S.2155 Does Not Facilitate Discriminatory Lending

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S.2155 DOES NOT FACILITATE DISCRIMINATORY LENDING

Written by Richard J. Andreano Jr.

In a blog post titled "How S.2155 (the Bank Lobbyist Act) Facilitates Discriminatory Lending," Professor Adam Levitin claimed, "This bill functionally exempts 85% of U.S. banks and credit unions from fair lending laws in the mortgage market." The claim was set forth in bold and italic text. If the intent was to draw attention to the claim, it worked. Members of this firm saw the claim. In short, the claim greatly mischaracterizes the limited implications of the amendment.

The Professor is referring to an amendment that S.2155 would make to the Home Mortgage Disclosure Act (HMDA) for insured banks and insured credit unions that satisfy certain conditions. First, I will address what the amendment would not do. The amendment:

- Would not exempt any institution from the Equal Credit Opportunity Act, the Fair Housing Act or any other substantive fair lending law.
- Would not exempt any institution from the mortgage loan data reporting requirements of HMDA that were in effect before January 1, 2018.
- Would not prevent bank and credit union regulators from obtaining any information on the mortgage lending activity of institutions that they supervise.

What the amendment would do is exempt small-volume mortgage lenders from the expanded HMDA data reporting requirements that became effective on January 1, 2018, if they met certain conditions. The conditions are:

- To be exempt from the expanded data reporting requirements for closed-end mortgage loans, the bank or credit union would have to originate fewer than 500 of such loans in each of the preceding two calendars years
- To be exempt from the expanded data reporting requirements for home equity lines of credit (HELOCs), the bank or credit union would have to originate fewer than 500 of such credit lines in each of the preceding two calendars years.
- The bank or credit union could not receive a rating of (1) "needs to improve record of meeting community credit needs" during each of its two most recent Community Reinvestment Act (CRA) examinations or (2) "substantial noncompliance in meeting community credit needs" on its most recent CRA examination.

The exemption for HELOC reporting would have no implications initially. For 2018 and 2019, the threshold to report HELOCs is 500 transactions in each of the preceding two calendar years. The 500 HELOC threshold was implemented by a temporary rule adopted by the CFPB under former Director Cordray in August 2017, which amended the HMDA rule adopted by the

CFPB in October 2015 to revise the HMDA reporting requirements. The October 2015 rule for the first time mandated the reporting of HELOCs, and set the reporting threshold at 100 HELOCs in each of the two preceding calendar years. The CFPB indicated in the preamble to the temporary rule that it had evidence that the number of smaller institutions that would need to report HELOCs under the 100 threshold may be higher than originally estimated, and that the costs on those institutions to implement reporting may be higher than originally estimated. The temporary rule allows the CFPB time to further assess the appropriate threshold.

While Professor Levitin inaccurately claims that the S.2155 amendment creates a functional exemption from the fair lending laws for small volume lenders, the statement that 85% of banks and credit unions would be covered by the exemption mischaracterizes the scope of lending activity subject to HMDA reporting requirements. Based on the data used by the CFPB to assess the 2015 rule, the change from the 100 to 500 threshold would reduce the number of institutions reporting HELOCs from 749 to 231, but would reduce the percentage of HELOCs reported only from 88% to 76%. Additionally, 2016 HMDA data reflect that while credit unions and small banks comprised over 73% of HMDA reporting entities, the institutions received under 15% of the reported applications for the year. While the CFPB now acknowledges it may have underestimated the number of institutions that would be covered at the 100 HELOC threshold, these statistics reflect that focusing on the percentage of institutions subject to reporting, and not the percentage of transactions subject to reporting, paints an inaccurate picture of lending activity subject to HMDA reporting requirements.

Even for institutions that would qualify for the exemption from reporting the expanded HMDA data, the CFPB and financial institution regulators will still receive the traditional HMDA data from these institutions. And regulators can use that information to assess whether they should take a closer look at the mortgage lending activity of any institutions. Of great significance, as noted above, the S.2155 amendment would not limit the amount of information on mortgage lending that bank or credit union regulators can obtain from institutions that they supervise.

Although the expansion of the HMDA data is intended to permit regulators to better assess the mortgage lending of an institution before having to request additional information from the institution, even the expanded data does not provide for a conclusive assessment of whether or not a given institution has engaged in discrimination when evaluating mortgage loan applications. In fact, even with data that is more comprehensive than the expanded HMDA data, a statistical analysis still does not provide for a conclusive determination regarding underwriting determinations. You have to get your hands on the actual loan files.

The main impact from the S.2155 amendment would be the reduction of some HMDA information from small volume lenders that will be made available to the public. With new leadership at the CFPB, we don't know what parts of the expanded HMDA data will be released to the public. However, even under Director Cordray, the CFPB did not plan to issue credit score information, which is an important item of information in conducting a fair lending analysis. A significant concern of the mortgage industry regarding the expanded HMDA data is that members of the public will improperly use the data that is released to claim that the data conclusively show that the institutions engaged in discrimination. Given that Professor Levitin paints an inaccurate picture of the impact of the HMDA amendment under S.2155, those concerns appear to be warranted.

- Richard J. Andreano, Jr.