

# To the Point!

legal, operations, and strategy briefs for financial institutions

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## Fair Lending - Disparate Impact

Applying the disparate impact doctrine to prove lending discrimination recently (i) was affirmed by the CFPB, (ii) was bolstered by HUD's proposed rule, and (iii) dodged review by the US Supreme Court. In guidance issued on April 18, 2012, the CFPB reaffirmed that the disparate impact doctrine is applicable to the CFPB's exercise of its supervision and enforcement authority to enforce compliance with the Equal Credit Opportunity Act and Regulation B. HUD proposed a rule on November 16, 2011, to establish a uniform standard for determining when a housing practice with

a discriminatory effect violates the FHA. The Supreme Court agreed to review *Gallagher v. Magner & City of St. Paul* on November 7, 2011, on whether there is a cause of action for disparate impact under the Fair Housing Act ("FHA"). Under pressure from various civil rights and human rights organizations, City of St. Paul withdrew its petition from the Supreme Court on February 13, 2012, just two weeks before the previously scheduled arguments for February 29, 2012, to avoid risking an undesired ruling.

The HUD proposed rule sets a high standard for lending institutions. If a policy is or is likely to have a greater negative effect on a protected class, the lending institution must show there is a "necessary and manifest relationship" to a legitimate business purpose and the policy is an option that does the least harm. Lending institutions should make sure their lending policies and procedures are facially neutral and consider the unintended consequences of their policies and procedures prior to implementation. And even if a lending institution believes its lending policy can be successfully defended under a disparate impact doctrine challenge, it should be cognizant of reputational and legal costs that it might incur in this era of heightened scrutiny.



## CFPB Enforcement

The CFPB solicits mortgage, credit card, bank account or service, vehicle loan, student loan, and general complaints directly from the public on its website, by phone, mail, e-mail, and from other agencies. Complaints within the CFPB's enforcement authority and non-duplicative complaints are sent directly to the reported company. The company is directed to review the consumer complaint, communicate directly with the consumer as appropriate, and determine what action to take. The company is required to report back to the consumer and the CFPB within 15 calendar days,

and the CFPB invites the consumer to review the response. The CFPB reviews and investigates complaints where the company fails to respond in a timely manner or if the consumer disputes the response. The CFPB shares consumer complaint information with the Federal Trade Commission and other state and federal agencies providing broad access regarding complaints to additional entities that may take enforcement action. The CFPB has itself hired over 100 litigation attorneys to address any potential issues appropriate for litigation. Financial Institutions should develop internal policies and allocate proper resources to review and respond to CFPB directed consumer complaints. Personnel in this position must have the requisite compliance and legal knowledge and experience to adequately identify issues and work effectively with customers and with regulators like the CFPB.



## Overdrafts

Despite various guidance and regulations that have been issued by banking agencies for the better part of the last decade, overdraft fees and overdraft programs continue to be a focal area for bank regulators, consumers, consumer groups, and others. The CFPB requested public comment on overdraft programs in February and extended the comment period to June 29, 2012. The Pew Charitable Trust recently issued studies on overdraft programs and disclosure of overdraft programs in deposit account agreements, concluding that the overdraft fees charged far exceed the cost to the bank of providing this service, and that such fees disproportionately affect low- and moderate-income individuals. Class action litigation related to overdraft fees continues at the state and federal levels. Bank of America and Chase opted to settle their cases. Wells Fargo's appeal of its \$203 million judgment was recently heard by the 9th Circuit Court of Appeals where Wells Fargo focused its arguments on preemption and the adequacy of its disclosures. The CFPB will decide whether to adopt new rules limiting overdraft programs, which may include limitations on fees and requirements regarding disclosures and marketing. Banks should continue to follow the existing guidance and regulations from the various federal agencies and monitor litigation and the CFPB for new guidance perhaps later this year.

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