include:

- “You are discouraged from applying for credit”;
- “You are offered credit with a higher rate than the one you applied for, even though you qualify for the lower rate”; and
- “Your deal sounds too good to be true.”¹¹

If you have any questions concerning the material discussed in this client alert, please contact the following members of our financial institutions practice group:

John Dugan	202.662.5051	jdugan@cov.com
Keith Noreika	202.662.5497	knoreika@cov.com
Mark Plotkin	202.662.5656	mplotkin@cov.com
Stuart Stock	202.662.5384	sstock@cov.com
D. Jean Veta	202.662.5294	jveta@cov.com
Jennifer Xi	202.662.5640	jxi@cov.com
Edward Yingling	202.662.5029	eyingling@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2012 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.

⁷ *Id.* part 1002, supp. I, § 1002.6 ¶ 6(a)-2.

⁸ Richard Cordray, Prepared Remarks at the National Community Reinvestment Coalition.

⁹ *Id.*

¹⁰ Consumer Financial Protection Bureau, *Credit Discrimination is Illegal*.

¹¹ *Id.*