

Agencies Issue Disappointing Statement on Qualified Mortgage Fair Lending Risks

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Earlier this year, I authored a [client alert](#) examining the potential implications of the CFPB's new mortgage rules in light of HUD's recent clarification on how it will apply the statistical disparate impact approach to fair housing enforcement. That article examines the potential conflict between the two rules and concludes that bankers who attempt in good faith to comply with the new mortgage rules by making only "Qualified Mortgages" will be at high risk for a fair housing / fair lending enforcement action.

In response to this same concern expressed by the banking industry, the Joint Regulatory Agencies last week released an *Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule*. In this Statement, the agencies say that they "do not anticipate that a creditor's decision to offer only Qualified Mortgages would, absent other factors, elevate a supervised institution's fair lending risk."

If that had been the end of the Statement, bankers would have some meaningful level of comfort that they could make Qualified Mortgages without fear of fair lending / fair housing enforcement. But unfortunately, the regulators went on to undermine their expectation with faulty reasoning and broad qualifications.

In support of their expectation that a lender's decision to offer only Qualified Mortgages will not elevate fair lending risk, the regulators recognized "that some creditors' existing business models are such that all of the loans they originate will already satisfy the requirements for Qualified Mortgages." I have a couple of observations on this. First, if you are trying to tell me that a bank will not face fair lending enforcement action *in the future* because they have not changed their policies and procedures from those used *in the past*, I have a hard time believing it. Since 2009, the various regulatory agencies have referred more than 122 matters to the Department of Justice for fair lending enforcement, and many of those referrals were based upon bank lending practices that had been in place for years without regulatory criticism. Also, while some banks may not be changing their mortgage lending strategy in response to the new rules, many banks *will* be making the decision to make only Qualified Mortgages. That decision involves a conscious determination to implement a strict set of underwriting criteria, and those criteria appear to be the *very definition* of disparate impact. In simply noting that many banks will not be changing their practices, the regulators appear to be ignoring the critical issue of potential conflict between disparate impact and Qualified Mortgage underwriting.

Also in support of their expectation, the agencies note that banks have been required to make product decisions in light of past rule changes, and to the knowledge of the agencies, those decisions have not resulted in enforcement actions predicated on disparate impact. In particular, the agencies point to product decisions made by banks in response to the 2008 HOEPA Rules. Here, I would point out that the regulators are not comparing "apples to apples." A decision by a bank whether or not to make higher-cost mortgage loans that would be subject to additional disclosures and protections under HOEPA is not the same as a decision to make only Qualified Mortgages as defined in the CFPB's new mortgage rules. A decision by a bank not to make HOEPA loans does not involve the same kind of underwriting determination, and it is the underwriting portion of the Qualified Mortgage decision that creates disparate impact risk. So here again, the regulators ignore the critical issue.

Finally, the joint agencies conclude their Statement with the following broad qualification:

"Creditors should continue to evaluate fair lending risk as they would for other types of product selections, including by carefully monitoring their policies and practices and implementing effective compliance management systems. As with any other compliance matter, individual cases will be evaluated on their own merits."

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Or in my words, *“Notwithstanding this Statement, you are still subject to fair lending enforcement for your decisions, including your decisions in response to the new mortgage rules.”*

Overall, the Statement is a disappointment. Ideally, the agencies would have responded to bankers' requests for guidance and clarification in this area with a safe harbor. Such a safe harbor would have acknowledged the significant incentive for banks to make only Qualified Mortgages under the new rules, and in light of that incentive, provided bankers with certainty that they would not be penalized for a decision to “take the bait.”

In all fairness, however, some guidance is better than no guidance. Bankers now have a slightly higher level of security in this area than they had prior to the issuance of the Statement last week. Nonetheless, the Statement is a far cry from the type of safe harbor bankers were expecting. And until we get such a safe harbor, bankers should to continue to factor fair lending / fair housing risks into their product decisions under the CFPB's new mortgage rules.