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Congress Kills Bureau Anti-Discrimination "Guidance" - Now What?

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On May 21, the Bureau of Consumer Financial Protection issued a statement in the wake of President Trump's signing into law a bipartisan Congressional Review Act resolution disapproving the hated Bureau rule in the form of guidance about indirect auto creditor compliance with the Equal Credit Opportunity Act and its implementing regulation.

So, what is this latest dust-up about? You probably know the history.

The Bureau issued a bulletin on dealer pricing in March 2013. The bulletin was controversial and intensely unpopular with the auto finance industry from the get-go.

Using a "disparate impact" theory, the Bureau said creditors buying retail installment contracts from dealers are liable for the dealers' credit pricing decisions. Calling the difference between the creditor's wholesale "buy" rate and the retail rate the consumer pays a "markup," the Bureau said the creditor is responsible if, on average, minorities or women pay more in markups than non-minorities or men.

The Bureau said it would hold assignee creditors liable if any dealer had higher average markups to one group than another. It also said the creditor was in trouble if there was a markup disparity when looking at contracts across the creditor's entire portfolio, comprised of pricing decisions by hundreds or thousands of different dealers. The bulletin stated the Bureau's detailed expectations of how the creditor should monitor and remediate any pricing disparities it found.

The bulletin elicited howls from the auto finance industry, with many critics pointing out the questionable legal and factual theories on which the Bureau based the directive. But the Bureau did not reconsider and went on to bring several high-profile enforcement actions against prominent indirect auto creditors. It also muscled several banks in nonpublic supervisory actions. In total, the Bureau extracted hundreds of millions of dollars from indirect auto creditors for conduct that many knowledgeable legal observers believe was completely legal.

At least a few of those observers complained that the "guidance" was in actuality a "rule" in disguise, and the Bureau had not gone through the required rulemaking process in coming up with it. When asked, the General Accounting Office concluded that the bulletin was, in fact a rule. That ruling opened the door for Congressional review.

The enactment of this CRA resolution erases the Bureau's guidance on indirect auto lending. It also prohibits the Bureau from ever reissuing a substantially similar rule unless specifically authorized to do so by Congress.

So the "guidance" is dead. What will that mean for the industry?

If you're thinking that we've seen the end of fair lending pressure from the Bureau, think again.

Acting Bureau Director Mick Mulvaney stated: "I want to make it abundantly clear that the Bureau will continue to fight unlawful discrimination at every turn. We will vigorously enforce fair lending laws in our jurisdiction, and will stand on guard against disparate treatment of borrowers."

But what does that mean for the elaborate fair lending monitoring and refund programs banks and auto finance creditors have put into place? The 2013 Bureau directive prompted them to undertake ongoing statistical analyses to measure the average markup differences between groups. This required using complicated proxy methodology to guess a person's race and ethnicity and to make refunds to customers if the averages were not almost exactly equal.

This process would be crazy even if the proxies could accurately identify race and ethnicity, which they cannot. After all, the banks and finance companies do not negotiate the rate the customer pays, and they don't control whether they receive an assignment of an approved contract. They don't know the customer's race and national origin. Even if they did, they don't know the retail rate the dealer negotiated until they receive the contract. There is no mystery why this Bureau decree was deeply disliked.

Some observers have suggested that the Bureau's monitoring-and-refund expectations have also gone away. Others have worried, with good reason, that the Bureau will continue to hold them liable for disparities in average markups between groups.

Even if the Bureau doesn't require monitoring, the thinking goes, auto creditors must still do it to avoid liability under the ECOA. Further complicating this uncertainty, banks also must contend with fair lending examinations by the FDIC, the Comptroller of the Currency, or the Federal Reserve Board. All three of these agencies, plus the Department of Justice, have been fully on board with the Bureau's view of discrimination in pricing auto finance contracts.

Observers hoped that Mulvaney's statement would answer these questions, but that's not what happened. Mulvaney went on to refer to "a recent Supreme Court decision distinguishing between antidiscrimination statutes that refer to the consequences of actions and those that refer only to the intent of the actor" and noted that because the Bureau is required by statute to enforce federal consumer financial laws consistently, the Bureau would be reexamining the requirements of the ECOA.

It is tempting to try reading between these lines. The "recent Supreme Court decision" from 2015 affirmed that the disparate-impact theory was valid under the Fair Housing

Act. But the case did not address that theory under the ECOA. Does the Bureau believe an unintentional pricing disparity violates the ECOA? We still don't know.

Until the Bureau completes its reexamination of the ECOA, auto creditors are on their own. The more aggressive ones may dump their monitoring and refund programs. The more cautious ones will continue them unchanged. Some will chart a middle course, modifying their programs to change the more indefensible aspects of the Bureau's rigid rules.

Now would be an excellent time for the Bureau and the Justice Department to say whether they continue to believe that unintentional disparities in markups violate the ECOA. But for now, when I gaze into my Magic 8 Ball, the answer I see is "Reply hazy; try again."

Regardless what the government eventually tells us on dealer pricing, the ECOA and Regulation B are still with us and are not going away. The law and its implementing regulation have plenty of teeth. We expect that, while the Bureau may reconsider the types of anti-discrimination enforcement actions it brings, we will still see such actions, and we will also see a continuing focus on anti-discrimination in the supervisory arena.

When I ask my Magic 8 Ball if this is a good time to review manual underwriting decisions for an even-handed and consistent application of discretion, the answer I see is "You may rely on it."

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

hudsoncook.com