

PUBLICATION

How the Current Regulatory and Legal Landscapes Can Lead to Fair Lending Violations

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The CFPB's website states, "Other regulators focus on the safety and soundness of the financial institutions first. The CFPB is the first to focus primarily on the American consumer." The CFPB's actions, however, may have the long-term effect of marginalizing some of the very consumers it is focusing on. Over the last five years the mortgage industry has seen unprecedented regulatory changes brought by the CFPB as well as landmark court decisions that are redefining risk in the mortgage industry, all of which have had immediate effects on mortgage lenders' staffing, policy, pricing and products. The question becomes, where will the regulators and policy makers focus on next as they search for an equilibrium of access to credit and consumer protection?

In response to the sweeping changes brought on by the CFPB, industry leaders immediately focused on their compliance, audit and legal functions, which in turn advised business partners to limit risk through the elimination of certain products, the tightening of lending guidelines, and redrafting of policies and procedures both to conform to new regulations and to curb future risk. This response has caused a segment of the borrowing population to lose access to mortgage credit that they once enjoyed. This segment tends to be made up of individuals with lower income and a higher credit risk.

In conjunction with the regulatory landscape shifting, the legal landscape also started to evolve to "protect" consumers. In 2015 we saw the Supreme Court rule in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that disparate impact claims are cognizable under the Fair Housing Act (FHA). This could be particularly troubling to lenders, where an inadvertent disparate impact may not be revealed until after a product or service has been offered to the marketplace. Lenders could be faced with defending disparate impact claims brought under the FHA where they had no prejudice at all, be it overt or unconscious. It can also open the door to plaintiffs second guessing valid, well-intentioned business decisions such as simply trying to conform to the current regulatory environment, which is attempting to protect the very same consumers.

As the effects of the tightening of credit take hold and more conservative policies, underwriting guidelines and products are the norm, policy is slowly shifting, beginning to compensate for the effects of the over-regulation. Speaking at the Mortgage Bankers Association Annual Convention in 2014, Julian Castro (Secretary of the U.S. Department of Housing and Urban Development) began his speech by reiterating that HUD understands the importance of credit availability, stating, "...credit is the lifeblood of the housing industry." Castro went on to declare "It's in our entire nation's interest to help more responsible Americans succeed in the housing market by **expanding** access to credit."

At the same time HUD was promoting greater access to credit, Freddie Mac introduced a product called the Home Possible Advantage. This product has a maximum loan-to-value (LTV) ratio of 97 percent and total loan-to-value (TLTV) ratio of 105 percent. With high LTV/TLTV products being re-introduced by Government-Sponsored Enterprises (GSEs) and policy makers beginning to ask for greater access to credit, it will likely not be long before mortgage lenders are being scrutinized for policies and underwriting guidelines, with fair lending allegations soon to follow. In this environment it would be wise to review your institution's fair lending policy

and procedures to determine any possible disparate impact issues a recently revised policy or product may have.