Ranking Member Pat Toomey (R-Pa.)
Opening Statement
Full Committee Hearing
December 1, 2022 at 10:00 AM

Mr. Chairman, thank you. Equal treatment under the law is a fundamental American value. Discrimination and racism are wrong and have no place in our society. Unfortunately, they are a sad part of our nation's history. Even though we've made great strides in dramatically reducing discrimination in our society, that doesn't mean instances of racial discrimination never take place today. When it occurs, the government should enforce the anti-discrimination laws, including in financial services.

However, in recent years some Democrats have sought to advance a liberal legal theory called "disparate impact." Disparate impact is not the same as discrimination—far from it. Disparate impact theory punishes people if they make business decisions that produce statistical differences in outcomes between demographic groups, even if there's no discriminatory motive. There can easily be differences in outcomes when there's been absolutely no discrimination.

Now, in theory, defendants can prevail in disparate impact cases if they can prove at trial that there was a business justification for the policy that created the disparate outcomes. But, in practice, these cases entail significant costs and reputational risks that can force even innocent defendants to settle. In this way, disparate impact is a gift from liberal Democrats to trial lawyers. It's also a boon to regulators inclined to abuse their authority, like the CFPB.

For example, the Obama CFPB claimed to have discovered discrimination, based on disparate impact, by auto lenders who didn't even know the race of the borrowers they were accused of discriminating against. To underscore the absurdity of this, not only did the lenders not know the race of the borrowers, the CFPB did not even know the race of the borrowers that it claimed were being discriminated against based on race. But that didn't stop the CFPB from discovering racial discrimination.

The CFPB's actions weren't authorized by statute. To make matters worse, they were based on flawed methodology.

The CFPB guessed race based on last names and zip codes, even though this method was flawed. For instance, this methodology predicts there's: an 89% chance that Chairman Brown is black, and a 64% chance that Senator Tim Scott is white.

Moreover, CFPB documents showed the agency knew that: Credit scores and other business factors accounted for much of the statistical disparities, and there was a significant risk the CFPB would lose in litigation.

Nonetheless, the CFPB brought enforcement actions they knew might very well fail in court because they determined defendants have a "powerful incentive to settle", as we discovered in CFPB's internal documents, and so could be driven to settle cases that the defendants might be able to win. This is an outrageous abuse of power—to pursue litigation because the costs, economic and otherwise, would drive an innocent person to settle.

In 2018, Congress overturned the CFPB's disparate impact guidance for auto lending. Nonetheless, the Biden CFPB has expanded its use of disparate impact theory—effectively extending the very policy Congress overturned.

The CFPB has claimed the authority to supervise for disparate impact in all consumer financial services and products, based on an unprecedented reading of the Dodd-Frank's grant of authority to prevent unfair, deceptive, or abusive acts or practices, known as UDAAP. But Congress did not authorize disparate impact under UDAAP. In the 12 years since Dodd-Frank was enacted, the CFPB never previously claimed it did.

Congress took the UDAAP language from the FTC Act. For nearly a century the FTC never interpreted that language to include discrimination or disparate impact, until after the CFPB's novel reinterpretation.

That's exactly the kind of abuse of power the Supreme Court recently ruled against in West Virginia v. EPA, when the EPA—in the Court's words—— "claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."

It could've been describing the CFPB.

To make matters worse, the CFPB implemented this controversial change in law by fiat—without even rulemaking. This overreach was possible

because the CFPB is structured to be unaccountable to Congress. It can simply take funds from the Fed, which also is not subject to appropriations, thereby doubly insulating the CFPB from congressional appropriations and control. That's why the Fifth Circuit recently found the CFPB unconstitutional, holding its funding violates the Appropriations Clause.

The court noted: "The Bureau's perpetual insulation from Congress's appropriations power . . . renders the Bureau 'no longer dependent and, as a result, no longer accountable' to Congress and, ultimately, to the people."

It's no surprise that this unaccountable agency disregards the law. And it's no surprise the CFPB is already being sued for its disparate impact overreach.

A harmful effect of the CFPB's unauthorized expansion of disparate impact is that it creates tremendous uncertainty.

Any action taken by financial institutions may subject them to disparate impact liability, even if they have no way of knowing whether a disparate impact will occur. They'll likely have to pass on the costs of liability to consumers, or avoid potential frivolous litigation by not offering services and products. So, the expected outcomes of disparate impact liability are higher costs and less access to financial services for low-income families, which disproportionately harms minorities.

The Biden administration should stop abusing its authority to advance this misguided, liberal legal theory.