From: Roger Clegg
To: Comments
Subject: Comments re RIN 3064-AD82
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Importance: High

The Center for Equal Opportunity has two comments with regard to RIN 3064-AD82 (76 FR 47652, August 5, 2011):

First, with regard to "Loan underwriting standards," unless there is explicit statutory authority for using a disparate impact (as opposed to the disparate treatment) standard, then it should not be used.

Second, with regard to "Section 390.405. General exemption"/(b) (2) (providing preferential treatment for depository organizations "controlled or managed by persons who are members of a minority group, or women"), this discriminatory provision should be eliminated, since it is objectionable as a matter of both law and policy.

Reasons we oppose the disparate-impact approach: If there is no explicit statutory authority for using the disparate-impact approach in your regulations, then the issue in this matter is similar to that with regard to Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, and our position is buttressed by the Supreme Court decision in *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001). Title VI of the Civil Rights Act of 1964 prohibits "discrimination under any program or activity receiving Federal financial assistance" against any person in the United States "on the ground of race, color, or national origin." *Sandoval* reaffirms the Supreme Court's earlier pronouncements that Title VI bans only disparate treatment, not actions that have only disproportionate effects on this or that racial or ethnic group.

There is obviously a problem, then, if a federal agency promulgates regulations purporting to implement a statutory ban on discrimination but those regulaions ban not only disparate treatment (which the statute is aimed at) but also actions with only disproportionate effects (which actions the statute does not prohibit). The Court has long recognized that the difference between disparate treatment and disparate impact is one of kind, not just degree. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976). Since a federal agency cannot even ban intentional discrimination without statutory authority, see *NAACP v. FPC*, 425 U.S. 662 (1976), then it would certainly seem to lack authority to ban actions that are not intentionally discriminatory when they have no statutory authority to do so.

While the *Sandoval* decision did not invalidate Title VI disparate-impact regulations —the Court concluded that the issue had not been presented to it—five justices on the Court strongly hinted that they might vote to do so in a future case. The *Sandoval* majority noted, "We cannot help observing … how strange it is to say that disparate-impact regulations" properly implement Title VI when the statute "permits the very behavior that the regulations forbid." That would be true in your agency's situation, too. The Court also noted that Title VI "limits agencies to 'effectuat[ing] rights already created by" it. *See* 121 S. Ct. at 1516-17, 1519 n.6, 1521. *See also* Thomas A. Lambert, *The Case against Private Disparate Impact Suits*, 34 Ga. L. Rev. 1155, 1211-21 (2000) (discussing, inter alia, the Court's "general rule that agency regulations may not be more prescriptive than the enabling statutes under which they are promulgated," *id.* at 1214). Again, this reasoning would apply to your statute, too, if does not specify the disparate-impact approach.

Since Congress cannot transform a disparate-treatment ban into a disparate-impact ban, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), it seems fair to conclude that a federal agency also lacks this authority. The Court in *Boerne* said that Congress's font of authority, Section 5 of the Fourteenth Amendment, does not give it authority to make this fundamental transformation; *a fortiori*, an agency's font of authority does not give *it* authority to make this fundamental transformation. *See* Lambert, 34 Ga. L. Rev. at 1218-21.

Such a transformation is additionally problematic because a ban on disproportionate effects will in fact *encourage* race-consciousness and disparate treatment—the very behavior that Congress sought to ban. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (Blackmun, J., concurring in judgment).

Finally, to the extent that your regulations are applied to states, problems are raised under *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), because Congress has not approved such incursions on state authority, let alone approved them "unequivocally." And were Congress to have given agencies authority to rewrite the statute actually passed, problems are raised under the nondelegation doctrine as well.

And even if in some future case the Supreme Court rules that federal agencies have authority to write disparate-impact regulations, that would not mean that they *should* do so, especially given the many bad consequences that the disparate-impact approach has had for civil-rights law. See discussion in this monograph: http://www.aei.org/docLib/Briefly-Disparate-Impact.pdf Thus, the administration ought to be reassessing the use of the disparate-impact approach in all areas not required by statute.

Reasons we oppose preferential treatment on the basis of race, ethnicity, and sex: It is generally illegal for the government to show favoritism or even use classifications based on race, ethnicity, or sex. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications … must be analyzed by a reviewing court under strict scrutiny"); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (gender classifications require an "exceedingly persuasive justification"). Indeed, such classifications and favoritism are "presumptively invalid" (see *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)).

There is no justification for such preferential treatment in this case, let alone "compelling" or "exceedingly persuasive" justification. The purpose of the antitrust laws is to protect consumers, nothing else. If minority- and women-owned organizations are thought to have some quality that ensures there participation in an interlock will pose less of a threat to consumer welfare (e.g., those organizations are smaller), then that quality should be the focus of the special treatment, and race, ethnicity, or sex should not be used as a proxy for having that quality (since some minority- and women-owned organizations will not have that quality and, conversely, some nonminority- and male-owned organizations will).