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For more information,
contact:

Andrew Michaelson
+1 212 790 5358
amichaelson@kslaw.com

Katherine Kirkpatrick
+1 312 764 6918
kkirkpatrick@kslaw.com

Brian Thavarajah
+1 202 626 5520
bthavarajah@kslaw.com

Margaret McPherson
+1 212 556 2274
mmcpherson@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
34th Floor
New York, NY 10036-2601

Washington, D.C.
1700 Pennsylvania Avenue,
NW
2nd Floor
Washington, DC 20006-4707

The Implications of a Revived Disparate Impact Doctrine Under a Biden CFPB

Every change in presidential administration results in shifts to agencies' policy priorities and enforcement efforts. In a Biden Administration, the Consumer Financial Protection Bureau ("CFPB" or "Bureau"), in particular, is expected to undergo significant changes. Headlines will focus on potential replacements of the CFPB Director, an issue which has been controversial in the past and may take months to address through the nomination and confirmation process in 2021.¹ But equally important will be a shifting enforcement focus: we anticipate that, under President-Elect Biden, the CFPB will revive the "disparate impact doctrine" (the "Doctrine") as a means for curtailing business practices that result in racial disparities, whether intended or not. Although there has been significant debate about the Doctrine's validity as applied to the Equal Credit Opportunity Act of 1974 ("ECOA"), codified at 15 U.S.C. §1691, the CFPB under President Obama applied the doctrine aggressively. We expect that Biden's CFPB will rely upon the Doctrine as a key piece of its ECOA enforcement agenda, and if matters are litigated, the Doctrine's validity may be resolved in court. Lenders and creditors should therefore carefully review their programs and products to assess whether availability, terms and/or conditions are consistently and evenly applied across demographic groups.

During his presidential campaign, President-Elect Biden made clear that, in his Administration, part of the mission of the CFPB would be to address systemic racism. In a July 9, 2020 speech addressing the topic of economic recovery, Biden discussed the "cost of systemic racism" and "the need for a comprehensive agenda for racial equality."² Biden's campaign platform included a promise to "create a new public credit reporting and scoring division within the [CFPB] to provide consumers with a government option that seeks to minimize racial disparities[.]"³ In carrying out Biden's vision, the CFPB will likely lean heavily on the Doctrine.⁴ The Doctrine, which lay dormant from an enforcement



perspective under President Trump, may be used to render facially-neutral lending practices that have a disparate impact on protected classes a violation of ECOA.

Given the breadth of the CFPB's authority to investigate companies providing consumer financial products and services and to enforce violations of ECOA, the revival of the Doctrine could be consequential. Companies in the auto-lending, student-lending and mortgage industries, in particular, should anticipate enhanced scrutiny. Statements by Vice President-Elect Kamala Harris suggest the CFPB may specifically investigate whether lenders' use of educational attainment data disproportionately impacts minorities in terms of the availability of loans or the loan terms received.

I. OVERVIEW OF THE ECOA AND REGULATION B

ECOA, in relevant part, prohibits creditors (or "lenders") from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, or receipt of public assistance income.⁵ Together, these groups are referred to as the "protected classes."

"Regulation B," 12 C.F.R. Part 1002, is the regulation promulgated by the CFPB that "provide[s] the substantive and procedural framework for fair lending."⁶ Pursuant to Section 6(a) of Regulation B, a lender evaluating an applicant's creditworthiness cannot consider any information that is "used to discriminate against an applicant on a prohibited basis."⁷ Regulation B explicitly references legislative history "indicat[ing] that the Congress intended an 'effects test' concept... to be applicable to a creditor's determination of creditworthiness."⁸ According to the CFPB's Official Interpretation of Section 6(a), under the "effects test," a creditor can be liable for a practice or policy "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."⁹ Such policies and practices are impermissible unless they meet "a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact."¹⁰

The CFPB has broad statutory authority to investigate companies that offer or provide consumer financial products or services for potential ECOA violations, and to bring enforcement actions in federal court. Companies that may be investigated and sued by the CFPB include, but are not limited to, those providing mortgage loans, other loans secured by real estate,¹¹ private student loans,¹² payday loans,¹³ or financial products such as debit cards. For depository institutions, the CFPB has primary enforcement jurisdiction over larger banks and credit unions with more than \$10 billion in assets.¹⁴ The CFPB has authority to investigate smaller banks and credit unions for ECOA and Regulation B violations but, for enforcement purposes, must refer the matter to the bank's prudential regulator.¹⁵

II. DISPARATE TREATMENT OF THE DISPARATE IMPACT DOCTRINE

While the ECOA does not expressly state that violations may be premised on unintentional conduct, under the Obama Administration, the CFPB repeatedly asserted that ECOA allowed for liability premised on disparate impact. In 2012, the CFPB issued a bulletin on Lending Discrimination to "reaffirm[] that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with ECOA and Regulation B."¹⁶ In support of its commitment to the Doctrine, Bulletin 2012-04 cited a 1994 Policy Statement by the Interagency Task Force on Fair Lending recognizing "[e]vidence of disparate impact" – also known as the 'effects test' – as a method of proving lending discrimination.¹⁷ The following year, the CFPB issued another bulletin, Bulletin 2013-02, affirming the Doctrine and applying it specifically to the indirect automobile lending market.¹⁸

During the Obama Administration, while under the leadership of Richard Cordray, the CFPB brought at least six ECOA enforcement actions premised on disparate impact. In December 2012, the CFPB and U.S. Department of



Justice (“DOJ”) entered into a Memo of Understanding providing for coordination between the agencies on fair lending enforcement efforts for, among other things, ECOA violations.¹⁹ Over the next four years (2013-2016), the CFPB and DOJ brought a series of joint enforcement actions against indirect automobile lenders for permitting dealers to impose a discretionary mark-up of the lender’s interest rate, regardless of consumers’ creditworthiness.²⁰ The practice allegedly resulted in minority buyers receiving less favorable interest rates by up to 2.5 percent, a disparate impact that violated ECOA and Regulation B.²¹

In the same time period, the CFPB also applied the Doctrine to mortgages. In 2013 and 2015, the CFPB and DOJ brought enforcement actions against companies for giving mortgage brokers the discretion to charge higher mortgage fees regardless of the applicants’ creditworthiness or the terms of the loan.²²

During the Trump Administration, in contrast, the CFPB did not bring any enforcement actions premised on disparate impact,²³ and questioned the Doctrine’s validity as applied to ECOA.²⁴ It rescinded Bulletin 2013-02 (which had applied the Doctrine to the indirect automobile lending market),²⁵ and cast doubt on the doctrine’s future enforcement by “reexamining the requirements of the ECOA” in light of a Supreme Court ruling applying the Doctrine under a different statute.²⁶ In addition, a Congressional Resolution disapproving Bulletin 2013-02 purported to prevent the CFPB “from ever reissuing a substantially similar rule unless specifically authorized to do so by law.”²⁷

III. EXPECTATIONS FOR THE DISPARATE IMPACT DOCTRINE UNDER A BIDEN ADMINISTRATION

a. Likely Swing Back in Support of Disparate Impact Doctrine

Based upon public statements made by Biden during the campaign, the CFPB will almost certainly seek to revive the Doctrine and make it a central piece of its efforts to address racial economic inequality. The Biden Campaign’s economic equity platform makes clear that he favors application of the doctrine in the ECOA and Regulation B contexts and holding creditors accountable for facially neutral policies that disparately impact racial minorities – marking a return to the CFPB’s approach during the Obama Administration.²⁸

Two individuals who may wield significant influence over the CFPB – Vice President-Elect Harris and Senator Elizabeth Warren – have repeatedly urged application of the Doctrine in the ECOA and Regulation B contexts.²⁹ Earlier this year, then-Senator Harris, Senator Warren and Senator Sherrod Brown co-authored a letter (the “Harris-Warren Letter”) to CFPB Director Kathy Kraninger relating to fair lending and, in particular, use of educational attainment data in credit decisions.³⁰ The Harris-Warren Letter urged the CFPB to take action “to address potential violations of [ECOA] and Regulation B due to lenders’ use of educational data to make credit decisions, which the letter explained, “can result in unfair discrimination against minority borrowers.”³¹ The letter expressed concern that one of the lenders failed to “conduct any testing to determine whether its underwriting practices have a disparate impact on applicants based on a protected class.”³²

b. Legal Challenges to Use of the Doctrine

As the CFPB seeks to revive the Doctrine, it will need to grapple with legal challenges that respondents may raise (and critics of the Doctrine have, in fact, raised) following the Supreme Court’s ruling in *Texas Department of Housing v. Inclusive Communities*, 576 U.S. 519 (2015). In that case, the Court upheld use of the Doctrine as applied to provisions of the Fair Housing Act, 82 Stat. 81, as amended, 42 U.S.C. §3601 *et seq.* (“FHA”). Notwithstanding that the Court affirmed its use, critics of the Doctrine have asserted that the Court’s rationale for upholding it under the FHA undermines its application under ECOA.³³ In *Inclusive Communities*, the Court considered whether the Doctrine applied to Section 804(a) of the FHA, which prohibited discrimination in a decision to refuse, deny, or “otherwise make available” a dwelling for sale or rent. The Court upheld the Doctrine as applied



to this provision because a “decision to... otherwise make available” a dwelling in a discriminatory fashion captured the discriminatory impact of the decision even absent discriminatory intent.³⁴

Critics of the Doctrine have asserted that the *Inclusive Communities* ruling relating to Section 804(a) of the FHA means that the Doctrine should *not* be applied under ECOA because, unlike the FHA, ECOA lacks language that would authorize impact-based violations absent intent.³⁵ In response, proponents of the Doctrine have argued that ECOA’s statutory language and legislative history is sufficient to support it.³⁶

Critics of the Doctrine also point to a separate section of the *Inclusive Communities* opinion that requires claimants (here the CFPB) to prove causation, and that allows respondents to defend “disparate impact” claims by presenting a legitimate policy rationale.³⁷ In the wake of *Inclusive Communities*, the Department of Housing & Urban Development (“HUD”) sought comment on,³⁸ and ultimately issued, more restrictive rules for analyzing disparate impact claims.³⁹ A responsive comment letter, drafted by a group of Attorneys General from 16 Democrat-led states and the District of Columbia, provides a guidepost for how the CFPB may grapple with that portion of the decision.⁴⁰ The letter asserts that pre-existing HUD rules, adopted in 2013, already squared with *Inclusive Communities*,⁴¹ via a three-step burden-shifting process:

- Step 1: A claimant (e.g., the CFPB) must show that defendant’s policy or practice results, or will predictably result, in a disparate impact to a protected class.
- Step 2: If the claimant satisfies Step 1, the defendant (e.g., a respondent in a CFPB investigation) then has the opportunity to explain that the questioned policy or practice is necessary to achieve one or more substantial non-discriminatory goals.
- Step 3: If the defendant provides a legitimate goal, the claimant then has the burden to show that the goal can be accomplished through an alternative approach that would have a lesser disparate impact.⁴²

This burden-shifting framework has been interpreted by lower courts as consistent with the *Inclusive Communities* decision, and the CFPB may choose to adopt it. Notably, however, federal appellate courts have yet to weigh in on the issue⁴³ and we anticipate respondents to continue to raise challenges to the CFPB’s use of the Doctrine after the *Inclusive Communities* decision.

IV. KEY TAKEAWAYS

Taken together, the statements by the Biden Campaign, Vice President-Elect Harris, and Senator Warren signal that the CFPB will attempt to revive and rely on the Doctrine, particularly as applied to practices that have the potential to perpetuate racial economic inequality. After the transition occurs in January, we anticipate that the Doctrine will begin to promptly resurface in questions and requests from CFPB investigative staff, and, once President Biden installs a new CFPB Director, enforcement actions should follow. While the transition – and particularly the replacement of the CFPB director – could take time, lenders and creditors should start considering the impacts of a shift back to the Doctrine now. Because the Doctrine targets practices that are facially neutral but which disproportionately impact protected classes, it may not be obvious to creditors that one of their policies or programs potentially violates ECOA and/or Regulation B. We recommend that lenders and creditors closely examine their policies and practices for determining loan applicants’ creditworthiness, as well as the terms and conditions on which credit is extended. In particular, we recommend that companies do the following:

- Review credit policies and practices to determine if any aspects disproportionately impact members of a protected class (for example, to determine whether educational attainment or other criterion result in disparate impact on protected classes);



- In the process, incorporate statistical analysis of lending programs to help uncover unanticipated disparate impacts; and
- As lenders and creditors often use third party providers or artificial intelligence to assist in their lending evaluation processes, they should be cognizant of the risk of inadvertent or unknowing participation in violations of these laws and should thus review any third-party policies or procedures undertaken on the company’s behalf to determine if any disproportionately impact members of a protected class.

ECOA and Regulation B are complex, and the CFPB’s enforcement approach will likely evolve quickly in the coming months, especially as it grapples with uncertainty regarding the legal basis for the Doctrine and the potential application of HUD’s burden-shifting test.

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¹ See Kate Berry, *GOP readies counterpunch if Biden removes CFPB chief*, AMERICAN BANKER (Nov. 23, 2020), <https://www.americanbanker.com/news/gop-readies-counterpunch-if-biden-removes-cfpb-chief>; see also *Seila Law LLC v. CFPB*, 591 U.S. ____ (2020) (holding that the President can remove the CFPB Director at will).

² Transcript of Joe Biden Speech on Economic Recovery (July 9, 2020), available at <https://www.rev.com/blog/transcripts/joe-biden-speech-transcript-on-economic-recovery-plan-july-9>.

³ See The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy, JOEBIDEN.COM (last accessed Nov. 13, 2020), <https://joebiden.com/racial-economic-equity/> (hereinafter “Biden Equity Platform”). In fact, President-Elect Biden has already taken steps to fill other economic posts with experts on systemic racism, putting the issue “high on the agenda.” Lananh Nguyen and Jennifer Epstein, *Biden Fills Economic Posts With Experts on Systemic Racism*, BLOOMBERG (Nov. 15, 2020), <https://www.bloomberg.com/news/articles/2020-11-15/biden-fills-economic-posts-with-experts-on-systemic-racism>.

⁴ Biden Equity Platform, *supra* note 3 (A function of the CFPB will include “ensuring the algorithms used for credit scoring don’t have a discriminatory impact[.]”).

⁵ 15 U.S.C. §1691(a); See also U.S. Dep’t of Just., Equal Credit Opportunity Act, <https://www.justice.gov/crt/equal-credit-opportunity-act-3> (last updated Jul. 22, 2020) (last accessed Nov. 11, 2020) (hereinafter “DOJ ECOA Overview”).

⁶ DOJ ECOA Overview, *supra* note 5.

⁷ 12 C.F.R. §1002.6(a).



⁸ *Id.* (explaining that the test was first outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)).

⁹ Comment for 1002.6 - Rules Concerning Evaluation of Applications, Supp. I to Pt 1002 - Official Interpretations, <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/Interp-6/> (last accessed Dec. 3, 2020).

¹⁰ *Id.*

¹¹ 12 U.S.C. § 5514(a)(1)(A).

¹² 12 U.S.C. § 5514(a)(1)(D).

¹³ 12 U.S.C. § 5514(a)(1)(E).

¹⁴ 12 U.S.C. § 5515(a).

¹⁵ 12 U.S.C. §§ 5516(c)-(d); see also 12 U.S.C. § 5481(24) (defining “prudential regulator”).

¹⁶ CFPB Bulletin 2012-04 re Lending Discrimination at 1 (Apr. 18, 2012),

https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf (last accessed Nov. 12, 2020) (hereinafter “Bulletin 2012-04”).

¹⁷ *Id.* at 2 (noting that the task force was composed of “ten federal agencies, including the Department of Justice, each of the federal prudential agencies with regulatory authority over financial institutions, and the Federal Trade Commission,” and explaining that the CFPB did not participate because it did not yet exist)..

¹⁸ CFPB Bulletin 2013-02 re Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (Mar. 21, 2013),

https://files.consumerfinance.gov/f/201303_cfpb_march_-_Auto-Finance-Bulletin.pdf (last accessed Nov. 12, 2020) (hereinafter “Bulletin 2013-02”).

¹⁹ See Memorandum of Understanding between the Consumer Financial Protection Bureau and the United States Department of Justice Regarding Fair Lending Coordination at 2 (Dec. 6, 2012), https://files.consumerfinance.gov/f/201212_cfpb_doj-fair-lending-mou.pdf (“The Dodd-Frank Act contemplates that the Agencies cooperate, as appropriate, on enforcement of Federal fair lending laws, which include ECOA.”)

²⁰ See, e.g., Press Release, CFPB, CFPB and DOJ Reach Resolution With Toyota Motor Credit To Address Loan Pricing Policies With Discriminatory Effects (Feb. 2, 2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-credit-to-address-loan-pricing-policies-with-discriminatory-effects/> (premising action on the fact that “discretionary pricing and compensation policies resulted in discriminatory outcomes”) (hereinafter “CFPB Toyota Press Release”); Press Release, CFPB, CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices (Sep. 28, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-fifth-third-bank-for-auto-lending-discrimination-and-illegal-credit-card-practices/>; Press Release, CFPB, CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing (Jul. 14, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/>; and Press Release, CFPB, CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013) <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/>.

²¹ CFPB Toyota Press Release, *supra* note 20.

²² See Press Release, CFPB, CFPB and Department of Justice Take Action Against Provident Funding Associates for Discriminatory Mortgage Pricing (May 28, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-department-of-justice-take-action-against-provident-funding-associates-for-discriminatory-mortgage-pricing/>; and Press Release, CFPB, CFPB and DOJ Take Action Against National City Bank for Discriminatory Mortgage Pricing (Dec. 23, 2013), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-take-action-against-national-city-bank-for-discriminatory-mortgage-pricing/>.

²³ Since Trump took office on January 20, 2017, the CFPB has only pursued two enforcement actions for ECOA violations – neither of which were premised on the Doctrine. See Press Release, CFPB, Consumer Financial Protection Bureau Files Suit Against Mortgage Creditor for Discriminatory Mortgage-Lending Practices (Jul. 15, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-files-suit-against-mortgage-creditor-discriminatory-mortgage-lending-practices/> (announcing action for violating ECOA by making public statements to discourage African-American applicants); Press Release, CFPB, CFPB and American Express Reach Resolution to Address Discriminatory Card Terms in Puerto Rico and U.S. Territories (Aug. 23, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-american-express-reach-resolution-address-discriminatory-card-terms-puerto-rico-and-us-territories/> (announcing enforcement action for discriminatory credit card terms for residents of Puerto Rico and the U.S. Virgin Islands).

²⁴ See Press Release, CFPB, Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57 (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/> (referring to the CFPB’s attempt to apply the Doctrine to indirect auto lending via Bulletin 2013-02 as “instance of Bureau overreach”) (hereinafter “CFPB S.J. 57 Press Release”).

²⁵ Bulletin 2013-02, *supra* note 18 (comment rescinding the bulletin and proclaiming it to have “no force or effect”).

²⁶ That case, *Texas Department of Housing v. Inclusive Communities*, 576 U.S. 519 (2015), is discussed in greater detail in Section III(B). Specifically, the CFPB purported to rescind Bulletin 2013-02 in light of *Inclusive Communities*’ distinction “between statutes that refer to the consequences of actions and those that refer only to the intent of the actor”). See CFPB S.J. 57 Press Release, *supra* note 24.. Then, earlier this year, the CFPB solicited comments on whether it should “provide additional clarity regarding its approach to disparate impact analysis under ECOA and/or Regulation B[.]” Request for Information on the Equal Credit Opportunity Act and Regulation B, 5 FR 46600, 46601 (Aug. 3, 2020), <https://www.federalregister.gov/documents/2020/08/03/2020-16722/request-for-information-on-the-equal-credit-opportunity-act-and-regulation-b>.

²⁷ CFPB S.J. 57 Press Release, *supra* note 24.

²⁸ See Biden Equity Platform, *supra* note 3 (“The Obama-Biden Administration held major national financial institutions accountable for discriminatory lending practices, securing hundreds of millions of dollars in settlements to help borrowers who had been harmed by their practices. And in 2013, the Obama-Biden Administration codified a long-standing, court-supported view that lending practices that have a discriminatory impact can be challenged even if discrimination was not explicit. But now the Trump Administration is seeking to gut this disparate impact standard by significantly increasing the burden of proof for those claiming discrimination. In the Biden Administration, this change will be reversed to ensure financial institutions are held accountable for serving all customers and not practicing policies that have the effect of deepening the impacts of systemic housing discrimination.”).



²⁹ Senator Warren has been widely credited with being the CFPB's chief creator and architect. See, e.g. Aaron Nicodemus, *CFPB under Biden will likely get new director, new direction*, COMPLIANCE WEEK (Nov. 9, 2020), <https://www.complianceweek.com/regulatory-policy/cfpb-under-biden-will-likely-get-new-director-new-direction/29699.article>.

³⁰ See Letter from Sherrod Brown, Kamala Harris, and Elizabeth Warren, Senators, to Kathy Kraninger, CFPB Director at 2 (Jul. 30, 2020), https://www.warren.senate.gov/imo/media/doc/2020-07-30_Letter%20to%20CFPB%20re%20use%20of%20educational%20data.pdf ("Finally, we renew our call for you to reverse your and Mr. Mulvaney's decision to strip the CFPB's Office of Fair Lending of its supervisory and enforcement duties. . . . The findings of our review highlight how important it is that the CFPB have a dedicated office with the necessary resources and expertise to rooting out redlining and other forms of illegal discrimination.").

³¹ *Id.* at 1.

³² *Id.* In support of their letter, the Senators (all Democratic members of the Senate Banking Committee) provided a review they had conducted of lenders' practice of using educational data in making credit determinations. See Sherrod Brown, Kamala Harris, and Elizabeth Warren, Senators, *Use of Educational Data to Make Credit Determinations* (Jul. 30, 2020), <https://www.warren.senate.gov/imo/media/doc/Review%20-%20Use%20of%20Educational%20Data.pdf>. Their review also expressed the view that "'creditors can be liable [under ECOA] if their practices have a disparate impact on a protected class.'" *Id.* at 1.

³³ *Texas Department of Housing v. Inclusive Communities*, 576 U.S. 519 (2015).

³⁴ *Id.* at 534 (stating that the FHA's "results-oriented language counsels in favor of recognizing disparate-impact liability").

³⁵ See, e.g., Catherine Brennan and Latif Zaman, *CFPB Re-examination of Disparate Impact and ECOA*, BUSINESS LAW TODAY (June 15, 2018), <https://businesslawtoday.org/2018/06/cfpb-re-examination-disparate-impact-ecoa/>; Daniel Press, *Ending Disparate Enforcement at Consumer Financial Protection Bureau*, COMPETITIVE ENTERPRISE INSTITUTE (May 16, 2018), <https://cei.org/blog/ending-disparate-enforcement-at-consumer-financial-protection-bureau/>.

³⁶ See Letter from Josh Stein, Att'y Gen., N.C., to Mick Mulvaney, Acting Director, CFPB (Sep. 5, 2018), available at <https://ncdoj.gov/attorney-general-josh-stein-leads-coalition-to-urg-d1/> (letter from 13 Democratic state Attorneys General –and the Attorney General from the District of Columbia – to Director Mulvaney advocating for the application of the Doctrine) (hereinafter "AG ECOA Letter"); see also Jon Hill, *14 AGs Urge CFPB Not To Back Off Disparate Impact Liability*, LAW360 (Sep. 5, 2018), <https://www.law360.com/articles/1079821/14-ags-urge-cfpb-not-to-back-off-disparate-impact-liability> (providing context and analysis of the letter).

³⁷ *Inclusive Communities*, 576 U.S. at 541-43.

³⁸ Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 FR 28560 (proposed Jun. 20, 2018) (to be codified at 24 C.F.R. pt 100), <https://www.federalregister.gov/documents/2018/06/20/2018-13340/reconsideration-of-huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

³⁹ HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 FR 60288 (Sept. 24, 2020),

<https://www.federalregister.gov/documents/2020/09/24/2020-19887/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard>.

⁴⁰ See Comment Letter from Josh Stein, Att'y Gen., N.C., to Office of Gen. Couns., HUD (Aug. 20, 2018, available at <https://www.law360.com/articles/1075430/17-ags-say-hud-shouldn-t-change-disparate-impact-rule> (hereinafter "AG HUD Letter").

⁴¹ See *id.* at 5 (citing 24 C.F.R. § 100.500(c)(1)-(3)).

⁴² Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 FR 11460 (Feb. 15, 2013),

<https://www.federalregister.gov/documents/2013/02/15/2013-03375/implementation-of-the-fair-housing-acts-discriminatory-effects-standard>.

⁴³ *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (stating that the Supreme Court "implicitly adopted HUD's approach"); *Burbank Apartment Tenant Ass'n v. Kargman*, 48 N.E.3d 394, 411 (Mass. 2016) ("framework laid out by HUD and adopted by the Supreme Court"); *Prop. Cas. Insurers Ass'n of Am. v. Carson*, No. 13-cv-8564, 2017 U.S. Dist. LEXIS 94502, at *29 (N.D. Ill. June 20, 2017).