

MEMORANDUM

To: Members of the Committee on Financial Services
From: FSC Majority Staff
Date: November 14, 2013
Subject: November 19, 2013, Subcommittee on Oversight and Investigations Hearing Entitled
“A General Overview of Disparate Impact Theory”

The Oversight and Investigations Subcommittee will hold a hearing entitled “A General Overview of Disparate Impact Theory” at 10:00 a.m. on November 19, 2013, in Room 2128 of the Rayburn House Office Building. This hearing will review the legal and theoretical underpinnings of disparate impact theory and explore the consequences of its application in various contexts, such as housing and lending policy.

This will be a one panel hearing with the following witnesses:

- Peter N. Kirsanow, Commissioner, United States Commission on Civil Rights and Partner, Benesch, Friedlander, Coplan & Arnoff
- Kenneth L. Marcus, President and General Counsel, Louis D. Brandeis Center for Human Rights Under Law

The Legal Theory of Disparate Impact

According to the legal theory of disparate impact, the government or private litigants can bring discrimination claims based solely on statistics that suggest that the application of a neutral policy disparately impacts a protected class.¹ Unlike other illegal discrimination claims, disparate impact claims do not require the government or a private plaintiff to prove intent to discriminate.

The Department of Housing and Urban Development (HUD) and the Consumer Financial Protection Bureau (CFPB) intend to apply disparate impact when reviewing compliance with the Fair Housing Act (Pub. L. No. 90-284), as amended (FHA), and the Equal Credit Opportunity Act (15 U.S.C. § 1691) (ECOA), respectively. On February 15, 2013, HUD issued a final rule titled, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard” which makes

¹ *The CFPB Issues Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, Client Update (Debevoise & Plimpton LLP), March 27, 2013, <http://www.debevoise.com/files/Publication/909cb718-76dc-4261-a5bc-3cf9dd5f5828/Presentation/PublicationAttachment/2feb52cf-d8dd-4e5f-a5e5-48d045b96280/The%20CFPB%20Issues%20Bulletin%20on%20Indirect%20Auto%20Lending%20and%20Compliance%20with%20the%20Equal%20Cr.pdf> (last retrieved November 13, 2013).

any housing practice with a “discriminatory effect” on a protected class a violation of the FHA even in the absence of any intention to discriminate.² On April 18, 2012, the CFPB issued a bulletin which stated that the agency “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 [its implementing regulations].”³

The Supreme Court has not ruled on whether disparate impact claims are permissible under ECOA or FHA. In 2012, the Supreme Court granted *certiorari* in a case styled *Magner v. Gallagher* to examine whether disparate impact analysis is legal under the FHA. The petition was withdrawn before the case could be heard.⁴ The Supreme Court is currently scheduled to hear *Township of Mount Holly v. Mt. Holly Gardens Citizens*, a case that presents the same legal issue that was presented in *Magner*.⁵ While these cases limit the scope of inquiry to disparate impact claims under FHA, legal scholars believe that the Supreme Court’s decision in the FHA context will likely apply to claims under ECOA.⁶

² HUD final rule on disparate impact codified at 24 C.F.R. § 100.500.

³ CFPB Bulletin 2012-04 (Fair Lending), Consumer Financial Protection Bureau, April 18, 2012 available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf (last retrieved November 13, 2013).

⁴ “Quid Pro Quota at Justice,” *Wall Street Journal*, September 25, 2012 available at <http://online.wsj.com/article/SB10000872396390444358804578018322144140506.html> (last retrieved November 13, 2013).

⁵ Docket for *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.* available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1507.htm> (last retrieved November 13, 2013).

⁶ “Courts likely to apply same discrimination theories in HUD, CFPB cases,” *HousingWire*, September 27, 2013 available at <http://www.housingwire.com/articles/27110-courts-likely-to-apply-same-discrimination-theories-in-hud-cfpb-cases> (last retrieved November 13, 2013).