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CFPB Says Using Multiple Debt Collectors Poses ECOA Risk

By **Jonathan Joshua** (September 21, 2017, 1:01 PM EDT)


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On Aug., 23, 2017, the Consumer Financial Protection Bureau entered into a consent order (the order) with American Express in connection with alleged fair lending violations by certain of its subsidiaries. The consent order should be carefully reviewed by creditors, debt buyers, and debt collectors in light of the CFPB's allegation that American Express' illegal discrimination included that a third-party debt collector operating in Puerto Rico settled delinquent debts for higher amounts than a different debt collector settled for in the U.S. The CFPB alleged that such practice allegedly had a disparate impact on a protected class in violation of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B.

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)."[1] Likewise, Regulation B states the general rule that "[a] creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction."[2] The CFPB's staff commentary explains that:

> The general rule covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts. Thus, whether or not specifically prohibited elsewhere in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule. Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.[3]

In addition to Regulation B's prohibition against disparate treatment on a prohibited basis, the CFPB has expressly committed itself to the "disparate impact" theory of liability under the ECOA, stating in a 2014 Bulletin:

> [T]he CFPB states that it will continue to adhere to the fair lending principles outlined in Regulation B. Consistent with other federal supervisory and law enforcement agencies, the CFPB 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 Regulation B.[4]

Disparate impact is defined by the CFPB's ECOA examination procedures as follows:

> Disparate Impact occurs when a creditor employs a neutral policy or practice equally to all credit applicants, but the policy or practice disproportionately excludes or burdens certain persons on a prohibited basis. Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be in violation if an alternative policy or practice could serve the same purpose with less discriminatory effect.[5]

The CFPB's application of the disparate impact theory remains controversial,[6] but, nonetheless the CFPB continues to apply it.

In 2014, the CFPB ordered Synchrony Bank (formerly GE Capital Retail Bank) to provide $169 million in debt relief to about 108,000 borrowers who were allegedly excluded from debt relief offers because of their national origin, where Synchrony Bank failed to provide debt settlement offers to residents of Puerto Rico or to consumers who had indicated their preference to communicate in Spanish.[7]

In the American Express order the CFPB found that American Express Centurion Bank (AECB) made lower settlement offers and applied more stringent hardship program criteria to residents of Puerto Rico, the U.S. Virgin Islands (collectively PRVI) and the Pacific Territories than were made available to U.S. residents by AECB. By alleging fair lending violations for disparities across different business subsidiaries, the CFPB is significantly expanding the theory first adopted in the Synchrony Bank consent order regarding the fair lending implications of making settlement offers.

However, the American Express order extends this theory even further and alleges fair lending violations where different corporate subsidiaries hire separate collection agencies to make settlement offers such that the settlement offers disparately impact a protected class.

As described in the consent order, American Express made credit card loans in the continental U.S. via its U.S.-based subsidiary, AECB. Loans to consumers in Puerto Rico, the U.S. Virgin Islands, and the Pacific Territories were made via American Express Bank, FSB (AEFSB). In 2013, American Express self-reported to the CFPB that, as a result of the fact that loans were being made by different business units, there were disparities in the "pricing and other terms and conditions, underwriting, customer and account management services, and collections practices between their PRVI cards and their U.S. cards, as well as disparities with respect to consumers who indicate a Spanish-language preference."[8]

Thus, the CFPB alleged in paragraph 33 of the order:

> Respondent AECB's assigning PRVI delinquent accounts to different collection agencies than those it assigned to delinquent U.S. States accounts resulted in less advantageous debt settlements for similarly situated PRVI consumers.

This application of Regulation B to creditors' use of multiple debt collectors could also pose significant risks to creditors, debt buyers and debt collectors, who frequently segment their debtor populations into various subgroups and apply different collection strategies to such subgroups in order to maximize their collections. Many creditors, debt buyers and debt collectors also

outsource their debt collection to more than one collection agency, either because different collection agencies have specific specialties (e.g., secondary and tertiary placements, skip tracing, prelitigation, geographic coverage, etc.), or simply as a means of evaluating the effectiveness of each collection agency.

In light of the recent order, creditors, debt buyers and collection agencies should evaluate their collection strategies and outcomes as part of their comprehensive fair lending compliance program. Care should be taken to ensure that segmentation criteria for internal collection strategies, placement with external collection agencies, and the collection strategies employed by multiple external third-party debt collectors do not result in the disparate treatment of protected classes. They should likewise consider if statistical analysis is appropriate to confirm that collection strategies and external collection agency placements are not having a disparate impact on any protected class. Finally, care should be taken to ensure that any observed disparities of the effects of collection strategies on protected classes should be explainable as being the result of a business necessity that could not otherwise be achieved with less discriminatory means.

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[1] 15 USC 1691(a)(1).

[2] 12 CFR §1002.4

[3] 12 CFR Supplement I to Part 1002

[4] See, CFPB Bulletin 2012-04 (Fair Lending). Available online at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf. Last visited on Sept. 19, 2017.

[5] See CFPB ECOA Enforcement Manual, Page ECOA 2 (October 2015). Available online at http://files.consumerfinance.gov/f/201510_cfpb_ecoa-baseline-review-modules.pdf. Last visited on Sept. 19, 2017.

[6] See, e.g., April 2017 white paper by the American Bankers Association, "Fair Lending Fighting Illegal Discrimination: Promoting Growth for the Whole Community," available online at https://www.aba.com/Compliance/Documents/FairLendingWhitePaper2017Apr.pdf#_ga=2.137362608.1632815719.1505828355-2028060009.1505828355. Last visited on Sept. 19, 2017.

[7] See, https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/. Last visited on Sept. 19, 2017.

[8] See, Paragraph 10 of the Order.

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