

Will The NYDFS Pick Up The Baton On Disparate Impact Auto Dealer Pricing?

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If you've followed the status of the CFPB's enforcement actions under the Equal Credit Opportunity Act related to auto dealer finance charge participation, you probably would have concluded that those cases are unlikely to resurface. Not only did Congress override the CFPB's Bulletin describing the underlying legal theory, but then the Bureau's new leadership made a statement immediately thereafter [describing the cases as an "overreach."](#)

Traditionally, state agencies have not been very active with regard to fair lending issues, but the New York Department of Financial Services recently made a [public announcement](#) in which it stated its intention to pursue what looks like the same disparate impact theory arising out of indirect auto finance transactions. The announcement is entitled "DFS Takes Action to Protect New Yorkers from Unfair Auto Lending Practices as Federal Government Rolls Back Consumer Protections," and "reminds lenders of their liability for any discrimination that may result from markup and compensation policies with third parties such as car dealers." The press release cites and relies on New York's state credit discrimination law, [NY Executive Law § 296-A](#), which is part of New York's Human Rights Law. (Section 296-a prohibits discrimination "in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status.")

In particular, the DFS press release urges auto finance companies to perform a similar set of steps as those listed in the now-overridden CFPB Bulletin:

- "Consider reducing dealer discretion by placing limits on dealer markup, or eliminating dealer discretion to markup interest rates by using a different method of dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination."
- "Monitor both its whole portfolio and specific dealers for compliance with fair lending policies and procedures."
- "The lender should take prompt corrective action if it finds any differences in interest rates that are unexplained by objective credit factors, such as restricting or eliminating a dealer's ability to mark up, terminating the lender's relationship with a dealer, and providing restitution to affected consumers."

So, the NYDFS has essentially staked out the position that it will enforce a set of expectations similar to those used by the CFPB over the past several years. We would assume that non-bank auto finance companies who purchase retail installment contracts in New York would be subject to the DFS requirements, and subject to examinations by DFS regarding this issue. The same would be true for any banks over which the NYDFS has authority.

But will New York be willing to engage in enforcement with respect to this highly controversial, and potentially fatally flawed, theory of liability against indirect auto finance companies? Will it adopt an attitude regarding analytical methods and the use of controls that inflates the appearance of disparities, as the CFPB did? And having won a major victory in securing the Congressional override of the CFPB's Bulletin, will the auto finance industry be willing to fight one of these cases in court, based on the well-documented legal and factual problems with the "portfolio" theory of assignee liability based on BISG-based statistical analyses? We'll all have to stay

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tuned to find out. But it appears that the demise of the dealer pricing disparate impact issue arising from the Congressional override earlier this year may not yet be complete.

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