Predatory Servicing

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I. Introduction

There is no straight-forward definition, statutory or otherwise, for "predatory servicing" of loans or debt.[1] What is clear is that the term, which has frequently been used by regulators, refers to unfair practices perpetrated on consumers *after* loan origination,[2] as distinguished from unfair or "predatory

1. There is no legal definition in the United States for "predatory mortgage servicing." However, the term is widely used and accepted by state and federal regulatory agencies such as the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, the Federal Trade Commission, and government sponsored enterprises, such as Fannie Mae and Freddie Mac. *See Predatory Mortgage Servicing*, Revolvy, https://www.revolvy.com/topic/Predatory%20mortgage%20servicing (last visited Feb. 4, 2018) ("While there are no specific laws against predatory mortgage servicing abuses, there are local, state, and federal laws against many of the specific practices commonly identified as predatory mortgage servicing abuses, and various state and federal agencies use the term as a catch-all term for many specific illegal activities in the mortgage servicing industry. Predatory mortgage servicing is not to be confused with predatory lending which is used to describe the unfair, deceptive, or fraudulent practices of mortgage brokers and lenders during the mortgage loan origination process.").

2. *See* Peter Moulinos, *Predatory Servicing v. Predatory Lending*, Moulinos & Associates, http://www.moulinos.com/2013/01/09/predatory-servicing-v-predatory-lending-by-peter-moulinos/ (last visited Feb. 4, 2018) ("Predatory servicing however is a term used to describe unfair, deceptive or fraudulent practices by a

lending" at the origination stage of the loan itself.[3] What is also clear is that the Consumer Financial Protection Bureau ("CFPB") and other regulators have increasingly focused on "predatory servicing" (or, more innocuously, "unfair servicing") as an arrow in their examination and enforcement quiver (at least under former director Richard Cordray).[4]

The CFPB has relied on the "any aspect of a credit transaction" language contained in the Equal Credit Opportunity Act ("ECOA") and Regulation B ("Reg. B") as authorization to pursue post-origination theories of "predatory servicing."[5] Under former director Richard Cordray, the CFPB

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lender, or another company which services a loan on behalf of the lender, after the loan is granted.").

3. *See* Paul Jackson, *Homecomings' Servicing Practices Subject of Class-Action Lawsuit*, Housing Wire (Feb. 11, 2008), https://www.housingwire.com/articles/homecomings-servicing-practices-subject-class-action-lawsuit ("Homecomings Financial, LLC is the latest servicer to undergo class-action scrutiny over its servicing practices, with a lawsuit filed against it last week alleging that the Minneapolis-based servicer engages in so-called 'predatory servicing.' . . . These sort of 'predatory servicing' lawsuits are traditionally more common among large subprime servicing shops, and are probably likely to become much more prevalent as more borrowers enter into default."); *see also Legal Protection Needed Against Predatory Servicing*, Mortgage Professor, https://mtgprofessor.com/A%20-%20Servicing/legal_protections_needed_against_predatory_servicing.htm (last visited Feb. 4, 2018) ("Recent years have seen a flurry of proposals and legislation directed toward predatory mortgage lending. The focus, however, has been almost entirely on loan originations. Aside from a few well-publicized law suits, predatory servicing has attracted little attention, yet in many respects it is more vicious, and the adverse consequences are more far-ranging. The loan origination market is a minefield for borrowers, to be sure, but they do have choices. Exercising intelligence and care, and with a little homework, they can find a loan provider who will treat them fairly. When the loan is closed and shifted to a servicing agent, however, the borrower's choices disappear.").

4. *See* Melanie H. Brody & Paul F. Hancock, *Fair Lending Compliance in the Age of Disparate Impact*, K&L Gates (Sept. 19, 2012), http://www.klgates.com/files/Upload/Fair_Lending_Compliance_in_the_Age_of_Disparate_Impact.pdf ("ECOA and FHA extend to post-closing activity, but until relatively recently, servicing and loss mitigation received little attention; DOJ, CFPB and others have indicated that fair servicing now is an area of focus. Issues include: Home retention vs. foreclosure, deed in lieu, etc., [m]odification terms and timelines, REO upkeep in minority vs. non-minority areas.").

5. *See* 15 U.S.C. § 1691(a)(1) (2014) ("It shall be 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"); 12 C.F.R. § 1002.4 (2014) ("A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction."); *see also* 12 C.F.R. § 202.4, Supp. I (2011) ("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 prohib-

seized on its broad grant of power, and provided notice in Bulletins and its Enforcement Manual of its intention to examine both predatory lending and predatory servicing of debt under the powers afforded to the CFPB by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[6] However, with President Trump's appointment of Mick Mulvaney as Acting Director of the CFPB, effective November 25, 2017 (and nomination of Kathy Kraninger), it remains to be seen whether the CFPB will continue to pursue claims with such vigor or under such aggressive legal theories.[7]

All indications are that under its new direction, the CFPB will cease its prior practices of "pushing the envelope" in its enforcement actions, and instead aim to provide "clarity and certainty to [all] market participants," including businesses.[8] This is evident in the February 12, 2018, Message from Acting Director Mick Mulvaney, set forth in the CFPB's 2018-2022 Strategic Plan, and in its recent reorganization.[9] However, while the

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ited 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.").

6. *See* Consumer Fin. Prot. Bureau, CFPB Bulletin 2012-04 (Fair Lending) (April 18, 2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf ("[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."); Consumer Fin. Prot. Bureau, Equal Credit Opportunity Act Baseline Review Modules (Oct. 2015), http://files.consumerfinance.gov/f/201510_cfpb_ecoa-baseline-review-modules.pdf.

7. *See* Alan S. Kaplinsky, *How Long can Mick Mulvaney Serve as CFPB Acting Director?*, Ballard Spahr LLP (Feb. 27, 2018), https://www.consumerfinancemonitor.com/2018/02/27/how-long-can-mick-mulvaney-serve-as-cfpb-acting-director/ ("President Trump has not yet announced his nominee for CFPB Director, thus giving rise to questions about how long Mr. Mulvaney can continue to serve as Acting Director.").

8. *See* Eric Levitz, *The CFPB Is Now the Predatory Lender Protection Bureau*, New York Mag. (Jan. 24, 2018), http://nymag.com/daily/intelligencer/2018/01/the-cfpb-is-now-the-predatory-lender-protection-bureau.html; Times Editorial Bd., *Will Mick Mulvaney Be the End of the Consumer Financial Protection Bureau as We Know It?*, Los Angeles Times (Feb. 7, 2018), http://www.latimes.com/opinion/editorials/la-ed-cfpb-mulvaney-payday-20180207-story.html.

9. Mick Mulvaney, Message From Acting Director, *in* Bureau of Consumer Financial Protection Strategic Plan FY 2018-2022, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf ("[W]e have committed to fulfill the Bureau's statutory responsibilities, but go no further. Indeed, this should be an ironclad promise for any federal agency; pushing the envelope in pursuit of other objectives ignores the will of the American people, as established in law by their representatives in Congress and the White House.

CFPB itself might be pulling back on the reins, various state attorneys general now appear poised to take the lead on consumer protection enforcement actions.[10] Moreover, there is still cause to believe that the CFPB will continue some level of enforcement in this area, and private compliance attorneys (lest they commit, as former Director Cordray called it, potential "compliance malpractice" by not monitoring their states' and the CFPB's enforcement activities)[11] should examine the CFPB's recent settlement with American Express premised on American Express's alleged discrimination in the servicing of debt held by residents of the United States territories.[12]

Pushing the envelope also risks trampling upon the liberties of our citizens, or interfering with the sovereignty or autonomy of the states or Indian tribes. I have resolved that this will not happen at the Bureau."); *see also* Christopher J. Willis, *Mulvaney Reorganizes CFPB Office of Fair Lending*, BALLARD SPAHR LLP (Feb. 1, 2018), https://www.consumerfinancemonitor.com/2018/02/01/mulvaney-reorganizes-cfpb-office-of-fair-lending/.

10. *See* Barbara S. Mishkin, *CFPB to Look to State AGs for More Leadership in Enforcement Arena*, BALLARD SPAHR LLP (Mar. 1, 2018), https://www.consumerfinancemonitor.com/2018/03/01/cfpb-to-look-to-state-ags-for-more-leadership-in-enforcement-arena/.

11. *See, e.g.*, Kate Berry, *Cordray: CFPB Is Right to Use Enforcement Actions to Craft Policy*, AMERICAN BANKER (March 9, 2016), https://www.americanbanker.com/news/cordray-cfpb-is-right-to-use-enforcement-actions-to-craft-policy ("Financial industry executives would be engaging in 'compliance malpractice' if they did not glean information from consent orders and respond by cleaning up their own practices [says CFPB Director Richard Cordray].").

12. *See CFPB and American Express Reach Resolution to Address Discriminatory Card Terms in Puerto Rico and U.S. Territories*, CONSUMER FIN. PROT. BUREAU (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/; *see generally* Jonathan Joshua, *CFPB Says Using Multiple Debt Collectors Poses ECOA Risk*, LAW 360 (Sept. 21, 2017), https://www.law360.com/articles/965428/cfpb-says-using-multiple-debt-collectors-poses-ecoa-risk; *see also* Obrea O. Poindexter, Donald C. Lampe & Ryan J. Richardson, *CFPB and Card Issuers Resolve ECOA Action Involving Cards Offered In U.S. Territories and Cardholders With Spanish Language Preference*, MONDAQ (Sept. 7, 2017), http://www.mondaq.com/unitedstates/x/627040/Consumer+Credit/CFPB+And+Card+Issuers+Resolve+ECOA+Action+Involving+Cards+Offered+In+US+Territories+And+Cardholders+With+Spanish+Language+Preference ("Substantively, the CFPB appeared to build its ECOA allegations upon both disparate treatment and disparate impact theories, but this was not stated expressly in the Consent Order. In this regard, the Consent Order cited U.S. census data showing that Puerto Rico's population is 99% of either Hispanic or Latino origin, while the U.S. Virgin Islands' population is 76% black or African-American, and the Pacific Territories have a majority population of Asian Pacific Islanders. In each case, these percentages are in excess of those in the U.S. states [*sic*] for these protected groups. Though precise theories of liability were not articulated in the Consent Order, it appears the basis for the alleged pattern or practice of

Among other things, the CFPB found (after American Express self-reported) that American Express and the local third party debt collectors it used settled delinquent debts for higher amounts in United States territories than debt collectors American Express used in the United States. American Express's use of local debt collectors instead of the debt collectors it used on the mainland allegedly resulted in a practice that discriminated against consumers with a Spanish-language preference and who were residents of U.S. territories in violation of ECOA and Reg. B.[13] In other words, the CFPB pursued a theory of "predatory servicing" against American Express.

Although there may be other statutory theories that could be lumped under the category of "predatory servicing," this Article focuses on the CFPB's and other regulators' ECOA theories of "discriminatory" predatory loan servicing in the *American Express* settlement.[14]

II. Application of ECOA and Regulation B to Debt Servicing

A. "Any Aspect of a Credit Transaction."

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 (pro-

discrimination was national origin in the case of consumers in Puerto Rico and race and ethnicity in the case of consumers in the U.S. Virgin Islands and the Pacific Territories. In the Consent Order, the CFPB concluded that the alleged disparities were not intentional, but they also were not justified by a legitimate business need under ECOA.").

13. *See* https://files.consumerfinance.gov/f/documents/201708_cfpb_american-express_content-order.pdf.

14. In other words, there may be other types of non-discriminatory unfair debt servicing that commentators would deem "predatory." *See* Jamie Hopkins & Katherine Pustizzi, *A Blast from the Past: Are the Robo-Signing Issues that Plagued the Mortgage Crisis Set to Engulf the Student Loan Industry?*, 45 U. Tol. L. Rev. 239, 249 (2014) ("Predatory servicing of subprime loans has followed the predatory lending practices described above, primarily because servicing defaulted subprime loans can be extremely profitable, particularly when foreclosure rates are high and accompanied by late payment charges and other fees."); *see also* Christopher Lewis Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda,* 78 Temp. L. Rev. 1, 24–25 (2005) ("Predatory servicing and collection practices may be as simple as incorrectly calculating interest charges, particularly with respect to complex variable rate loans and open-end lines of credit. Excessive or inappropriately levied late fees can also significantly increase consumers' indebtedness over time. For instance, consumer advocates have complained about lenders' failure to timely post monthly payments. In some cases, late fees are imposed after timely monthly payments are held in a 'suspense' account . . . . For many predatory lenders, the most important aspect of servicing a loan is diverting consumers back to the beginning of the process.").

vided the applicant has the capacity to contract)."[15] 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*."[16] 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.[17]

This broad interpretation can have far-reaching consequences in a number of different contexts, including by tying predatory lending to other prohibited actions, such as predatory servicing.

B. Predatory Lending to a Protected Class Can Result in Predatory Servicing.

Advocates posit a simple syllogism: An ECOA claim based on predatory origination results in riskier and higher-interest loans held by a protected class. When the protected class holds riskier and higher-interest loans, the protected class will also default more frequently than non-protected classes of borrowers holding less risky loans.[18] Hence, it is said,

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15. 15 U.S.C. § 1691(a)(1) (2014).
16. 12 C.F.R. § 1002.4 (2014) (emphasis added).
17. 12 C.F.R. § 202.4, Supp. I (2011).
18. *See* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, ProPublica (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods ("That's not only true in Jennings. The story is the same down the road in Normandy and in every other black community nearby. In fact, when ProPublica attempted to measure, for the first time, the prevalence of judgments stemming from these suits, a clear pattern emerged: they were massed in black neighborhoods. The disparity was not merely because black families earn less than white families. Our analysis of five years of court judgments from three metropolitan areas—St. Louis, Chicago and Newark—showed that even accounting for income, the rate of judgments was twice as high in mostly black neighborhoods as it was in mostly white ones."); *see also* Monique W. Morris, *Discrimination and Mortgage Lending in America: A Summary of the Disparate Impact of Subprime Mortgage Lending on African Americans*, Nat'l Assoc. for the Advancement of Colored People (March 2009), http://action.naacp.org/page/-/resources/Lending_Discrimination.pdf ("Nationwide, African Americans comprise 12 percent of the population age 18 and over. However, 52.4 percent of the loans awarded to African American borrowers are subprime and/or high-cost. Across the nation, 1 in 33 homeowners is expected to lose a home to foreclosure—primarily as a result of a subprime loan made in 2005 and 2006. This national reality chills the ambitions of those seeking the American Dream of homeownership and threatens a loss of at least $164 billion—a figure that disproportionately impacts wealth building among African American

predatory lending often also leads to predatory servicing. For example, some have argued that "predatory servicing" exists when collection procedures on "prime" accounts differ from collection procedures employed on "non-prime" or "sub-prime" accounts; again, the argument relies on the premise that non-prime and sub-prime accounts are held in higher numbers by minority borrowers and, therefore, minority borrowers are disparately impacted by the different collection procedures employed with respect to non-prime and prime accounts.[19] In *Rodriguez v. Bear Stearns Companies*, for example, the district court found that policies employed to service prime loans differently from non-prime loans could, but did not, have a disparate impact on the plaintiffs or the putative class:

> The plaintiffs here have not offered any statistical evidence whatsoever. As defendants correctly assert, there is no evidence that (1) any EMC practice disproportionately impacts minorities compared with other similarly situated groups subject to the same practices; (2) minority borrowers' loans are subject to a greater frequency of misapplied payments than non-minority borrowers' loans; (3) EMC minority borrowers are forced into delinquency with greater frequency than similarly situated non-minority borrowers; (4) EMC practices cause minority borrowers to pay more unwarranted fees than similarly situated non-minority borrowers; or (5) that EMC practices caused minority borrowers to receive harassing calls and letters more frequently than similarly situated non-minority borrowers.[20]

families. While no single factor is responsible for the accumulated disadvantage presented by these disparities, discrimination in lending practices is a leading culprit.").

19. *See Minority Plaintiffs Can Pursue Predatory Loan Servicing Claim*, HDR Current Developments, 37 NO. CD-9 HDR CURRENT DEVELOPMENTS 38 (May 4, 2009) ("Plaintiffs contended that after defendants acquired nonprime loans, they engaged in predatory servicing practices that affected a greater number of minority borrowers than similarly situated nonminority borrowers. The complaint alleged EMC's mishandling of mortgage payments and tax payments from existing escrow accounts and its failure to correct these errors, leading to derogatory information on plaintiffs' credit reports, credit problems, higher interest rates on subsequent loans, and, in one case, an erroneous notice of default. The newest complaint for the first time alleged that defendants' underwriting guidelines encouraged loan originators to make nonprime loans in greater proportion to minority borrowers. Plaintiffs also alleged that defendants used computer algorithms to direct collection efforts toward a higher proportion of minorities. Plaintiffs' primary claim is that defendants' predatory loan servicing practices disproportionately harmed minority borrowers, as compared to similarly situated Caucasian borrowers.") (citing Rodriguez v. Bear Stearns Companies, Inc., No. 07-ev-1816, 2009 WL 995865 (D. Conn. Apr. 14, 2009)).

20. Rodriguez v. Bear Stearns Co., No. 07-ev-1816 (JCH), 2009 WL 995865, at *11 (D. Conn. Apr. 14, 2009).

Thus, due to the absence of statistical evidence, the court entered summary judgment against the *Rodriguez* plaintiffs.

III. Predatory Servicing

A. Regulatory Guidance.

In 2009, the Inter-Agency Fair Lending Procedures were released, stating that, under ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction. A lender may not, because of a prohibited factor:

- Fail to provide information or services or provide different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards;
- Vary the terms of credit offered, including the amount, interest rate, duration, or type of loan;
- Use different standards to evaluate collateral;
- Treat a borrower differently in servicing a loan or invoking default remedies; or
- Use different standards for pooling or packaging a loan in the secondary market.[21]

In 2010, the Office of the Comptroller of Currency ("OCC") also started conducting "fair servicing reviews," published a booklet about fair lending, and indicated an expectation that lenders would conduct self-assessments.[22]

B. The CFPB's Guidance.

The CFPB has added to this framework, embedding fair lending into its examinations.[23] For example, the CFPB has published comprehensive rules in the nature of national servicing standards applicable to servicers of residential mortgage loans.[24]

21. Fed. Deposit Ins. Corp., Interagency Fair Lending Examination Procedures, at ii (Aug. 2009), https://www.ffiec.gov/PDF/fairlend.pdf; *see also* Fed. Deposit Ins. Corp., Compliance Examination Manual, at IV-1.1 (Sept. 2015), https://www.fdic.gov/regulations/compliance/manual/4/iv-1.1.pdf.

22. *See* Pamela C. Buckley & Amy E. Preble, *Fair Lending & Fair Servicing*, Fis (May 2013), http://www.massmba.com/files/public/FairLendingHandoutPresentation.pdf.

23. *See id.*

24. *See* Christopher J. Wills, *CFPB Focuses on ECOA in Mortgage Servicing,* Lexology (Oct. 18, 2011), https://www.lexology.com/library/detail.aspx?g=092ef7bb-8f6a-427d-9db1-630bad8960b4 ("There are two aspects of the CFPB's planned focus, though, that are cause for concern. First, with regard to loan modifications, under the 'disparate treatment' section, the Examination Procedures call for several inquiries into 'the exercise of discretion' by individuals involved in the

Moreover, when outlining the CFPB agenda in February 2013, former Director Richard Cordray "noted that 'loan servicing practices remain a concern,' and drew parallels between the mortgage servicing market and the student loan servicing market."[25] "Mr. Cordray also noted that the CFPB was looking to take steps to address the same kinds of problems faced by student loan borrowers."[26]

> [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.[27]

The CFPB Examination Procedures confirmed that ECOA compliance was part of the obligation of entities collecting on consumer debt:

> As they seek to collect debt from consumers, the entities that the CFPB supervises must comply with various laws to the extent applicable, including . . . . [ECOA] and its implementing regulation, Regulation B,

process. The CFPB's concentration on 'discretion' suggests that the CFPB views discretion as 'a factor that may indicate disparate treatment.' . . . Second, the Examination Procedures envision several different statistical inquiries designed to test for 'disparate impact' in loan modifications and foreclosures. This analysis covers the receipt of loan modifications; the processing time for such modifications; the terms of the modifications; and the incidence of foreclosures.").

25. Buckley et al., *supra* note 22, at 49. Indeed, commenters point out that compliance should be ensured across all lines of business. *See New Route Ahead: The Changing Dynamics of Auto Finance Risk and Compliance Highlights 2017*, PWC at 4 (2017), https://www.pwc.com/us/en/consumer-finance/publications/assets/pwc-auto-finance-risk-compliance-highlights-2017.pdf ("Lenders should also review the CFPB's guidance on redlining reviews for home lending when determining how to document their fair lending controls since this guidance also sheds light on CFPB perspectives."); *see also* Joshua, *supra* note 12 ("This application of Reg. B to creditor's use of multiple debt collectors could 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. second and tertiary placements, skip tracing, pre-litigation, geographic coverage, etc.), or simply as a means of evaluating the effectiveness of each collection agency.").

26. *See* Buckley et al., *supra* note 22, at 49.

27. Consumer Fin. Prot. Bureau, CFPB Bulletin 2012-04 (Fair Lending) (April 18, 2012), http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

> apply to all creditors and prohibit discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), receipt of public assistance income, or exercise in good faith of any right under the Consumer Credit Protection Act. (12 CFR 1002.2(z), 1002.4(a)). Credit transactions encompass "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit," and include "revocation, alteration, or termination of credit" and "collection procedures."[28]

The CFPB also required entities to pay particular attention to the entity's collection procedures and practices, controls, training, and monitors, and whether the entity's collection procedures and practices incorporate a prohibited basis under ECOA.[29]

As to standards, the CFPB committed to the "disparate impact" theory of liability under ECOA.[30] 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.[31]

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28. Consumer Fin. Prot. Bureau, CFPB Examination Procedures Debt Collection, at Procedures 2–3, http://files.consumerfinance.gov/f/201210_cfpb_debt-collection-examination-procedures.pdf (last visited Feb. 4, 2018) (citing 12 CFR 1002.2(m)).

29. *See id.* at 3.

30. *But see, e.g.*, Andrew L. Sandler & Kirk D. Jensen, *Disparate Impact in Fair Lending: A Theory Without a Basis & the Law of Unintended Consequences*, Banking & Financial Services 4 (Feb. 2014), https://buckleysandler.com/uploads/1082/doc/Disparate_Impact_in_Fair_Lending.pdf ("[T]he FHA and ECOA contain similar language to the disparate treatment provisions of Title VII and the ADEA—which the Supreme Court has clarified require a showing of intent to discriminate. However, neither statute contains any language resembling the disparate impact provisions of those statutes.").

31. Consumer Fin. Prot. Bureau, *supra* note 6, at ECOA 2; *see also* Christopher J. Willis, *CFPB Focuses on ECOA in Mortgage Servicing*, Consumer Fin. Monitor (Oct. 18, 2011), https://www.consumerfinancemonitor.com/2011/10/18/cfpb-focuses-on-ecoa-in-mortgage-servicing/ ("The CFPB's concentration on 'discretion' suggests that the CFPB views discretion as 'a factor that may indicate disparate treatment.' In *Wal-Mart v Dukes*, the U. S. Supreme Court rejected an employment discrimination class action predicated on 'discretion' as the alleged discriminatory practice. According to the Supreme Court, giving discretion to employees is 'a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct."' It's not

Industry has argued that the CFPB's application of the disparate impact theory conflicts with the Supreme Court's *Inclusive Communities* decision, but the CFPB historically maintained that financial services and debt collection compliance attorneys commit "compliance malpractice" by not monitoring CFPB enforcement actions.[32] On the other hand, new Acting Director Mick Mulvaney also recently noted that the CFPB will likely try to refrain in the future from "rulemaking by enforcement."[33]

Finally, on May 21, 2018, Congress repealed the CFPB's March 2013 Bulletin on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act," wherein the CFPB had posited a "disparate impact" analysis for indirect vehicle financing.[34] While the CFPB's enforcement standards regarding ECOA and disparate impact theories appear to be constricting or, at a minimum, in flux, nothing in the media or statements from the CFPB suggests that the CFPB intends to retreat from coupling origination issues with servicing issues or tying predatory lending claims to unfair servicing claims.

C. Enforcement.

1. *Synchrony Bank* Order.

In 2014, the CFPB ordered Synchrony 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.[35] Much of the Order involved the CFPB's position that origination

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clear whether the CFPB[] truly views 'discretion' as a factor that 'may indicate disparate treatment,' but I believe that any inference along those lines would not be consistent with the Supreme Court's decision in *Dukes*.").

32. *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015); *see also Fair Lending Fighting Illegal Discrimination: Promoting Growth for the Whole Community*, AM. BANKERS ASS'N at 2 (Apr. 2017), https://www.aba.com/Compliance/Documents/FairLendingWhitePaper2017Apr.pdf ("Federal agencies responsible for ensuring compliance with national fair lending laws have in the last few years aggressively applied a controversial legal theory, disparate impact, to brand banks with violations of fair lending rules. . . . In doing so . . . they have largely ignored the analytical framework established by the Supreme Court to guard against abusive disparate impact claims."); Berry, *supra* note 11.

33. See Mishkin, *supra* note 10.

34. Catherine Brennan & Latif Zaman, *CFPB Re-Examination of Disparate Impact and ECOA*, BUS. LAW. TODAY (June 15, 2018), https://businesslawtoday.org/2018/06/cfpb-re-examination-disparate-impact-ecoa/.

35. *See CFPB Orders GE Capital to Pay $225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices*, CONSUMER FIN. PROT. BUREAU (June 19, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ge-capital-

of the credit cards and/or loans were offered to residents of the United States that were not offered to residents of Puerto Rico.

With respect to the debt relief offer, the CFPB found that Synchrony's predecessor also had engaged in post-origination misconduct relative to settlements on balances owed. Specifically, the CFPB found that:

> Customers with balances greater than $200, a credit score within certain thresholds, four or more payments overdue, and no payments in the past 90 days received offers to waive their remaining account balance if they paid between 25 percent and 55 percent of what was owed. This promotion ran from January 2009 to March 2012. GE Capital did not extend these offers to any customer who indicated that they preferred to communicate in Spanish or had a mailing address in Puerto Rico, even if the customer met the promotion's qualifications. This meant that Hispanic populations were unfairly denied the opportunity to benefit from these promotions. Such discrimination is in direct violation of [ECOA].[36]

Importantly, the CFPB punctuated the Order by noting that ECOA was not limited to misconduct at origination: "ECOA prohibits creditors from discriminating in any aspect of a credit transaction on the basis of characteristics such as race and national origin. In this case, the customers did not receive either offer in any language, including English, and did not know they were being discriminated against."[37]

The *Synchrony Bank* Order resulted from the bank's self-reporting following a quarterly audit by the CFPB.[38] The bank reported that it did not provide the small balance settlement offers to customers with an address in Puerto Rico despite the fact that the settlement offer was made to qualifying card-holders in the mainland United States.[39] Notably, the Order did not

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to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/.

36. *Id.*

37. *Id.*

38. *Id.* Consent Order, *In re* Synchrony Bank, CFPB No. 2014-CFPB-0007, at ¶ 19 (June 19, 2014) ("During the course of the CFPB's supervisory quarterly monitoring, the Bank self-identified and reported to the CFPB that it had excluded Cardholders with 'Spanish-preferred' indicators on their accounts or with mailing addresses in Puerto Rico from its Statement Credit Offer (as defined in Paragraph 23(a) below) and Settlement Offer (as defined in Paragraph 23(b) below).").

39. *Id.* at ¶¶ 24–25 ("During the Offer Exclusion Relevant Time Period, the Bank did not provide the Statement Credit Offer or Settlement Offer to otherwise eligible Cardholders with a 'Spanish-preferred' indicator on their accounts or with a mailing address in Puerto Rico, in writing in any language, including English. The Bank provided the Collection Offers in writing to other Cardholders who met the respective eligibility criteria . . . . These Collection Offers relate to an aspect of a credit transaction, including the Bank's collections procedures for settling and resolving the outstanding debts of its existing Cardholders. These procedures include the Bank's reg-

hinge on Administrative Order No. 2011-006, issued by the Department of Consumer Affairs ("DACO"), which is discussed below.

2. *American Express* Order.

On September 1, 2011, the Puerto Rico Secretary of DACO issued Administrative Order No. 2011-006 (the "DACO Order"), which cites longstanding discrimination against consumers in Puerto Rico by companies that charge consumers in Puerto Rico higher prices and yet provide limited access to products and services as compared to consumers in the United States.[40] The Administrative Order requires all companies that sell goods and services in Puerto Rico to offer them with "similar conditions of access, sales, products, goods, service and delivery guarantees offered to citizens within the continental United States."[41] The CFPB has used the DACO Order as a springboard upon which to base not only the-

ular participation in the decision to grant its credit card customers the right to incur and defer debt.").

40. *See* Consent Order, *In re* Am. Express Centurion Bank, CFPB No. 2017-CFPB-0016 (Aug. 23, 2017) ("Any company doing business in Puerto Rico offering goods, products and services to consumers through the Internet, direct sales, catalogs or any other means, shall offer to consumers in Puerto Rico the access, sales, products, goods, services, warranties and delivery services under the same or similar conditions as those offered to citizens within the continental United States.").

41. *See id.* at 6; *see also* Michelle Kantrow, *DACO Opens New Office to Pursue Stateside Retailers Shunning P.R.*, News is My Business (Sept. 1, 2011), http://newsismybusiness.com/daco-opens-new-office-to-pursue-stateside-retailers-shunning-p-r/ ("In an effort to safeguard the rights of all consumers living in Puerto Rico against illegal and discriminatory practices by companies that offer goods and services, especially online, Consumer Affairs Secretary Luis G. Rivera Marín and acting governor, Kenneth McClintock, signed an administrative order Thursday creating the Anti-Discrimination Commercial Office."); Press Release, Cabrera & Rico, DACO Order Created Anti-Discrimination Unit, available at http://www.cabrera-rico.com/lawtext9-DacoOrder_create_antidiscrimination-Sept2011.htm (last visited Feb. 4, 2018) ("The Administrative Order No. 2011-0006 is predicated on the belief that US [*sic*] nation side businesses treat Puerto Rico differently and such differences are not based on actual costs of doing business in the island or with the island consumers. DACO ventures that many such differences are simply discriminatory due to origin and are therefore, offensive to the equal rights protection afforded to Puerto Ricans as American citizens under both the Puerto Rico and United States Constitution."); *Retail Alert DACO Creates Office Against Discrimination in Commerce*, McConnell Valdés LLC (Sept. 7, 2011), http://www.mcvpr.com/media/site_files/29_DACO-Creates-Office-Against-Discrimination-in-Commerce.pdf ("The Puerto Rico Department of Consumer Affairs ('DACO' by its Spanish acronym) issued on September 1, 2011, Administrative Order No. 2011-0006 requiring all entities doing business in Puerto Rico that offer goods, products and services to consumers through the Internet, direct sales, catalogs or any other mean, to offer the same or similar

ories of predatory loan origination (i.e. "predatory lending"), but also "predatory servicing."

In particular, on August 23, 2017, the CFPB entered into a Consent Order with American Express in connection with violations of ECOA by certain of its subsidiaries with residents in Puerto Rico and U.S. territories.[42] The Consent Order included data based on Census and other surveys and noted that the concentrations of minority residents in these areas far exceeded the concentration of the same racial and ethnic minorities in the United States. As a result, the CFPB found that American Express discriminated against consumers in U.S. territories, including those with Spanish-language preferences, by providing them with credit and charge card terms that were inferior to those available in the 50 states.

American Express's discrimination included charging higher fees and interest rates, offering fewer advantageous promotional offers, and imposing more stringent credit score cutoffs and lower credit limits to residents in the U.S. territories. The discrimination also included requiring these residents to pay more money to settle debt, where a third-party debt collector operating in Puerto Rico would settle delinquent debts for higher amounts than a different debt collector settled for in the U.S.

The CFPB found that such practices constituted disparate treatment of a protected class in violation of the Equal Credit Opportunity Act (ECOA) and its implementing Regulation B.[43] The CFPB also found that these discriminatory practices occurred over the course of at least ten years and that more than 200,000 consumers were harmed.

Notably, the CFPB did not find that American Express intentionally discriminated against its customers and actually indicated that the difference in treatment was the unintentional result of American Express's card management structure, which had different business units overseeing its U.S. and U.S. territory cards. Nonetheless, as a result of the CFPB's find-

methods of access, sales, products, goods, services, warranties and delivery that are offered to citizens within the continental United States of America.").

42. *See CFPB and American Express Reach Resolution to Address Discriminatory Card Terms in Puerto Rico and U.S. Territories*, Consumer Fin. Prot. Bureau, (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/; *see generally* Joshua, *supra* note 15; *see also* Poindexter et al., *supra* note 15.

43. *See* Fred O. Williams, *CFPB: American Express Discriminated in Puerto Rico, Territories* (Aug. 23, 2017), https://www.creditcards.com/credit-card-news/american-express-discrimination-consumers-puerto-rico-us-territories-cfpb.php ("Cordray went on to say that the credit card company brought the problems to the bureau's attention. The disparate practices resulted from having a separate management structure for the affected markets, not because of an intention to discriminate, the CFPB said. As a result, the bureau's consent order does not include a fine against the company. 'They have ceased this practice and are making consumers whole,' Cordray said.").

ings, American Express has paid over $95 million in consumer redress. Notably, the CFPB did not assess any penalties against American Express due to a number of factors, including the fact that American Express self-reported the violations, self-initiated remediation, and fully cooperated with the CFPB's review and investigation.

IV. Conclusion

The *Synchrony Bank* and *American Express* Orders both suggest that remedies sought by the CFPB's prior regime for "unfair" or "predatory" loan servicing under ECOA is no longer a mere afterthought. Indeed, while the CFPB has now promised to stop "pushing the envelope" under its new Acting Director and nominee, its role to protect consumers remains intact. Whether the model that it employed in *Synchrony Bank* and *American Express* will remain intact under the new regime is open to question, but it is also possible that states' attorneys general will now rely on these orders as roadmaps for their own enforcement actions. Whatever the regulatory environment and evolving ECOA standards, it appears that the *Synchrony Bank* Order and the *American Express* Order signal a reminder that predatory lending claims often will be coupled with predatory servicing claims.