The Daily Dish

Regulatory Magic

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One of the poorly understood aspects of the administrative state is the amount of regulatory activity that can take place without an agency seemingly doing anything at all. It is the great regulatory magic trick.

As an example, consider the Consumer Financial Protection Bureau (CFPB). The CFPB has hardly been a daily presence in the headlines; indeed, you would be forgiven if you thought that it was up to nothing at all. Hardly.

The CFPB makes important decisions via the medium of "advisory opinions." Recently it decreed that the Equal Credit Opportunity Act (ECOA) applies to a lender's existing customers and not just applicants. This seemingly innocuous move is interesting for three reasons: (1) it significantly widens the potential scope for liability (albeit only if there is actual wrongdoing); (2) it is another example of agencies and particularly this one testing the limits of what it can constitutionally achieve via less rigorous "guidance" procedures (as opposed to rulemaking subject to public comment); and (3) the content of the opinion itself.

The ECOA prevents lenders from discriminating against credit applicants on any basis other than their ability to repay. The ECOA is policed by a wide range of federal agencies, not just the CFPB, which enforces it for banks and credit unions. While the ECOA covers all aspects of a "credit transaction," with this guidance the CFPB has indicated that the ECOA:

- ***"Continues to protect borrowers after they have applied for and received credit:*** *Lenders are prohibited from discriminating against borrowers with existing credit. For example, ECOA prohibits lenders from lowering the credit limit of certain borrowers' accounts or subjecting certain borrowers to more aggressive collections practices on a prohibited basis, such as race.*
- ***Requires lenders to provide "adverse action notices" to borrowers with existing credit:*** *Adverse action notices explain why an unfavorable decision was made against a borrower. Credit applicants and borrowers receive these notices for reasons including that credit was denied, an existing account was terminated, or an account's terms were unfavorably changed. "Adverse action notices" discourage discrimination, and they help applicants and borrowers learn the reasons for creditors' decisions."*

Unfair, deceptive, or abusive acts or practices by those who offer financial products or services to consumers are illegal under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. So, the first question is, why widen the ECOA to duplicate existing standards? Is it just to enable the CFPB to require adverse action notices?