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AFSA Webinar

Fair Lending, Sexual Orientation and Gender Identity: The CFPB ECOA Rule



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Background

- *Bostock* Decision
 - On June 15, 2020, the U.S. Supreme Court issued a landmark decision in *Bostock v. Clayton County, Georgia*, holding that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses **sexual orientation** discrimination and **gender identity** discrimination.
- CFPB ECOA RFI
 - Through an RFI released on July 28, 2020, the CFPB sought public input on opportunities for the Bureau to clarify Regulation B in a way that prevents credit discrimination and promotes credit access and innovation. The Bureau requested feedback on a diverse set of 10 topics, including: In interpreting ECOA, can or should the CFPB look to the Supreme Court's recent ruling in *Bostock v. Clayton County* that the prohibition against sex discrimination under Title VII applies to discrimination on the basis of **sexual orientation and gender identity**?
- White House, HUD, CFPB and FTC all issue statements/guidance following SCOTUS's decision in *Bostock*

Background (cont'd)

- Executive Order 13988 – Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021)
 - Directed agency heads to review and revise orders, regulations, guidance documents, etc. to fully implement statutes that prohibit sex discrimination to include sexual orientation and gender identity discrimination.
- HUD Memorandum Re: Implementation of Executive Order 13988 (Feb. 11, 2021)
 - HUD’s Office of General Counsel concluded that the Fair Housing Act’s sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity.
 - Directs HUD’s Office of Fair Housing and Equal Opportunity (FHEO) to take action to administer and fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity.
 - This memorandum also affects state and local agencies that enter into agreements with the Department under the Fair Housing Assistance Program (FHAP), pursuant to which such agencies process discrimination complaints under laws that the Department certifies as “substantially equivalent” to the Fair Housing Act. In order for FHAP agencies’ laws to remain substantially equivalent, they must be administered consistent with *Bostock*. According to HUD, to be consistent with *Bostock*, the state or local law either must explicitly prohibit discrimination because of gender identity and sexual orientation or must include prohibitions on sex discrimination that are interpreted and applied to include discrimination because of gender identity and sexual orientation.
- CFPB ECOA Interpretive Rule: Discrimination on the Bases of Sexual Orientation and Gender (March 9, 2021)
- FTC Statement on Fighting Discrimination in the Credit Marketplace
 - Reiterates that it will follow the CFPB’s interpretive rule and advises compliance personnel to review its policies to ensure compliance

CFPB Interpretive Rule: Sexual Orientation and Gender Identity under ECOA

- *“[W]ith respect to any aspect of a credit transaction, the prohibition against sex discrimination in the Equal Credit Opportunity Act (ECOA) and Regulation B, which implements ECOA, encompasses sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant’s associations.”*
- The Bureau believes that under ECOA and Regulation B:
 - (1) sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex;
 - 2) an applicant’s sex must be a “but for” cause of the injury, but need not be the only cause; and
 - (3) discrimination against individuals, and not merely against groups, is covered.
- Bureau also clarifies that ECOA’s and Regulation B’s prohibition against sex discrimination encompasses discrimination motivated by perceived non-conformity with sex-based or gender-based stereotypes, as well as discrimination based on an applicant’s associations.

CFPB Interpretive Rule: Sexual Orientation and Gender Identity under ECOA

- CFPB believes sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex.
- For example, if a creditor declines the loan application of a male applicant on the basis that he is attracted to men, the creditor discriminates against him for traits or actions it tolerates in female applicants; further, this discrimination is motivated, at least partly, by the applicant failing to fulfill traditional sex stereotypes.
- If you decline a credit application because the applicant is transgendered, the individual applicant's sex plays an "unmistakable and impermissible role" in the credit decision.

CFPB Interpretive Rule: Sexual Orientation and Gender Identity under ECOA

- Examples of sexual orientation or gender identity discrimination:
 - A creditor declines a loan application from a male applicant on the basis that he is attracted to men.
 - A creditor declines the loan forbearance application of a transgender person who was identified as male at birth but who now identifies as female, but approves the application of a similarly-situated applicant who was identified as female at birth and now continues to identify as female.
 - A creditor rejects an application from a woman because the loan officer regards her as insufficiently feminine.
 - A small business lender discourages a small business owner appearing at its office from applying for a business loan and tells the prospective applicant to go home and change because, in the view of the creditor, the small business customer's attire does not accord with the customer's gender.
 - A creditor requires a person applying for credit who is married to a person of the same-sex to provide different documentation of the marriage than a person applying for credit who is married to a person of the opposite sex.



Compliance with Interpretive Rule

- Many states (and the District of Columbia) already included sexual orientation and/or gender identity as prohibited bases in its credit, housing, and/or general anti-discrimination laws.
- Review P&Ps
- Training
- Consumer complaint monitoring
- QA/QC/Mystery shopping



Compliance Challenges

- Focus on disparate treatment
- No methodology for quantitative testing on these characteristics
- AML/KYC/CIP
- Marriage and non-marital relationships
- Customer service



Questions?



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