

December 1, 2020

The Hon. Kathleen L. Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

**Re: *Request for Information on the Equal Credit Opportunity Act and Regulation B
Docket No. CFPB-2020-0026***

Dear Director Kraninger:

The American Financial Services Association (AFSA)¹ is pleased at the opportunity to comment on the Bureau of Consumer Financial Protection's (CFPB or Bureau) request for information (RFI) to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under the Equal Credit Opportunity Act (ECOA) and Regulation B.

AFSA and its members support the Bureau in its mission to create a regulatory environment that expands access to credit, helps to ensure that all consumers and communities are protected from discrimination in all aspects of a credit transaction, and develops approaches to address regulatory compliance challenges.

In particular, the Bureau requested answers to ten specific questions. AFSA's responses are below. The Bureau wrote that it issued the RFI in lieu of a symposium it had planned to host on ECOA issues this past fall. We look forward to continuing the discussion on these issues with the CFPB and encourage the Bureau to hold the symposium either virtually or when it is safe to do so in-person.

1. Should the Bureau provide additional clarity regarding its approach to disparate impact analysis under ECOA and/or Regulation B? If so, in what way(s)?

AFSA appreciates that the Bureau is asking this question. There is no need for the CFPB to provide additional clarity regarding its approach to disparate impact analysis under ECOA and the accompanying Regulation B because disparate impact is not a cognizable theory under ECOA.

AFSA and its members have long supported ECOA's purpose and strongly oppose all unlawful discrimination, in any form, in any aspect of lending. In fact, our association's mission statement

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

emphasizes that one of AFSA’s main goals is promoting ethical lending, and its members employ diverse workforces serving diverse customers.

Discrimination essentially means treating otherwise similar people differently based on a dissimilar characteristic. If that characteristic is a protected one, such as race, gender, ethnicity, or religion, then the discrimination is wrong—morally as well as legally. It is also contrary to the societal and business interests of our members and their stakeholders. Intentional discrimination in any form should be rooted out and stopped. Toward that end, intentional discrimination is clearly prohibited by the ECOA’s language making it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age . . .”

While no Supreme Court case has held that disparate impact (focused on the effects of an act or policy that was not intended to discriminate) is a cognizable theory under ECOA, in *Inclusive Communities*,² the Supreme Court considered language in the Fair Housing Act (FHA) that prohibits intentional discrimination based on race and other factors, and its holdings are instructive on ECOA.

As explained by the Supreme Court, where Congress use language such as “because of,” it is prohibiting intentional discrimination. ECOA’s “on the basis of,” language is substantively equivalent to FHA’s “because of” language, and there can be no doubt that intentional discrimination, or disparate treatment, is prohibited. The Supreme Court also made clear that because the statutory text of FHA also contains additional “results oriented language,” specifically, “otherwise make available” in Section 804(a), FHA supports disparate impact claims.

Unlike FHA, however, ECOA does not have any additional “results oriented language,” like “otherwise make available.” Therefore, *Inclusive Communities*, confirms that theories of disparate impact should not form the basis of any claims or regulatory actions under ECOA. We note that, when the Supreme Court in *Inclusive Communities* emphasized the necessity of statutory, “results oriented language” and a subsequent “robust causality requirement.” In doing so, it did not deny the existence of racial imbalances, but rather, the Court acknowledged that a textual basis and robust causality requirement are necessary prerequisites to ensure that creditors are not “held liable for racial disparities they did not create.”³

Unless Congress amends ECOA, as it amended the FHA in 1988, to include results-oriented language, based on U.S. Supreme Court interpretation, the CFPB does not have the authority to impose or interpret disparate impact under ECOA and/or Regulation B.⁴

² *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015)

³ *Id.* at 2523.

⁴ Regulation B references an effects test, which is derived from subsequent committee reports, not statutory text. See Cubita, Peter N. and Michelle Hartmann. *The ECOA Discrimination Proscription and Disparate Impact— Interpreting the Meaning of the Words that Actually Are There*. The Business Lawyer, Vol. 61, February 2006. Available at: <https://www.weil.com/~media/files/pdfs/ecoadiscrim.pdf>

2. *Should the Bureau provide additional clarity under ECOA and/or Regulation B to further encourage creditors to provide assistance, products, and services in languages other than English to consumers with limited English proficiency (LEP)? If so, in what way(s)?*

AFSA believes that it is important for creditors to continue to examine how they can better serve the LEP community. Decisions regarding the treatment of LEP customers and the provision of services in languages other than English are often complex and creditors need flexibility to communicate with their customers based on their knowledge of their customers and market conditions. In addition, many creditors must also comply with state laws that have different requirements.

Ultimately, creditors want customers to be informed. In furtherance of this, a creditor may want to offer some materials in both English and a language other than English (e.g., Spanish). However, the creditor may not be able to commit to providing every single document to the customer in the translated language. Having to conduct the entire transaction in a language other than English may be cost-prohibitive (and, for indirect auto lenders, complicated, if a motor vehicle dealer does not have the resources to negotiate and/or execute a transaction in a language other than English). In addition, the creditor may want to provide a document translated into one additional language, but not others (or maybe add one translated version at a time). Providing materials in languages other than English generally is more than most state consumer and contract laws require.

In the spirit of selecting the best way to communicate with consumers for maximum understanding, to the extent a customer indicates a language of choice other than English, a creditor should have the option to send marketing and other materials to that customer in the preferred language. The terms would not vary or be governed by what language the material is being sent in, rather, sending in the customer's preferred language would reflect a commitment to the customer experience.

Creditors would appreciate clarity from the CFPB confirming that ECOA and Reg B provide for this type of flexibility—that, when creditors are trying to help make customers more informed by giving them the option to obtain documents in a language of choice, they are not going to be punished for it.

3. *Should the Bureau address any potential regulatory uncertainty and facilitate the use of Special Purpose Credit Programs (SPCPs)? If so, in what way(s)? For example, should the Bureau clarify any of the SPCP provisions in Regulation B?*

AFSA members generally offer products and services to all consumers and most do not operate Special Purpose Credit Programs. Thus, our general position is that the Bureau should encourage creditors to determine their own lending criteria and marketing strategies compliant with fair lending laws.

4. *Should the Bureau provide clarity under ECOA and/or Regulation B to further encourage creditors to use affirmative advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?*

Many AFSA members offer the same products and services to all consumers and do not use affirmative advertising.

Our members are committed to compliance with the letter and spirit of ECOA, particularly the availability of credit. To the extent a creditor participates in affirmative advertising targeting a traditionally disadvantaged group with the intent of promoting the availability of credit, such activity should not be scrutinized. For example, if a creditor believes African Americans have been traditionally disadvantaged and the creditor tailors advertising to appeal to African Americans (not varying terms based on any prohibited basis), the CFPB should not scrutinize or penalize the creditor for not running a similar advertising campaign for another traditionally disadvantaged group (for example, Latinos). To the extent a creditor is attempting to help, educate, or promote the availability of credit, there should be no scrutiny under ECOA or Regulation B and as much flexibility as possible to creditors.

We also note that creditors could engage in more affirmative advertising with clarity from the CFPB that marketing segmentation of pre-application prospective applicants is permissible under ECOA and Regulation B. In the absence of a clear view on this issue from the CFPB, many social media platforms prohibit creditors from engaging in target marketing. Therefore, if a creditor wanted to engage in affirmative advertising through digital target marketing to reach traditionally disadvantaged consumers, the creditor would be prevented from doing so by the digital platforms' restrictions.

5. *In light of the Bureau's authority under ECOA/Regulation B, in what way(s) might it support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned?*

To meet the credit needs of small businesses, the CFPB should continue to carefully consider the impact its policy- and rulemaking may have on the availability of credit. Specifically, the Bureau should examine the impact that its rulemaking under Dodd-Frank Act § 1071 will have on the availability of credit to small businesses, particularly those that are minority-owned and women-owned.

6. *Should the Supreme Court's decision in *Bostock* affect how the Bureau interprets ECOA's prohibition of discrimination on the basis of sex? If so, in what way(s)?*

The Supreme Court's decision in *Bostock* did not interpret ECOA. Absent new legislation or a court ruling implementing ECOA, the CFPB does not need to expand on the ECOA protected classes. AFSA members extend credit or make loans based on a consumer's ability to repay, neither sexual orientation nor gender identity plays a role in the credit decision. We note that some

creditors may have fair lending policies that recognize protected classes beyond those specified in ECOA or applicable state laws.

- 7. What are examples of potential conflicts or intersections between state laws, state regulations, and ECOA and/or Regulation B, and should the Bureau address such potential conflicts or intersections? For example, should the Bureau provide further guidance to assist creditors evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B?***

The Bureau should be clear—both to creditors and to states—that ECOA and Regulation B preempt state laws. States may enforce their own duly enacted fair lending laws, but those laws must be consistent with ECOA and Regulation B.

If there are any state laws that conflict with ECOA and Regulation B, the CFPB should issue no-action letters or similar relief so that creditors are not put in the position of deciding which law to violate and with which law to comply. Faced with that quandary, creditors could decide to stop lending in a state, which would limit options for consumers.

An example of this conflict was apparent last year when Nevada passed *NV SB 311 / Ch 280*. The Nevada law states that for an applicant with no credit history, creditors must deem the credit history of their current or former spouse identical to the credit history of the applicant. Failure to do so would be considered discrimination based on marital status in the state. However, doing so would violate ECOA.

We also urge the CFPB to invoke its coordination authority under Section 1015 of the Dodd-Frank Act to consult with other federal banking agencies and state regulators and identify and reconcile potential conflicts between federal and state laws.

- 8. Should the Bureau provide additional clarity under ECOA and/or Regulation B regarding when all or part of the applicant's income derives from any public assistance program? If so, in what way(s)? For example, should it provide guidance on how to address situations where creditors seek to ascertain the continuance of public assistance benefits in underwriting decisions?***

The Bureau should allow creditors latitude to assess an applicant's financial resources, consistent with ECOA, to avoid harm to these consumers. In particular, when an applicant is unable to provide information concerning the length of time the applicant will likely remain eligible to receive stated public assistance income, creditors should be able to access external resources such as a state agency website or statute to be able to calculate this duration. The CFPB should clarify that the use of such external information is still consistent with a creditor's Regulation B obligation to conduct an assessment of an applicant's income derived from public assistance on an individual basis.

9. *Should the Bureau provide more regulatory clarity under ECOA and/or Regulation B to help facilitate innovation in a way that increases access to credit for consumers and communities in the context of AI/ML without unlawful discrimination? If so, in what way(s)? Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML? If so, in what way(s)?*

Creditors are committed to compliance with the letter and spirit of ECOA, particularly the availability of credit. AI and machine learning can help make models more predictive which could help creditors better price their products, reduce credit losses, and expand the availability of credit.

The CFPB could provide a safe harbor for AI and machine learning techniques used to develop “credit scoring systems” defined under Regulation B, when those systems use Fair Credit Reporting Act (FCRA), or credit bureau, data attributes in accordance with the “empirically derived, demonstrably and statistically sound” requirements under § 1002.2(p)(1).

In addition, the CFPB could provide guidance for creditors using AI/ML techniques with non-FCRA data attributes. Such guidance could direct lenders to consider a variety of approaches to avoid fair lending risks, including: 1) adhering to the definition of an “empirically derived, demonstrably and statistically sound credit scoring system;” and 2) performing other types of classification analysis to determine if, in a series of simulations, any potential disparate treatment can be observed including:

- Use of depersonalized datasets prepared by outside credit reporting agencies that do not require the lender to obtain protected class information prohibited by ECOA. Results that are consistent and predictive within depersonalized sub-groups can be a useful indicator to mitigate the risk of disparate treatment by the model(s).
- Where possible, analyze the strongest weighted variables within such AI/ML powered models and reasonably describe the interactions that such variables have on the ultimate outcomes.

10. *Should the Bureau provide any additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor, requiring a notification that includes a statement of specific reasons for the adverse action? If so, in what way(s)?*

AFSA members believe the adverse action notice framework in place today under ECOA and Regulation B is working as intended, and that the requirements are clear. However, to the extent the CFPB wishes to provide additional guidance, AFSA requests that the Bureau consult with industry to ensure that its guidance considers operational concerns and offers the maximum amount of clarity. The Bureau should also consider how to reduce conflicts between federal and state laws when offering guidance.

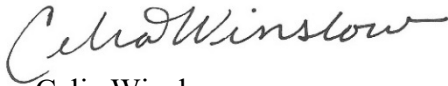
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AFSA members are firmly committed to compliance with applicable laws, including ECOA. Within the bounds of ECOA, individual finance companies have benefited from establishing their own policies to reflect business priorities. While some companies may choose to establish Special Purpose Credit Programs or engage in Affirmative Advertising as mentioned in this RFI, some companies have chosen otherwise. Similarly, some companies may have made a business decision to expand upon the protected classes in their fair lending policies, although no court has yet done so. In all these examples, companies are acting in complete compliance with ECOA.

In the future, AFSA members appreciate that the CFPB recognize the established elements of ECOA compliance and the areas in which companies have latitude to make business decisions that reflect the company's business priorities and values.

Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,



Celia Winslow
Senior Vice President
American Financial Services Association