



June 1, 2020

SUBMITTED VIA WWW.REGULATIONS.GOV

Director Kathleen Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

**Re: Comments in Response to Request for Information from Taskforce
on Federal Consumer Financial Law, Docket No. CFPB-2020-0013**

Dear Director Kraninger:

The National Women's Law Center (the "Center") takes this opportunity to comment in response to the Request for Information (RFI) regarding the Taskforce on Federal Consumer Financial Law, intended to "help identify areas of consumer protection on which it should focus its research and analysis."¹ The Taskforce is charged with making recommendations "for ways to improve and strengthen Federal consumer financial laws."²

In Question Six of this RFI, the Taskforce asks, "Should the Bureau clarify its position on disparate impact theory under the Equal Credit Opportunity Act? If so, what should be the Bureau's position?"³ For reasons discussed in more detail below, the Center urges the Taskforce to *not* recommend that the Consumer Financial Protection Bureau (CFPB) clarify or otherwise change its position on disparate impact theory under the Equal Credit Opportunity Act (ECOA). The CFPB should focus on protecting consumers, engaging in outreach and education, and oversight during the COVID-19 pandemic, not engage in an unnecessary review of well-established, effective, and essential consumer protections that could result in rolling them back.

The Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone – especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

¹ Request For Information To Assist the Taskforce on Federal Consumer Financial Law, 85 Fed. Reg. 18214, 18215 (Apr. 1, 2020).

² *Id.* at 18214.

³ *Id.* at 18216.

This comment focuses on Question Six; however, the Center also urges CFPB and the Taskforce to consider the importance of fair access to credit for women and people of color in addressing the other questions posed in the comment. The Center also urges CFPB to reopen the comment period so the public has a meaningful opportunity to comment.

Fair access to credit is important to women. Especially because women, on average, are paid less than men, discriminatory lending policies and practices lead to lost economic opportunity for individual consumers and contribute to the gender and racial wealth divide that plagues this nation. Median wealth for single men age 18 to 64 (“working-age”) was \$10,150 in 2013—more than three times the median wealth of \$3,210 for single working-age women.⁴ The gaps are even greater for women of color:

- In 2016, the median wealth of white households was almost 10 times greater than that of Black households (\$171,000 vs \$17,600) and over eight times greater than that of Latinx households (\$171,000 vs \$20,700).⁵
- White households living near the poverty line typically have about \$18,000 in wealth, while Black households in similar economic conditions typically have a median wealth close to zero.⁶
- Single women of color face a staggering gap in wealth because of the compounded effects of race and gender—the median net wealth of single, working-age, white, non-Hispanic men was \$28,900 in 2013, compared to \$100 for single, working-age Latinx women and \$200 for single, working-age Black women.⁷

One contributor to the gender and racial wealth divides are gaps in homeownership, for which access to credit is essential. In 2007, 50 percent of single white, non-Hispanic men owned homes; whereas only 33 percent of single Black women and 28 percent of single Latinx women owned homes.⁸ Leading up to the Great Recession, women of color faced a higher chance of being steered into subprime mortgages, and many lost their homes and have not yet recovered. Moreover, households of color saw the values of their homes decrease the most during the Great Recession,⁹ and the values of men’s

⁴ See, e.g., MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH: INSIGHTS FOR GRANTMAKERS 5 (2015), available at https://assetfunders.org/wp-content/uploads/Women_Wealth_-_Insights_Grantmakers_brief_15.pdf.

⁵ JESSE BRICKER ET AL., FED. RESERVE, CHANGES IN U.S. FINANCES FROM 2013 TO 2016: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES, (2017), available at <https://www.federalreserve.gov/publications/files/scf17.pdf>.

⁶ WILLIAM DARITY, JR. ET AL., SAMUEL DUBOIS COOK CTR. ON SOCIAL EQUITY, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Apr. 2018), available at https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT_.pdf.

⁷ CHANG, *supra* note 4, at 6.

⁸ MARIKO CHANG, LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA’S FUTURE, INSIGHT CTR. FOR COMMUNITY ECON. DEV., 1, 12 tbl.4 (2010), available at https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCCED_2010.pdf. Fifty-seven percent of single white women owned homes. *Id.*

⁹ SARAH BURD-SHARPS & REBECCA RASCH, IMPACT OF THE U.S. HOUSING CRISIS ON THE RACIAL WEALTH GAP ACROSS GENERATIONS, SOC. SCI. RES. COUNCIL, 1, 4 (2015), available at https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf.

homes tend to be worth more, and appreciate more, compared to women's homes.¹⁰ (The value of a home impacts the owner's ability to access a second mortgage or home equity line of credit.) Single women, especially women of color, could be expected to be even less likely to own homes, or have homes that have decreased in value, as a result of the current economic downturn.

In addition, women business owners face disparities in their access to credit. Women business owners seeking loans in 2019 received, on average, nearly \$30,000 less than the average loan for men business owners (\$40,513 compared to \$69,596).¹¹ In the context of the current COVID-19 crisis, it has been reported that many women-owned and minority-owned businesses have been unable to access loans from the Paycheck Protection Program.¹² Fair access to credit through enforcement of the ECOA's discrimination prohibitions based on sex, race, color, and national origin are clearly more important than ever.

Most consumers struggle to navigate the financial marketplace in the United States, but the financial marketplace has historically underserved, and sometimes even excluded, women, people of color, and other communities. Before the ECOA was passed in 1974, lenders frequently denied credit opportunities to women, especially to single women applicants and married women applying for a separate account from their spouse.¹³ Lenders who did approve credit for women often subjected them to blatant and egregious discrimination – for example, requiring women to have higher incomes and more consistent employment than men, refusing to consider sources of income such as child support and alimony, considering married employed women to be solely dependent on their husbands' incomes (even if they earned more than their husbands did), requiring married women to have their husband's formal approval for a loan, asking invasive questions about a woman applicant's birth control practices, and more.¹⁴ Discriminatory practices like these led Congress in 1974 to pass the ECOA, which

¹⁰ See AMY CASTRO BAKER, FOLOSADÉ FAMAKINWA & STACIA MARTIN-WEST, ON SHAKY GROUND, ASSET FUNDERS NETWORK 1, 4 (2019), <https://assetfunders.org/wp-content/uploads/AFN-Shaky-Ground-Brief-2018.pdf>.

¹¹ Women-Owned Business Study 2020: Credit Scores and Revenue of Women-Owned Businesses Rose, But Revenue Gap Grew in 2019, According to Biz2Credit's Annual Study (Mar. 13, 2020), <https://www.biz2credit.com/research-reports/women-owned-business-study-2020>.

¹² MEGAN CERULLO, UP TO 90% OF MINORITY AND WOMEN OWNERS SHUT OUT OF PAYCHECK PROTECTION PROGRAM, EXPERTS FEAR, CBS NEWS (Apr. 22, 2020), <https://www.cbsnews.com/news/women-minority-business-owners-paycheck-protection-program-loans/>; COURTNEY CONNLEY, SHUT OUT OF PPP LOANS, STRUGGLING WITH NO CHILD CARE: HOW COVID-19 IS IMPACTING WOMEN-OWNED SMALL BUSINESSES, CNBC (May 19, 2020), <https://www.cnbc.com/2020/05/07/how-covid-19-is-impacting-women-owned-small-businesses.html>; STEPHEN BABCOCK, PPP LOANS AREN'T REACHING WOMEN AND MINORITY-OWNED BUSINESSES. BALTIMORE ENTREPRENEURS TELL THEIR STORIES, TECHNICAL.LY (May 12, 2020), <https://technical.ly/baltimore/2020/05/12/sole-proprietors-women-minority-owned-businesses-shut-out-federal-aid-entrepreneurs-ppp-loans/>.

¹³ See, e.g., ANDREW A. CUOMO, EQUAL CREDIT OPPORTUNITY ACT: HOW MUCH CAN WOMEN EXPECT, 8 J. LEGISLATION 121, 124-125 (1981).

¹⁴ *Id.*; Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, 93rd Cong., 1st Sess., 17 (1973).

declared that “[i]t shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.”¹⁵

Members of Congress also debated whether they should amend the ECOA to include, for example, protections against discrimination based on race, color, and national origin. At the time, the Civil Rights Act of 1866 and the Fair Housing Act protected against discrimination on these grounds in some credit transactions. However, the Civil Rights Act of 1866 required proof of intentional discrimination,¹⁶ and under the Fair Housing Act, the government could only bring actions related to housing financing and not other consumer credit areas.¹⁷ Because the scope of these statutes was insufficient to eliminate credit discrimination, Congress expanded the ECOA in 1976 to provide protections against discrimination based on race, color, national origin, age, source of income from public assistance, and religion.¹⁸

Disparate impact liability applies when a policy or practice has a disproportionately harmful effect on protected classes – for example, on women, people of color, or immigrants. Legislative history demonstrates that Congress intended to establish disparate impact liability under the ECOA. A Senate report accompanying passage of the 1976 ECOA amendment states, “[I]n determining the existence of discrimination... courts or agencies are free to look at **the effects of a creditor’s practices** as well as the creditor’s motives or conduct in individual transactions.”¹⁹

Thanks in part to the ECOA, lending practices have changed since 1974, with fewer egregious examples of sex discrimination like the ones described above, or racially discriminatory lending policies like redlining. But discrimination continues, though it may be harder to detect. Policies and practices with a discriminatory effect include discriminatory mark-ups in auto lending,²⁰ minimum loan and minimum value amount

¹⁵ Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1500 § 701(a) (codified as amended at 15 U.S.C. § 1691 (2018)).

¹⁶ DUBRAVKA RITTER, DO WE STILL NEED THE EQUAL CREDIT OPPORTUNITY ACT?, FED. RESERVE BANK OF PHILADELPHIA, 8-9 (2012), *available at* <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2012/D-2012-equal-credit-opportunity-act.pdf>.

¹⁷ *Id.* at 8.

¹⁸ Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 § 2 (codified as amended at 15 U.S.C. § 1691 (2018)).

¹⁹ See, e.g., S. Rep. No. 94-589, 94th Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 403, 406 (emphasis added).

²⁰ See, e.g., NAT’L CONSUMER LAW CTR., Case Index – Closed Cases: Auto Finance Discrimination <https://www.nclc.org/litigation/case-index-closed-cases.html> (last accessed June 1, 2020) (discriminatory effect on Black and Latinx customers).

policies,²¹ maternity leave policies,²² and targeting for subprime mortgages.²³ These policies may not appear discriminatory to the average credit applicant who does not have access to information about how the policy affects similarly-situated consumers who do not share their protected characteristics. Testing and other investigations by fair lending groups or a regulatory fair lending examination, however, can reveal discriminatory effects.²⁴ That is why the availability of disparate impact liability under the ECOA is so important.

Full enforcement of the ECOA is necessary to tackle systemic barriers women, people of color, and other protected classes face in accessing credit. Research from the Urban Institute revealed that more reasonable lending standards would have led to 6.3 million more mortgages from 2009 to 2015.²⁵ Disparate impact liability under the ECOA is thus a critical tool in protecting against discrimination in lending. Moreover, disparate impact liability is key to protecting civil rights in the context of employment, housing, education, health care, and more.

In questioning whether CFPB should “clarify its position on disparate impact theory under the Equal Credit Opportunity Act”²⁶ and then providing the opportunity for recommending a different position than the CFPB’s current one, the Taskforce seems to be effectuating CFPB’s former Acting Director Mick Mulvaney’s May 2018 statement indicating CFPB would reexamine the use of disparate impact under the ECOA.²⁷

²¹ See, e.g., *Briceno v. United Guaranty Residential Insurance Co.*, No. 3:89 CV 7325 (N.D. Ohio) (discriminatory effect on people of color); JOVAN BURTON, PARTNERSHIP FOR HOUSING AFFORDABILITY, SENIOR HOUSING STUDY (2018), *available at* <https://pharva.com/wp-content/uploads/2018-Senior-Housing-Study.pdf> (discriminatory effect based on age).

²² See, e.g., *Williams v. Countrywide Home Loans, Inc.*, No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002) (filed under an Ohio statute with an anti-discrimination provision similar to the ECOA provisions). See also ALLISON TAIT, CTR. FOR WORKLIFE LAW, UC HASTINGS COLLEGE OF THE LAW, DISCRIMINATION IN MORTGAGE LENDING ON THE BASIS OF PREGNANCY AND MATERNITY LEAVE, (2010), *available at* <http://worklifelaw.org/publications/WLLMortgageDiscriminationBrief.pdf>.

²³ ALLEN J. FISHBEIN & PATRICK WOODALL, WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET, CONSUMER FED’N OF AM. (Dec. 2006), *available at* <https://consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>; WOODSTOCK INST., HER LONGER ROAD HOME: DISPARITIES IN MORTGAGE LENDING TO WOMEN IN THE CHICAGO REGION (Jun. 2015), *available at* https://woodstockinst.org/wp-content/uploads/2015/06/140619_longerroadhome_cowan_factsheet.pdf; NIKITRA S. BAILEY, PREDATORY LENDING: THE NEW FACE OF ECONOMIC INJUSTICE, 32 AM. BAR ASS’N HUMAN RIGHTS MAGAZINE (2005), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol3_2_2005/summer2005/hr_summer05_predator/.

²⁴ See, e.g., LISA RICE & ERICH SCHWARTZ, JR., NAT’L FAIR HOUSING ALLIANCE, DISCRIMINATION WHEN BUYING A CAR: HOW THE COLOR OF YOUR SKIN CAN AFFECT YOUR CAR-SHOPPING EXPERIENCE (2018), *available at* <https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

²⁵ LAURIE GOODMAN, URBAN INST., OVERLY TIGHT CREDIT KILLED 1.1 MILLION MORTGAGES IN 2015 (Nov. 20, 2016), <https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015>.

²⁶ Request For Information To Assist the Taskforce on Federal Consumer Financial Law, 85 Fed. Reg. at 18216.

²⁷ CONSUMER FIN. PROTECTION BUREAU, Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57 (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57>.

There is no legal basis for CFPB to do so. As described above, the legislative history conclusively demonstrates that Congress intended the use of disparate impact liability under the ECOA. Federal courts have consistently recognized disparate impact claims under the ECOA for four decades.²⁸ As recently as 2015, the Supreme Court ratified disparate impact liability under the Fair Housing Act.²⁹ The Court's ruling in this case affirmed the use of disparate impact liability under the Fair Housing Act and thus other civil rights statutes like the ECOA – contrary to former CFPB Acting Director Mick Mulvaney's suggestion that the decision warranted a review of the use of disparate impact under the ECOA.³⁰ Consequently, the Center urges the Taskforce *not* to recommend that the CFPB "clarify" its position on disparate impact theory under the ECOA. If CFPB were to reexamine its position, there would be no grounds for it to do anything other than reaffirm the existing standard. Indeed, if CFPB were to take any action that undermines the full availability and protection of disparate impact liability under the ECOA, that action would be contrary to the ECOA's mandate and judicial interpretation.

It would be particularly inappropriate for the CFPB to reconsider its position on disparate impact liability in the midst of the economic recession triggered by the COVID-19 pandemic. The economic pain that people are experiencing in this moment is staggering. Women of color, who faced significant economic precarity before the public health emergency, are especially devastated by the COVID-19 crisis both because they face health disparities and because they are overrepresented in low-paid jobs like retail, restaurant, cleaning, and caregiving that are being lost in high numbers or designated as essential without commensurate protections and pay. CFPB should honor people on the front lines of this pandemic by maintaining and fully enforcing the current standard for disparate impact liability under the ECOA,³¹ not questioning its position on this critical civil rights tool.

CFPB has played a critical role in uncovering discriminatory policies and practices and providing remedies in the form of requiring institutions to change their policies and practices so they are fair and non-discriminatory – providing nearly \$12 billion in total fiscal relief to about 29 million borrowers in its first six years of operation.³² The Center urges the Taskforce not to undermine the CFPB's history or its own mandate to find

²⁸ See, e.g., *Cherry v. Amoco Oil Co.*, 490 F.Supp. 1026 (N.D. Ga. 1980); *Golden v. City of Columbus*, 404 F.3d 950, 963 (6th Cir. 2005); *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), vacated and remanded on other grounds, 492 U.S. 901 (1989); *Barrett v. H & R Block, Inc.*, 652 F.Supp. 2d 104, 108 (D. Mass. 2009); *Guerra v. BMAC LLC*, 2:08-CV-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); *Dismuke v. Connor*, 05-CV-1003, 2007 WL 4463567 (W.D. Ark. Dec. 14, 2007); *Powell v. Am. Gen. Fin., Inc.*, 310 F.Supp. 2d 481, 487 (N.D.N.Y. 2004); *Wide ex rel. Estate of Wilson v. Union Acceptance Corp.*, IP 02-0104-C-M/S, 2002 WL 31730920 (S.D. Ind. Nov. 19, 2002); *Faulkner v. Glickman*, 172 F.Supp.2d 732, 737 (D. Md. 2001); *Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama*, CA 96-0922-MJ-C, 1997 WL 33644511 (S.D. Ala. July 31, 1997).

²⁹ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015).

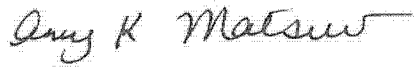
³⁰ CONSUMER FIN. PROTECTION BUREAU, *supra* note 27.

³¹ CONSUMER FIN. PROTECTION BUREAU, CFPB BULL. NO. 2012-04, LENDING DISCRIMINATION (Apr. 18, 2012), available at https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

³² CONSUMER FIN. PROTECTION BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (July 2017), available at https://files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf.

ways “to strengthen Federal consumer protection laws” by recommending that the CFPB clarify/change its position on disparate impact liability under the ECOA.

Sincerely,

Handwritten signature of Amy K. Matsui in black ink.

Amy K. Matsui
Senior Counsel & Director of Income Security
National Women’s Law Center

Handwritten signature of Sarah Hassmer in black ink.

Sarah Hassmer
Senior Counsel for Income Security
National Women’s Law Center