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The FTC Caught Up: What You Need to Know About Its Latest Disparate Impact Statement

SPEAKERS

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In this crossover edition of *Moving the Metal: The Auto Finance Podcast* and *The Consumer Finance Podcast*, hosts Brooke Conkle, Chris Capurso, and Chris Willis break down the FTC's policy statement abandoning disparate impact enforcement under the Equal Credit Opportunity Act and Section 5 of the FTC Act. The group traces the reversal to two key drivers — a reassessment of the FTC's statutory authority and President Trump's executive order directing agencies to deprioritize disparate impact liability — while placing the move in the broader context of similar rollbacks at the CFPB and federal banking regulators. They also examine what remaining exposure looks like at the state level, particularly in New York and New Jersey, and close with a clear message for compliance officers: fair lending is far from dead, the current federal retreat is best understood as a vacation rather than a permanent reprieve, and paying close attention to regulatory signals now can be a meaningful competitive advantage down the road.

Transcript

Podcast: *Moving the Metal: The Auto Finance Podcast*
Episode: The FTC Caught Up: What You Need to Know About Its Latest Disparate Impact Statement (Crossover Episode With *The Consumer Finance Podcast*)
Hosts: Brooke Conkle, Chris Capurso, and Chris Willis
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Chris Willis (00:05):
Welcome to this special crossover edition of *Moving the Metal* and *the Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today we're going to be talking about the FTC's recent statements about disparate impact and unfair discrimination and the impact that they have on the auto finance market and the consumer financial services market in general.

But before we jump into that topic, let me remind you to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com. And don't forget about all of our other podcasts, the *FCRA Focus*, *Payments Pros*, and *the Crypto Exchange*, which are available on all popular podcast platforms.

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Now, as I said, today we're going to be talking about a statement that the Federal Trade Commission recently made about disparate impact and unfair discrimination under Section 5 of the FTC Act. And there's no one better to discuss that with than the two co-hosts of the *Moving the Metal* podcast, Brooke Conkle and Chris Capurso. So, Brooke, Chris, it's great to be with you again.

Chris Capurso (01:11):
As always.

Brooke Conkle (01:12):
Thanks, Chris.

Chris Willis (01:13):
So, Brooke, let me start with you. This statement from the FTC is about disparate impact. So just give the audience a little refresher on what that is and how did we get here with the FTC.

Brooke Conkle (01:23):
Absolutely. In plain terms, traditional discrimination claims are different from disparate impact. Traditional discrimination requires proof that someone intentionally treated a customer differently because of their race or another protected characteristic. Disparate impact, on the other hand, is a policy or practice that can be illegal because it produces different outcomes for different groups, even without intent. So regardless of whether a business intended to discriminate, if a policy results in a different outcome for a protected class, then that can be disparate impact.

Now, Chris, just as you mentioned, so what has the FTC done here? The FTC issued a formal policy statement saying it will no longer pursue disparate impact claims in any context. Full stop. And there are really two core reasons cited by Chairperson Ferguson. First is statutory authority. The FTC concluded that it actually never had the legal authority to bring these claims to begin with. Particularly Section 5, according to this version of the FTC, is a consumer protection statute. It's not an anti-discrimination statute.

Then second, the executive order from President Trump, Restoring Equality of Opportunity and Meritocracy, which directed federal agencies to deprioritize disparate impact enforcement. And Chris, this is not in a vacuum. What's the history here and how did we get here?

Chris Willis (02:52):
Well, historically the FTC, which does have enforcement authority under the Equal Credit Opportunity Act, has brought some disparate impact cases. And most notably during the Biden administration, brought a number of dealer pricing cases dealing with the pricing of interest rates on retail installment contracts that were predicated on a disparate impact theory, and pursued those cases, and that led to settlements with some large automotive dealer groups.

And likewise during the Biden administration, the FTC took the position very vocally and even used it in a couple of enforcement cases that again were ended by consent orders, that discrimination was unfair under the language of the FTC Act, which prohibits unfair and deceptive acts and practices. And so that has sort of been in the background.

Of course, the CFPB made its own try at unfair discrimination too, which I'm sure we're going to talk about in just a minute. And so I think what you have to see is this reversal by the FTC announced by Chairperson Ferguson is basically moving away from the statements that the FTC made in enforcement cases and otherwise during the Biden administration about disparate impact and unfair discrimination.

The only question in my mind, though, is why did it take so long? Because the executive order came out in April of 2025, I think, and the federal banking regulators and the CFPB followed very rapidly with statements that they weren't going to do disparate impact anymore. The federal banking regulators removed it from their exam manuals, the CFPB published its guidance document saying we're not going to do this anymore, and only more than a year later did the FTC come around to sort of joining the party, which I think we all assumed was going to happen, but it is surprising to me that it took so long.

Brooke Conkle (04:36):
Chris, we'll say Chris C., this did not come out of left field for Chairperson Ferguson either. He's got a history here, doesn't he?

Chris Capurso (04:43):
He does. And it's interesting, we were talking about the time period that it took to do this. I guess the two-person commission, they had a lot of talk, and that 2-0 vote took a lot of time to come to a policy statement. But it's interesting, and I'll chalk this up in a win column for us. When we discussed kind of where we're going to see auto finance with the FTC go, we kept pointing to these statements that Chairperson Ferguson had made when he was wee but a young commissioner and not a chairperson. And they were the kind of back-to-back auto announcements back in August 2024.

And he had a concurring statement, and I believe it's a concurring and dissenting statement, that he had two of them, and we've been citing those pretty constantly in the price advertising realm because of the fact that he discussed the kind of disparate impact pieces of these actions but never mentioned the price advertising part. And we were like, well, reading the tea leaves, that certainly looks like he endorses the way the FTC was going with price discrimination even during the Biden administration.

And then lo and behold, here we are, there's the other half of that coin, which is he was really not a fan of the disparate impact parts of it. And those two concurring statements really look like the genesis for this policy statement. He discusses that disparate impact is not a UDAP and that ECOA doesn't provide for disparate impact. He discusses that in both of them, and he describes a procedural issue in both of them.

One of them, there was going to be a lawsuit, so he said, oh, the FTC didn't pursue disparate impact here because they're afraid of judicial review and they don't want these things being litigated. Whereas with the one that's a pure settlement, lo and behold, it's there. I think it's really interesting that, and this is now two years ago, he had said all these things again as a commissioner about disparate impact. And now here we are two years later, and it's kind of a play-by-play exactly what he had done two years ago, now only in the form of a policy statement.

That kind of takes care of the background. We've discussed the FTC policy statement, we've discussed where it came from, but let's dig into the specifics of it. The statement makes clear that Section 5 of the FTC Act, the UDAP provisions, were never meant to be an anti-discrimination statute and that the prior commission was essentially trying to make new law. Like you had said, Chris, we had seen this kind of at the CFPB. What are your thoughts on that characterization just generally, that anti-discrimination is not a UDAP?

Chris Willis (07:20):
I think it is correct as a matter of statutory interpretation. And in fact, as I alluded to earlier, the CFPB also went down this road at about the same time during the Biden administration, and did it via an update to its UDAAP examination manual and used that as the vehicle to announce that, oh, we've suddenly discovered that the word "unfair" in the Dodd-Frank UDAAP statute encompasses discrimination. And so now we're not tethered by the specifics of the Equal Credit Opportunity Act, which only applied to credit and creditors and certain protected classes and annoying things like that.

Now we can apply anti-discrimination principles in other non-credit products like deposit accounts and credit reporting, and we don't have to tie ourselves to the protected classes that Congress decided to put in the Equal Credit Opportunity Act. You may recall that during the Biden administration, a coalition of trade groups, banking trade groups, filed a lawsuit in the, I believe, Northern District of Texas challenging that exam manual as being outside the CFPB's authority because unfair doesn't encompass discrimination. And the district court agreed with them and enjoined the CFPB from applying that policy to anybody who was a member of the associations that were the plaintiffs in that case.

And the district court's reasoning was essentially, look, Congress has enacted very specific anti-discrimination statutes, like the Equal Credit Opportunity Act or the Fair Housing Act or Title VII or Americans with Disabilities Act, et cetera. And when it has done so, it has done so very specifically and has used very careful language to describe sort of what's okay and what's not okay under each of those discrimination statutes. And you can't, against the backdrop of that very specific anti-discrimination legislation, say that the word "unfair" empowers an administrative agency to just make its own law and create a new anti-discrimination statute with no guidance whatsoever from Congress.

That I always felt like was the most persuasive argument, and the district judge in that case agreed with it. That case then went to an appeal to the Fifth Circuit, and the appeal was pending at the time of the administration change to the current Trump administration. And so, as you would expect, the Trump administration, after it got its legs under it, agreed with the outcome in the district court, dismissed the appeal, and let the district court opinions stand together with its injunction.

So my feeling is the FTC's ability to argue that unfair in the FTC Act means no discrimination is just as weak, if not weaker, than the Dodd-Frank argument was, particularly since the FTC statute is over 100 years old, before we had any anti-discrimination legislation in this country that came about during the civil rights era in the 1960s for the earliest of those statutes.

So I think that Chair Ferguson's statement in this regard is correct, and I think if it gets litigated and the Supreme Court got ahold of it, they would find that "unfair" doesn't encompass discrimination either. And in fact, the Trump administration is actively looking for a way to get the Supreme Court to decide that disparate impact generally is unconstitutional, because there's plenty of people in the administration who feel that way, and we'll see if the Supreme Court takes that case or decides it. But that is a very great interest of the regulatory agencies in the Trump administration.

Brooke Conkle (10:48):
Well, Chris, we've talked a lot about the federal regulators, but again, this isn't happening just solely on one track. We've also got state regulators that are active in this space as well. What do you expect coming out from these state attorneys general in response to this policy statement?

Chris Willis (11:04):
Well, there are a few states that have anti-discrimination laws where the regulator has taken the position, or the courts have taken the position, or the statute itself says that it provides for disparate impact liability. Not a lot, but a few. So New Jersey is an example of that. New Jersey has a law called the Law Against Discrimination. There's case law in New Jersey that says it calls for disparate impact liability, and the New Jersey Division on Civil Rights, which is a division of the Attorney General's office, released some disparate impact regulations in December of 2025 around that idea.

Likewise, the New York Fair Lending Law, Executive Law 296-A, has been interpreted by the New York Department of Financial Services to include disparate impact liability, and New York DFS can apply that and has applied it in a number of enforcement actions, notably dealing with dealer finance charge markups in several scattered enforcement cases over the years. So there could be some action from state regulators on the disparate impact issue, but the big thing that limits them is that a lot of them don't have supervision authority or don't have it broadly across the entire industry.

So state attorneys general don't have any supervision authority whatsoever, and a state agency like New York DFS does have supervisory authority over the entities that it licenses essentially. But those tend to be New York-chartered banks or non-banks who are lending or engaging in consumer reporting or other things that are licensable under New York law. But the vast majority of state regulators probably don't have a lot of interest in this issue. And so I think both because it's difficult to detect disparate impact claims, you really need supervision to do that and complicated statistical analyses to find the case in the first place, and when you want to bring one of those cases, if the other side decides to contest it, that's a pretty resource-intensive case for the regulator to bring.

And so the CFPB and the federal banking regulators have some significant advantages in bringing disparate impact cases because they can see what's in somebody's credit policy or other things like that that are not visible to the outside world, and they have the data scientists to run those detailed statistical analyses. These are not capabilities that you find frequently in a lot of state regulators. My guess is if you see disparate impact claims brought by state regulators, it's largely going to be in the area of housing, because you have HMDA to provide data for mortgage lending. And then in a few years, we'll have the 1071 rule generating similar data for small business lending.

And I think some of the regulators will be interested there. So I think New York DFS will be applying it in its own supervisory exams as it has been consistently for a long time. But there's not been a blazing amount of action from the state regulators on disparate impact. And that's because of the constraints that I don't think have changed much despite the FTC statement and any reaction that there may be in the minds of state regulators.

Let me put the question now to the two of you. If you had one piece of advice for a compliance officer in light of everything we've discussed, what would it be? Brooke, do you want to go first?

Brooke Conkle (14:10):
Sure. My one piece of advice probably would be to stay the course. This policy statement can be helpful when it comes to, in terms of, a very likely means that folks are not going to face a disparate impact enforcement action in the coming years. It does not mean that this is totally dead. To the extent we have a changeover in the White House in a couple of years, this policy can still come back. This is not the time to throw the baby out with the bathwater and decide that this is not a thing, it never will be a thing, and we do not have to worry about this ever.

My advice would be essentially to stay the course, and to the extent you see issues that could potentially be indicative of disparate impact, address those issues. It's still a good consumer-friendly policy to make sure that folks are not receiving an unintended consequence from your policies.

Chris Willis (15:03):
Chris C., how about you?

Chris Capurso (15:05):
Yeah, I think I'd tack on one there and bring up another one. The tack-on point is, in the policy statement, Chairperson Ferguson specifically says discrimination is still, it's a wrong. ECOA still exists, and we're still enforcing ECOA. So even outside of the disparate impact, if somebody saw this and said, "Ah, you know, fair lending's dead," that's a crazy position. The FTC has specifically said unfair discrimination, the things that ECOA specifically provides for, are still actionable, and we will still be looking at it. So I would just say the laws that are specifically tied to discrimination are still there and still being enforced, regardless of what this policy statement says about disparate impact.

The second point, this is kind of more of a macro general idea, but when you see announcements or press releases or anything like that coming from these regulators, there's a reason why people say read the tea leaves. The concurring statements were two years ago. And I mean, it obviously took some time, but here we are. And to Chris's point, last year with the executive order, it was over a year ago now, but here we are. These things don't happen in a vacuum, and they don't happen for no purpose. It could be a real advantage for a compliance professional to be able to just look at these types of things or ask us about them and just kind of see what kinds of things we're seeing and what we would guess would come out of it.

Because these concurring statements are a great point. Not only did we get price advertising from the FTC, but we also got essentially the repeal of disparate impact from the FTC. And all those things could be seen in these statements. And it's just something to keep in mind as we go forward, that a lot of this stuff doesn't happen in a vacuum and that it's important to pay attention to the context and the things that are going on with regulators to kind of understand where things could go in the future, because it could really be an advantage if you're ahead of the game and you kind of see these things coming down the road.

Chris Willis (17:03):

Yeah, that's absolutely true, Chris. And let me just add a couple of things to your comments. We're not going to be getting any concurring or dissenting opinions, I think, in today's FTC, given the fact that the President has been able to fire the Democratic commissioners, and the Supreme Court said that was okay, and have just two Republican commissioners. Well, if this President can do that and the Supreme Court says he can, the same thing can happen under a Democratic administration.

And so the kind of whipsawing that we've seen with these dramatic changes in position with the CFPB is now equally possible with the FTC under a new administration, because it's no longer a bilateral commission. The Supreme Court has done away with that now. And so it's very important to understand just how severely the stance of the FTC can change upon an administration change, which I don't think we've been used to from a historical standpoint, but now we know it can happen.

The other thing that I want to remind everybody of is that even if you were to get a Supreme Court decision that says there's no disparate impact under ECOA, for example, or there's no unfair discrimination under Section 5 of the FTC Act, having that case law out there only helps an enforcement target of the FTC or some other agency if the enforcement target is willing to litigate the case in court. Because in fair lending there's always been two lines of law. There's the line of law that the courts apply, and then there's what the regulators do, and they are not the same.

As long as the regulators perceive that industry participants are not willing to litigate fair lending cases in court, and historically they have not been, they can get away with doing things that would seem to be in tension with or contradicted by even Supreme Court decisions in fair lending cases or other anti-discrimination cases. And there's some great historical examples of that dealing with dealer finance charge participation during the end of the Obama administration.

So the point is, regardless of what these agencies say, and to a large extent regardless of what the courts say, we still have to worry about disparate impact. It has been in the law now since the 1970s, and it will not die that easily in the minds of consumer advocates and enforcement-oriented regulators. And so that I think is the thing that we all need to understand is that the vacation that we're having from disparate impact at the federal level now, and it is a vacation, and it's a great vacation because disparate impact was applied in a very unfair, arbitrary, unprincipled way a lot of times in the past, it's great to have some time off from that. But don't ever think that anything that we're seeing from the regulators today is permanent, because the whipsawing that we've experienced over the last several administration changes is just going to continue.

Chris Capurso (19:46):
Those are really good points. It could be the end of August and next week's Labor Day and school's starting right after, or I guess in Virginia it starts before Labor Day, which is crazy to me.

Chris Willis (19:55):
My kids started at the beginning of August.

Chris Capurso (19:57):
What is this? Where has childhood gone? But with that, we'll wrap it up for today's podcast. Thank you to our audience for tuning in. Don't forget to check out our blogs where you could subscribe to the entire blog or just the

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