*Via regulations.gov*

December 1, 2020

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Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

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

Dear Ms. Bacon,

The 48 undersigned consumer, civil rights, community, housing, and other public interest organizations submit these comments in response to the Consumer Financial Protection Bureau (CFPB or the Bureau)'s Request for Information (RFI) on the Equal Credit Opportunity Act (ECOA) and Regulation B.

## I. Introduction

The ECOA prohibits creditors from discriminating against an applicant for any part of a credit transaction on the basis of race, color, national origin, sex, marital status, age, source of income, public assistance, and religion.[1] It is imperative that all consumers are able to access the credit for which they are qualified without discrimination. The ECOA is a critical tool for removing illegal barriers to credit and advancing our country's financial services market towards operating on fair and non-discriminatory terms.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) gave the CFPB the primary authority for oversight and compliance for ECOA and Regulation B. The Bureau has a crucial role in protecting the rights of borrowers, preventing discriminatory practices, and providing redress for borrowers who experience lending discrimination.

To play its role effectively, the CFPB must exercise its authority with regards to the ECOA and Regulation B in a manner that aligns with Congressional intent to make the financial marketplace

[1] 15 USC § 1691.

fair and free from discrimination.  Any actions the CFPB considers must be focused on strengthening protections against discrimination and thoroughly examined to avoid creating any paths to evade oversight in the name of regulatory certainty or innovation. New products, practices and services should be evaluated with greater scrutiny to make sure that they are not creating unintended negative consequences, or worse, perpetuating discriminatory outcomes. While regulatory clarity is important, it cannot be used as a reason to pursue policies that would result in shielding companies from accountability for discriminatory effects. The CFPB should also vigorously pursue enforcement actions for ECOA violations. Robust oversight is necessary to combat the persistent harms of systemic racism and exclusion in the lending market.

## II. Disparate Impact

As noted in the RFI's introduction, the Bureau has recognized evidence of disparate impact as a method of proving lending discrimination under the ECOA.[2] Disparate impact liability occurs when government or private actors unjustifiably pursue practices that have a disproportionately harmful effect on women, people of color, people with disabilities, families with children, and other groups protected by civil rights statutes. Federal courts have consistently acknowledged that disparate impact claims are cognizable under the ECOA for the past 40 years, and the Supreme Court upheld the cognizability of disparate impact *in Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*.

By focusing on the consequences of unfair credit practices, the disparate impact standard provides a crucial mechanism to address hidden discrimination and practices that may be neutral on their face but perpetuate the effects of systemic racism and inequality. Disparate impact liability thus is essential to taking on subtle barriers that unnecessarily block equal access to credit. Because affordable credit is a key that opens the door to opportunities like homeownership, higher education, and starting a small business, robust disparate impact law is imperative.

Existing regulatory standards, guidance, and case law on application of the disparate impact doctrine have proven workable and effective. The principles-based standards reflected in the Official Interpretations, along with decades of guidance and case law interpreting these standards under the ECOA and related antidiscrimination statutes like the Fair Housing Act (FHA) and Title VII, provide sufficient clarity and flexibility to apply to evolving credit policies and markets. For the past four decades, courts have used the foundational three-part test referenced by the Supreme Court in *Inclusive Communities*, which provides an effective legal framework to examine policies that may seem neutral but unfairly exclude certain groups of people or isolate particular communities in practice.

[2] 85 FR 46601 (Aug 3, 2020).

The Bureau must be careful not to take any action that could increase the plaintiff's burden or create hurdles in bringing a disparate impact claim. Applicants are usually only privy to their own offer or denial, and rarely know if they have been subjected to a policy with a disproportionately adverse effect on a protected class. If a plaintiff successfully identifies a problematic policy that is causing a disproportionate adverse impact, the three-part test gives the defendant the opportunity to demonstrate that the policy is grounded by a legitimate business purpose. This burden-shifting framework effectively prevents plaintiffs from bringing unsubstantiated claims and prevents defendants from escaping responsibility with hollow reasons for their policies. The CFPB's Official Interpretations set forth the basic obligation to adopt policy alternatives that reduce disparate impact, so long as the alternative satisfies the creditor's legitimate business needs.[3]

Potential disparate impact liability incentivizes creditors to examine whether policies that have a disparate impact on protected classes are actually necessary to achieve their legitimate business interests. If an alternative would meet the creditor's legitimate goals while having a less discriminatory impact on a protected class, disparate impact law requires the creditor to adopt it. The CFPB should incorporate into its own examinations a search for less disparate impact and alternative analyses of credit-related policies, and it should revise its examination procedures to provide examiners with guidance on these analyses. The Bureau should use its regulatory and supervisory tools to ensure that entities' compliance management systems include routinely testing policies and models for disparate impact and actively considering and adopting less discriminatory alternatives where they are available.

For individuals and entities looking for detailed guidance on the standards governing disparate impact claims, the Bureau should encourage entities to look to the Department of Housing and Urban Development (HUD)'s 2013 Rule for additional direction on how disparate impact applies in the credit context. The CFPB could provide confirmation that these standards are consistent with Regulation B and employ the substantive standards found in the HUD 2013 rule in its own supervisory and enforcement activities for ECOA compliance.

Vast discrepancies persist within the lending space, most notably affecting women and borrowers of color. Disparate impact liability under the ECOA is an important tool to address pervasive injustices of segregation, exclusion, and other continuing impacts of systemic racism. It is critical that the CFPB prioritize ECOA concerns as part of its examination process and full enforcement of disparate impact claims.

[3] 12 C.F.R. § 1002, Supp. I, ¶ 6(a)-2.

## III. Limited English Proficiency

Greater language accessibility is needed for all credit transactions to allow limited English proficient (LEP) consumers to fully participate in the financial marketplace. Under the ECOA, financial companies have a duty not to discriminate against individuals based on national origin, which is closely tied to LEP status. Facially neutral policies may have an unjustified discriminatory effect when LEP individuals do not have equal opportunity because they cannot understand the terms of their transactions or access services in their language. Expanding access to safe, affordable and sustainable credit for LEP consumers should be a top priority for the CFPB. The Bureau should take several steps to increase fair and transparent language access in the consumer marketplace for LEP individuals and work with supervised institutions to adequately serve LEP consumers and meet their ECOA obligations.

The CFPB has provided helpful guidance in the past regarding effective Compliance Management Systems and ways for financial institutions to mitigate risk by having a thoughtful, data-informed language access plan in its 2016 report about LEP consumers.[4] The Bureau's comments reflected that many companies are serving LEP consumers in effective ways that do not create enforcement risk. The CFPB has also pointed to practices that can expose institutions to risk, including activities that steer LEP borrowers to only certain products through its Supervisory Highlights, which has been useful for all stakeholders.[5] The obligations of a financial institution may vary depending on their size, the footprint of the communities they serve, and the available documents that have been translated by government agencies or other approved sources. The CFPB should continue to provide direction through its supervisory examination process to help entities through the process to expand their in-language services for LEP consumers and encourage them to utilize the translated documents and other resources available through the CFPB and other government agencies.

If the CFPB decides to take other regulatory action regarding the obligations of lenders to provide language access to borrowers beyond the direction it has provided thus far, any such guidance must be public and transparent. The Bureau must not act in this space through ad hoc No Action Letters or regulatory sandboxes based on private requests or information submitted behind closed doors. The risk of unintended consequences is significant. If the Bureau is considering regulatory action, it must do so only after fully vetting the issues in a careful and public process to make sure not to insulate conduct that is unfair, deceptive, abusive, harmful or discriminatory. It is crucial that the CFPB take the requisite time to conduct research, hear from all stakeholders, and consider all feedback and perspectives before moving forward with any proposed action in this area.

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[4] Consumer Fin. Prot. Bureau, Spotlight on Serving Limited English Proficient Consumers (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf.

[5] Consumer Fin. Prot. Bureau, Supervisory Highlights (Oct. 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

Expanding language access is a process that will vary depending on an institution's size and resources. To that end, the CFPB should require the institutions under its supervision to develop a language access plan to expand access over time in a way that makes sense for each company's market and the consumers that they serve. It is in the best interest of companies to ensure that their policies do not have an unintended discriminatory effect on LEP consumers. The Department of Justice has adopted a helpful four-factor process to be used in creating language access plans under Title VI. Because the requirement for lenders and servicers to avoid practices that cause an unjustified disparate impact on consumers based on national origin is comparable under the ECOA to that under Title VI, the Bureau should require lenders and servicers to consider the same four factors. The factors to be considered in crafting a language access plan include: (1) the number or proportion of LEP persons served or encountered in the eligible service population, (2) the frequency of with which LEP persons come into contact with the program (3) the nature and importance of the program, activity, or service provided by the program, and (4) resources available and costs to the recipient.[6] The CFPB should adapt this four factor analysis and require financial institutions to create a language access plan analyzing these factors and update it annually. The four-factor test will illuminate steps lenders need to take in order to comply, and the lender or servicer's written language access plan could serve as strong evidence of compliance with fair lending laws, including the ECOA.

In the course of implementing a comprehensive language access plan, lenders may identify the need for targeted support for consumers of particular national origins in specific markets. Lenders should use information gleaned during these efforts to identify whether special purpose credit programs or affirmative advertising could help address lending gaps to LEP consumers of specific national origins.

## IV. Special Purpose Credit Programs (SPCPs)

Throughout its history, discriminatory policies in the U.S. created distinct advantages for White families and excluded families of color from those benefits. The inequities built into our society from race-based policies and practices are seen in massive wealth, homeownership, and credit gaps that persist today. SPCPs provide a tailored way to benefit such economically disadvantaged groups, including groups that share a common characteristic such as race, national origin, or gender.[7] Properly designed, SPCPs can play a critical role in promoting equity and inclusion, building wealth, and removing stubborn barriers that have contributed to financial inequities, housing instability, and residential segregation.

[6] Executive Order 13166; DOJ Guidance on LEP Persons.
[7] 12 CFR §1002.8

The Bureau should take steps to encourage and facilitate the development of more SPCPs. In a 2016 issue of its Supervisory Highlights, the CFPB favorably highlighted examples of existing SPCPs.[8] The CFPB should continue to provide public information about existing SPCPs, including product type and program benefits, eligibility criteria, and populations served. The more information lenders have about existing programs, the easier it will be for them to design their own. Information about existing programs will also illustrate that a wide range of features and benefits can be deployed to ensure that SPCPs will effectively meet the needs of groups and further the purposes of the ECOA. Features of SPCPs should be focused not just on increasing access to credit but on designing products that are affordable and facilitate equity and wealth building, including down payment assistance, waivers of fees and closing costs, and targeted alternative underwriting. The CFPB should consider providing a template or checklist to aid institutions in developing SPCPs.

The CFPB should also coordinate with other government agencies, including the banking regulators, HUD and the Federal Housing Finance Agency, to clarify that SPCPs designed to benefit applicants on the basis of a protected class in compliance with the ECOA and Regulation B also do not violate other federal antidiscrimination statutes. The Federal Financial Institutions Examination Council (FFIEC) Interagency Fair Lending Examination Procedures —issued by the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, Federal Reserve Board, National Credit Union Association, and adopted by the CFPB—highlight SPCPs as favorably designed to meet the needs of underserved markets, particularly with respect to mortgage programs.[9] The procedures provide interpretation and instruction for the agencies' examiners on how to determine lenders' compliance with fair lending laws, including the FHA and ECOA. They instruct examiners on how to consider home mortgage SPCPs, along with other housing loan programs designed to assist underserved consumers. Regulators should work together to empower and facilitate the creation of more SPCPs to address the racial wealth gap and other disparities that persist in the credit market today.

## V. Affirmative Advertising

Affirmative advertising directed to a specific clientele based on their characteristics could be particularly useful for groups that may not normally apply for credit, either due to a lack of knowledge, perceived unwelcomeness, or other barriers. Targeted outreach, including partnerships with community organizations, in-language advertisements for LEP communities, and particular platforms, such as ethnic media and websites, could inform traditionally excluded

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[8] Consumer Fin. Prot. Bureau, Supervisory Highlights (Summer 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.

[9] FFIEC Interagency Fair Lending Examination Procedures at 7 (Aug. 2009), available at https://www.ffiec.gov/PDF/fairlend.pdf. *See also* CFPB, Fair Lending Report, 84 FR 32420, 32426 (July 8, 2019) (explaining that CFPB has adopted Interagency Fair Lending Examination Procedures).

groups about the availability of credit products and encourage them to apply. Affirmative advertising could be particularly useful for LEP communities, who often have challenges accessing sustainable credit even if they would otherwise qualify because they are unable to access materials in their language to understand their options or comprehend the terms of any offer they receive. The CFPB could consider providing additional guidance on affirmative advertising so that financial institutions can target their advertising on specific underserved markets without violating ECOA obligations to expand credit opportunities for protected classes. Such guidance should include best practices and prohibited actions.

It is important to make sure the products and services advertised to specific groups are quality products, and not subpar options that are more expensive or come with problematic terms. Fair lending concerns arise when a financial institution's advertisements target different and potentially suboptimal offerings to different protected class members, or otherwise impermissibly treat them worse than other customers. Financial institutions must also take responsibility for discriminatory effects caused by the algorithms used by third-party advertising platforms they give permission to advertise their products. The CFPB should require financial institutions to have fair lending protocols in place to examine their advertisements on a regular basis as part of their ECOA compliance. Affirmative advertising has the potential to be a useful tool but must be regularly examined for reinforcing discriminatory patterns or causing unintended adverse effects on protected classes.

## VI. Small Business Lending

Data released by the Federal Reserve Board in 2017 revealed that banks denied credit to more than half of Black small business owners and nearly 40% of Latinx small business owners. Over 30% of women-owned businesses were also denied loans.[10] Black and Latinx business owners were also given less information about different loan products and required to provide more personal information in their search for a small business loan.[11]

More data must be made available on small business lending to better understand how minority and women-owned businesses are treated when they seek credit. Section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to collect and maintain small business lending data, including demographic information, and report it to the Bureau on a regular basis. The purpose of Section 1071 was to facilitate enforcement of fair lending laws and identify the needs and opportunities of women and minority-owned businesses. Over a decade after Dodd-Frank, in September 2020, the CFPB issued a SBREFA outline to move forward with the

[10] Report to the Congress on the Availability of Credit to Small Businesses (Sept 2017), https://www.federalreserve.gov/publications/2017-september-availability-of-credit-to-small-businesses.htm.
[11] National Community Reinvestment Coalition, "Disinvestment, Discouragement and Inequity in Small Business Lending," (Sept 2019), available at https://ncrc.org/disinvestment/

rulemaking process to implement this data collection. The Bureau should prioritize moving this rulemaking forward for 2021 and develop a robust rule that provides the public with a clearer picture of the small business lending market. As intended by the statute, this information will help the CFPB, other regulators and government agencies, and the public identify the needs of small businesses and help the CFPB address discriminatory practices through its supervision and enforcement processes.

In the CFPB's 2018 supervisory highlights, the Bureau noted that it had begun supervising institutions for compliance in regard to small business product lines.[12] The CFPB should incorporate fair lending examinations as part of its supervision over small business lending for supervised institutions to make sure that all small businesses are treated fairly and that companies do not have policies or procedures in place that are causing discriminatory effects for women and minority-owned businesses. Similarly, the Bureau should also apply its enforcement authority to small business lending and pursue enforcement actions against companies with policies and practices that have denied access to credit or only offered credit on more expensive or less favorable terms to minority or women-owned businesses. In addition, the CFPB should consider whether a small business lending program or product may fit into the framework of a new SPCP or targeted affirmative advertising campaign, and work with financial institutions to move these products and services into the market to better serve minority and women-owned businesses.

## VII. Sexual Orientation and Gender Identity Discrimination

Several studies have found that LGBTQIA people often experience credit discrimination when seeking credit. A 2020 study by the National Community Reinvestment Coalition found disparities in mortgage lending for same sex couples, who had higher interest rates on their mortgages and paid more in closing costs.[13] A 2019 study published in the Proceedings of the National Academy of Sciences found that mortgage lenders are less likely to approve same-sex couples.[14] A 2018 survey of LGBT people by Freddie Mac found that 21% of gender expansive (transgender, gender nonbinary, etc.) homeowners experienced discrimination when trying to purchase a home, as did 19% of lesbians, and 10% of both gay men and bisexual people. When asked about discrimination they fear when purchasing a home, the majority of LGBT people,

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[12] Consumer Fin. Prot. Bureau, Supervisory Highlights (Summer 2018), https://files.consumerfinance.gov/f/documents/bcfp_supervisory-highlights_issue-17_2018-09.pdf.

[13] National Community Reinvestment Coalition, "Mortgage Data Reveals Disparities In Same-Sex Lending." June 29, 2020, available at: https://ncrc.org/mortgage-data-reveals-disparities-in-same-sex-lending/?mc_cid=30ceab89fc&mc_eid=b6388c8c93.

[14] Hua Sun and Lei Gao, "Lending Practices to Same-Sex Borrowers." PNAS May 7, 2019 116 (19) 9293-9302; available at: https://www.pnas.org/content/116/19/9293.

including a majority of LGBT people of color, reported they feared discrimination based on their sexual orientation and/or gender identity.[15]

In *Bostock v. United States*, the Supreme Court held discrimination against an individual for being transgender constitutes unlawful sex discrimination, and found that the Title VII prohibition of sex discrimination covers discrimination based on sexual orientation and gender identity. The Supreme Court's *Bostock* decision should guide the analysis of sex discrimination under federal civil rights laws that prohibit sex discrimination, including the ECOA and the Fair Housing Act. Courts have consistently construed discrimination analysis under ECOA to follow discrimination analysis under other federal civil rights statutes, including Title VII. The CFPB's 2016 memo supports a reading of sex in ECOA as including sexual orientation and gender identity based on the same reasoning as *Bostock*: that sex discrimination includes a prohibition of discrimination based on sexual orientation and gender identity.[16] Like most civil rights jurisprudence, the CFPB's memo also cites Title VII cases as instructive.

*Bostock* confirms the Bureau's existing position that the ECOA prohibits discrimination on the basis of sexual orientation and gender identity, and should guide the Bureau's interpretation of ECOA as it pertains to sexual orientation and gender identity discrimination. By confirming that discrimination based on sexual orientation and gender identity is a form of sex discrimination, both the Supreme Court in *Bostock* and the CFPB have taken steps to advance the goal that LGBTQIA people can access mortgages, car loans, small business loans, and other forms of credit and be treated fairly with decisions based on their creditworthiness and not on unrelated characteristics. After *Bostock*, there is no question that ECOA's prohibition on sex discrimination—which tracks Title VII's same prohibition—encompasses sexual orientation discrimination and gender identity discrimination. In line with the Supreme Court's *Bostock* decision, the Bureau should continue to interpret ECOA's prohibition of discrimination on the basis of sex to include sexual orientation and gender identity discrimination.

## VIII. Scope of Federal Preemption of State Law

As the RFI states, Regulation B only preempts state laws that are inconsistent, and "only to the extent of the inconsistency" with the ECOA.[17] A "state law is not inconsistent with ECOA or Reg B if it is more protective of an applicant."[18] The ECOA is crystal clear that state law is

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[15] Freddie Mac, *The LGBT Community: Buying and Renting Homes* (2018), http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf.

[16] CFPB letter to SAGE re: Application of the Equal Credit Opportunity Act to Credit Discrimination on the Bases of Gender Identity and Sexual Orientation (Aug. 30, 2016), available at https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/09/SAGE-Letter.pdf.

[17] 85 FR 46602 (Aug 3, 2020).

[18] 12 CFR § 1002.11(a).

preempted only to the extent that it is inconsistent with the ECOA, and that a state law that provides greater protection to the applicant cannot be preempted. 15 U.S.C. § 1691d(f) provides:

> **(f) Compliance with inconsistent State laws; determination of inconsistency**
>
> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Bureau is authorized to determine whether such inconsistencies exist. The Bureau may not determine that any State law is inconsistent with any provision of this subchapter if the Bureau determines that such law gives greater protection to the applicant.

This purpose is made clear by the statute's meticulous treatment of several specific types of state laws, such as community property laws and state caps on finance charges and loan amounts.[19] The language is crystal clear, and the Bureau should take particular care to follow legislative intent. The CFPB must not take any action that could interfere with states' ability to further protect their residents from other forms of discrimination. The Bureau's preemption authority under the ECOA is narrow, and it must be exercised only in ways that will strengthen protections against credit discrimination.

As discussed above, SPCPs have the potential to create more equity in the financial marketplace. To facilitate the development of SPCPs, the CFPB should formalize the position that ECOA preempts state laws in the instance that state laws could be interpreted to prohibit SPCPs. This confirmation would remove uncertainties about the legality of SPCPs under state law so that they do not act as a roadblock to their development. Regulation B is clear that the ECOA preempts state laws that "[p]rohibit[] inquiries necessary to establish or administer a special purpose credit program."[20] Regulation B does not specifically state that the ECOA also preempts a state law that would bar a creditor from taking a prohibited basis into account when establishing eligibility for a special purpose credit program, but the Official Interpretation of 12 C.F.R. § 1002.11(a) takes this specific position in a preemption determination specific to New York state law. The determination states that New York's prohibition on credit discrimination on the basis of race, creed, color, national origin, age, sex, marital status, or disability "is preempted to the extent that it bars taking a prohibited basis into account when establishing eligibility for certain special-purpose credit programs."[21] The Bureau should clarify that its preemption determination regarding New York state law applies equally to other, similar state laws and how they interact with SPCPs.

[19] 15 U.S.C. § 1691d(a)-(d).
[20] 12 C.F.R. § 1002.11(b)(1)(v).
[21] 12 C.F.R. § 1002, Supp. I, ¶ 11(a)(1).

The ECOA prohibits discrimination based on national origin but does not directly address immigration status. Although the ECOA itself does not explicitly enumerate citizenship and immigration status as protected classes, the ECOA certainly does not preempt state and local laws that do provide these additional protections. Laws prohibiting discrimination based on citizenship and immigration status provide “greater protection” to the applicant. They do not “require[] or permit[] a practice or act prohibited by” the ECOA or Regulation B, or fall into any other circumstance that Regulation B enumerates as an inconsistency dictating preemption.

Regulation B provides that a creditor “may consider the applicant’s immigration status or status as a permanent resident,” only if “necessary to ascertain the creditor’s rights and remedies regarding repayment” or if necessary to comply with laws limiting dealings with certain countries.[22] While these provisions of Regulation B and the Official Interpretations address immigration status, none of them are inconsistent with a state law that prohibits discrimination on that basis. They do not *require* a creditor to consider an applicant’s immigration status, but simply recognize that Regulation B does not *prohibit* a creditor from doing so. These provisions thus leave room for states to act by enacting a prohibition where Regulation B does not. Such a prohibition is no more inconsistent with the ECOA than a state law that adds any other category to the list of prohibited bases for denying credit. Particularly in light of the ECOA’s instruction that it does not preempt state laws that provide greater protection to the applicant, it would be helpful for the Bureau to make explicit that state laws protecting discrimination based on immigration status are not inconsistent with ECOA and therefore not preempted.

## IX. Public Assistance Income

It is unlawful, under the ECOA, to discriminate against applicants for credit “because all or part of the applicant's income derives from any public assistance program.”[23] The CFPB should ensure that persons who receive public assistance have an even playing field with those who do not. Currently, the amount of discretion within ECOA and the additional guidance do not provide consumers receiving public assistance with an equal opportunity because creditors often require more invasive and stringent documentation to use public assistance income to qualify for credit.

The ECOA allows creditors to seek confirmation of the amount of public assistance income and whether it is probable that benefits will continue, and thus allows for creditors to ask for some basic information about benefits as necessary to determine an applicants’ ability to repay going forward. However, to address the probability of benefit continuation, recipients of public assistance income, especially recipients of disability income, should not have to provide sensitive

[22] 12 CFR § 1002.6(b)(7).
[23] 15 U.S.C. 1691.

personal information, including medical records, when applying for credit. ECOA guidance from the CFPB should ensure that the privacy of applicants with public assistance income is protected and that requests regarding benefits are tailored only to document an applicant's ability to repay credit. The Bureau should maintain its 2014 guidance and continue to protect borrowers receiving public assistance income from intrusive, burdensome and unnecessary document requests.[24]

Assistance through the Housing Choice Voucher (HCV) Homeownership program should continue to be counted as a source of income when applicable. The Bureau recognized that disparate treatment may exist "when a creditor excludes or refuses to consider Section 8 HCV Homeownership Program vouchers as a source of income or accept the vouchers only for certain mortgage loan products or delivery channels."[25] The Section 8 HCV Homeownership Program provides an important path to housing stability for low-income families, including borrowers of color, and the CFPB should require lenders to fully honor the assistance applicants receive from the program.

In addition, the Bureau should facilitate the grossing up of disability income, such as Social Security Disability Income (SSDI) and Supplemental Security Income (SSI), to ensure that recipients of disability income are evaluated similarly to wage earning borrowers for credit. Many, if not most, SSDI and SSI recipients do not pay federal income tax on their benefits pursuant to the Internal Revenue Code. When disability income is not grossed up, it may put recipients at a potential disadvantage when compared to wage-earners who are not measured by their net income but by their higher, pre-tax gross income.

Many states and localities have banned source of income discrimination, and the Bureau should take special care to avoid preemption of these state laws and local ordinances that may provide additional protections. Any further Bureau guidance in this area should explicitly state that source of income laws are not preempted. As discussed above, federal ECOA protections are a floor, not a ceiling, and laws and ordinances prohibiting source of income discrimination offer greater protection and are not inconsistent with the ECOA and Regulation B. The Bureau should take a strong stand against preemption of state or local source-of-income laws and ordinances that provide greater protections for consumers.

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[24] CFPB Bulletin 2014-03, Social Security Disability Income Verification, https://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf.

[25] CFPB Bulletin 2015-02, Section 8 Housing Choice Voucher Program, https://files.consumerfinance.gov/f/201505_cfpb_bulletin-section-8-housing-choice-voucher-homeownership-program.pdf.

## X. Artificial Intelligence (AI) and Machine Learning (ML)

Financial institutions are increasingly using AI/ML models to make decisions regarding creditworthiness, marketing, and other key issues. In recent years, AI/ML models have become more sophisticated and process new kinds and greater quantities of data. While AI/ML models may offer some benefits, they raise serious risks of discrimination because they have the potential to replicate, amplify, and exacerbate discriminatory lending practices.

Humans are still behind the design of the formulas for algorithmic decision-making, and in certain contexts, algorithmic decision-making has resulted in the perpetuation of human biases.[26] The data used in these AI/ML models often reflects historical biases that may be replicated in any automated credit decision or risk assessment. Both traditional credit scores and new sources of data reflect deeply ingrained structural inequalities in employment, education, housing and economic opportunity. Learning algorithms, processing large volumes of information, will likely pick up subtle but statistically significant patterns that correlate with race and other protected characteristics and replicate existing bias.[27] Serious concerns have arisen regarding the accuracy, relevance and predictability of the data sources used in these models and its potential to worsen existing disparities. As a result, use of AI/ML models by creditors and others to assess risk or creditworthiness may cause a disparate impact on protected classes due to existing societal disparities resulting from historic and continuing discrimination and exclusion.[28] Seemingly neutral variables when used alone or in combination can correlate with race, ethnicity and other prohibited factors.

Algorithmic models are often proprietary and closely guarded by the businesses that develop them and the creditors that rely on them for decision-making. Creditors that use complex, opaque algorithmic models that have a discriminatory impact on protected classes must not be shielded from liability. The Bureau must not allow the use of algorithms to become a way to avoid scrutiny for a company's credit decisions. Financial institutions should not be able to hide behind "black boxes" for their decisions to offer or deny credit, or the terms of the credit they offer. The CFPB should use its regulatory and supervisory tools to ensure that entities' sound compliance management systems include routine fair lending testing of models, including looking for and adopting less discriminatory alternatives to models that may cause disproportionate negative impacts on protected classes.

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[26] The Brookings Institute, "Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms." (May 22, 2019), available at https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/.

[27] *See* Moritz Hardt, "How Big Data is Unfair, Understanding Unintended Sources of Unfairness in Data Driven Decision Making." (Sept. 2014); Andrew Selbst, "A New HUD Rule Would Effectively Encourage Discrimination by Algorithm," Slate, (August 19, 2019).

[28] National Consumer Law Center, "Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination." (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

Financial institutions rely increasingly on models created or deployed by third parties, including models for marketing, screening, underwriting, and pricing. The CFPB should insist on equivalent testing for credit-related models developed or implemented by third parties and ensure these third-party models undergo fair lending testing as well. That testing should include: (1) transparency for entities regarding the variables and model criteria, including segmentations, optimization, and the like; and (2) disparate impact and alternatives assessments. The CFPB and OCC bulletins on third-party service provider liability emphasize that relationships with service providers do not absolve banks of responsibility for complying with consumer protection laws, including the ECOA and Regulation B.[29]

Given the many concerns surrounding algorithmic decision-making, it is important that there is ongoing examination of both the data and the algorithm to check for unintended discriminatory consequences. As an entity offering credit, the financial institution has an obligation to regularly evaluate all the data sources and algorithms it relies upon in making decisions to check for discriminatory effects and to make necessary changes if they discover discrimination is baked into the formulas they are using unless they can prove the reasons for those effects are tied to a legitimate business purpose. These obligations do not change whether they use in-house models or rely on a vendor or third-party provider. The CFPB should incorporate such examinations into their supervision processes. Disparate impact and alternative testing should rely on methodologies for assessing impact that focus on disparities in the rates of credit provided, pricing for that credit, or other measures of access across protected classes, without controls that would unnecessarily obviate the search for a less discriminatory alternative. These methodologies should also not rely on accuracy or performance metrics that could exacerbate disparities or artificially avoid the requirement to search for less discriminatory alternatives.

Robust testing for disparate impact and less discriminatory alternatives will ensure that innovation increases access to credit without unlawful discrimination. The Bureau should also compel creditors to use debiasing techniques to increase the fairness of models. Increasing use and complexity of AI/ML models require greater oversight and supervision by the CFPB and other regulators as the data, decision-making criteria, and impact become more difficult for the financial institutions - or a vigilant regulator - to see and understand. Close examination is necessary to address and prevent the perpetuation of discrimination.

[29] *See* CFPB, Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf; OCC Bull. 2013-29, Third-Party Relationships Risk Management Guidance (2013), https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html.

## XI. Adverse Action Notices

When data is used in a decision to grant or deny credit, how the data is used is governed by the ECOA. If data is obtained from a source that is not the consumer, the Fair Credit Reporting Act (FCRA) also applies. The ECOA and FCRA require creditors to provide adverse action notices to consumers. Adverse action notices are intended to provide consumers with an explanation for an unfavorable credit decision with sufficient detail to allow consumers to understand what information was used for the adverse decision and to identify potential inaccuracies in the information used to dispute errors. The notices required by the FCRA and ECOA raise one of the key issues with regards to the use of alternative models that rely on artificial intelligence or machine learning – transparency. Consumers should always be able to know, access, and understand both what information is being used in credit decisions and how it is used.

As discussed above, the Bureau must not allow the use of algorithms to become a way to avoid scrutiny. Companies should be required to provide sufficient information to the consumer about the data points that informed the decision to offer or deny credit, and the terms of the credit if offered. Users of alternative modeling techniques are still required to provide ECOA and FCRA adverse action notices, and the notices must contain sufficient information to satisfy the ECOA standard that the notice disclose the specific reasons for the action taken.[30] These legal obligations do not change because the decisions using the data involve artificial intelligence or machine learning. The key requirements for any data used for credit decisions are that it be accurate, predictive and transparent.

Currently, adverse action notices do not provide the level of specificity or clarity needed for consumers to understand credit decisions. The CFPB should insist that creditors provide more understandable and consumer-friendly reasons in adverse action notices. A key purpose of the adverse action requirements is to provide transparency into the credit underwriting process so that consumers understand what information is being used to judge their applications. The knowledge should allow consumers to take steps to correct inaccuracies in the information used and improve their chances of being approved for credit in the future. Current notices do not provide sufficient information for consumers to use these notices as intended.

The Bureau should review existing adverse action notices as part of its supervisory processes to evaluate their effectiveness, and consider further guidance to address three overlapping risks related to adverse action: First, ensure adverse action notices are actually understandable and useful for consumers. Second, ensure creditors are providing accurate adverse action notices. Third, ensure creditors are complying with basic regulatory requirements and are not attempting to evade the letter and spirit of Regulation B’s adverse action notice requirements. The CFPB should convene focus groups and conduct consumer testing to learn what types of notice are

[30] 15 USC § 1691(d).

actually useful and understandable for consumers to inform any actions it might take to make changes to the adverse action notice requirements to better meet their intended purpose.

## XII. Conclusion

The ECOA is a critical tool to protect consumers from discrimination and provide access to safe and responsible credit products on fair terms. Full and vigorous implementation and enforcement of ECOA as Congress intended is important to fight discrimination and exclusion. It is imperative that the CFPB not take any steps that make it easier for companies to escape liability for discriminatory practices or harder for victims of discrimination to seek redress. Innovation and clarity must not be used to create an escape from accountability. Any regulatory action the CFPB takes with regard to the ECOA and Regulation B must be guided by the principle of first doing no harm. The second principle is that the CFPB should employ all available tools to equitably expand access to credit and protect consumers from discrimination. If the Bureau provides some additional guidance and takes certain steps as discussed here, the ECOA and Regulation B can become a stronger and more effective tool for fighting credit discrimination and pave the way to bring more historically excluded groups into the financial mainstream and allow them to access the credit they need to build wealth for their families and businesses.

Thank you for the opportunity to comment.

Sincerely,

Americans for Financial Reform Education Fund
Affordable Homeownership Foundation, Inc.
Alaska PIRG
American Atheists
Arkansans Against Abusive Payday Lending
Arkansas Community Organizations
California Reinvestment Coalition
Center for Disability Rights
Center for NYC Neighborhoods
Centre for Homeownership & Economic Development Corporation, Inc.
Change to Win
Consumer Action
Consumer Federation of America
Credit Builders Alliance
Delaware Community Reinvestment Action Council, Inc.

Equality California
Equality North Carolina
Georgia Watch
Habitat for Humanity International
Housing Action Illinois
Human Rights Campaign
Jacksonville Area Legal Aid, Inc.
Jesuit Social Research Institute, Loyola University New Orleans
Kentucky Resources Council, Inc.
Local Initiatives Support Corporation (LISC)
NAACP
National Association for Latino Community Asset Builders
National Association of Consumer Advocates
National CAPACD- National Coalition for Asian Pacific American Community Development
National Center for Transgender Equality
National Consumer Law Center (on behalf of its low-income clients)
National Council of Asian Pacific Americans (NCAPA)
National Equality Action Team (NEAT)
National Housing Law Project
Pennsylvania Council of Churches
Prosperity Now
Public Good Law Center
Public Justice Center
RAISE Texas
SC Appleseed Legal Justice Center
Silver State Equality-Nevada
Southern Dallas Progress Community Development Corporation
Texas Appleseed
The Leadership Conference on Civil and Human Rights
THE ONE LESS FOUNDATION
United Way of Southern Cameron County
University of Iowa College of Law
VOICE-OKC