## Equal Credit Opportunity (#60-61, 76, 121)

The history of consumer credit and lending is fraught with discrimination on the basis of immutable human characteristics that have no place in the evaluation of creditworthiness. In the mid-1970s, Congress enacted and amended the Equal Credit Opportunity Act (ECOA)[1] to outlaw discrimination on nine prohibited bases. Per Regulation B, which implements the ECOA, they are "race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act."[2] The ECOA was a key victory in the push for civil rights in the finance sphere, along with the Fair Housing Act, the Community Reinvestment Act, and the Home Mortgage Disclosure Act.

However, the main antidiscrimination rules in Regulation B have remained largely unchanged since 1977, and what concerned Regulation B's drafters enough to be codified over forty years ago may be no longer relevant and may have unintended consequences. Initially conceived as a law to protect women from sex and marital status discrimination, the ECOA, in conjunction with other legal and social movements toward equality, has been largely successful in significantly reducing disparities in credit access between men and women. Now, as sex roles are destabilized and activities traditionally associated with being a woman are destigmatized, some of the specific requirements, prohibitions, and constraints laid out in the ECOA may be harmful or unnecessary.

One such precaution that was useful in preventing discrimination at the time but has since become both obsolete and a hindrance to financial inclusion is the prohibition on considering whether an applicant has a telephone listing in their own name. Initially the ban was necessary because of the prevalence of husband-registered telephone lines in married households, but now mobile numbers are typically associated with an individual rather than a household. Since 2016, a majority of households have only cellphone service.[3] The ban may restrict a creditor's ability to consider alternative data that would benefit the consumer, such as the use of automated records of wireless phone numbers and the owner's name. As the utility of alternative data as a vehicle for economic inclusion continues to grow, we must be cognizant of the stifling effects of overly-prescriptive regulations that have not been modernized to reflect the world we live in today or futureproofed with a principles-based approach to adapt to the world of tomorrow.

[redacted]

In a similar vein, the Bureau should remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use. This was an important protection in 1977, when the credit history that married women helped build was typically listed only under their husband's name. This problem was compounded if the woman was widowed or divorced, because they often lost all access to the credit history at the time they most needed it. The risk of harm to an applicant of being penalized by a

[1] 15 U.S.C. § 1691(a) (2018).
[2] 12 CFR §1002.1 (b)
[3] National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July – December 2016 (May 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf,

| | |
|---|---|
| *Alex Nongard* | *10/26/2020* |

spouse's poor credit or bankruptcy not involving the applicant and the risk to creditors of attributing a good credit history to those who have not earned it, such as minor children and strangers, ~~is~~ likely outweigh~~sed by~~ the benefits, because there is little evidence that married women now have difficulty in establishing credit in their own names. The Federal Reserve Board found in a report published in 2007 that credit scores vary little by sex, which strongly suggests that women and men have approximately the same access to credit.[4] It would be difficult for women to have the same average credit score as men if they experienced a meaningful difficulty in obtaining credit.

The requirement in 12 CFR 1002.5(d)-(2) to present a disclosure before asking about income from child support and similar sources is outdated and cumbersome, causing unnecessary expense in processing applications for a protection that is no longer relevant for many women and parents. Choosing to provide income from child support does not necessarily reveal the applicant's marital status, because a child support payor and recipient may never have been married to each other, and the recipient, at the time of application, could have any marital status. Additionally, the ban on questions related to childbearing or childrearing plans should have an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant.

Although civil rights legislation such as the ECOA have made great progress in advancing access to credit for many disadvantaged groups, not all vulnerable groups are explicitly protected. The ECOA does not include disability as a prohibited basis group, despite its inclusion in civil rights legislation regarding employment and in other credit granting such as the Fair Housing Act. The Americans with Disabilities Act (ADA) provides protections against unlawful discrimination on the basis of disability, but there is no entity examining financial institutions for compliance with it in any systematic way like is done with other prohibited basis groups. There is very little literature on the prevalence or severity of discrimination on the basis of disability in consumer credit markets, but that does not mean that it does not exist – people with disabilities have historically faced discrimination in many facets of life.

The Bureau should conduct research on the need for amending the ECOA to include disability as a prohibited basis group, and then potentially recommend its inclusion to Congress. Conducting this research first will allow us to understand the prevalence of discrimination, and follow-up research after including disability status will allow us to measure the effect of the law, something that was not done at the inception of the ECOA for other prohibited basis groups. Including disability as a prohibited basis will bring the ECOA in line with the Fair Housing Act, providing uniform protections to protected classes across the credit sphere. Research should look for holes in the ADA that Regulation B should fill, looking at issues around machine readability and other concerns raised by rapidly developing financial technology in addition to potential discrimination in underwriting and pricing.

One of the cornerstones of the Bureau's fair lending supervision and enforcement mission has been the evaluation of lenders using the standard of disparate impact to identify illegal disparities in outcomes for different protected groups. In 2015, the Supreme Court issued a ruling in *Texas Department of Housing and Community Affairs vs. Inclusive Communities* ("*Inclusive Communities*") on the validity of disparate impact under the Fair Housing Act. The Supreme Court held that it is cognizable,

[redacted]

[redacted]

**Commented [NA(4]:** This was text from the original sub-recommendation that I moved into the preamble.

**Commented [NJ5R4]:** This is probably the weakest example of a harmful or unnecessary provision. I might prefer to discuss it farther down.

**Commented [NA(6R4]:** I moved it from the top to the bottom.

**Commented [NA(7]:** I sort of tacked this one on. You may want to provide additional/different/separate justification for its inclusion here.

**Commented [NJ8]:** Good point.

[4] The Federal Reserve Board, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit (August 2007), [ HYPERLINK "https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/performance.htm" ].

| *Alex Nongard* | *10/26/2020* |
|---|---|

but that claims using disparate impact place the burden on the plaintiff to establish that the defendant's policies cause the disparities in question.[5] The Department of Housing and Urban Development (HUD) has subsequently issued a final rule reinterpreting disparate impact significantly raising the bar for plaintiffs to bring a suit for housing discrimination, though this rule has been stayed by a federal district court. [6]

HUD's rule and the *Inclusive Communities* ruling are specifically related to the Fair Housing Act but raise broader concerns about the use of disparate impact in other applications of fair lending including ECOA actions by the Bureau. Perhaps anticipating these concerns and potential future challenges, in July of 2020 the Bureau published a Request for Information on several aspects of Regulation B including whether the Bureau should clarify its use of Disparate Impact testing for fair lending liability.[7] The Bureau should adopt or consider adopting an interpretive rule on dDisparate iImpact that minimizes the risk of concluding discrimination has occurred when the facts do not meet the *Inclusive Communities* standard, or failing to pursue discrimination that does meet the standard, due to a lack of certainty in how to apply it.

**Commented [NA(9]:** This happened Monday 10/28: https://news.bloomberglaw.com/banking-law/huds-anti-discrimination-rule-rewrite-put-on-hold

**Commented [NJ10]:** In light of the stay, I wonder if the case for adopting an interpretive rule has been weakened.

[5] *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, 576 U.S. (2015)
[6] Mass. Fair Hous. Ctr. Inc. V. HUD (D. Mass., No. 1:20-cv-11765, preliminary injunction, Oct. 25, 2020).
[7] Bureau of Consumer Financial Protection, *Request for Information on the Equal Credit Opportunity Act and Regulation B*, CFPB, July 28, 2020, at 6, [ HYPERLINK "https://files.consumerfinance.gov/f/documents/cfpb_rfi_equal-credit-opportunity-act-regulation-b.pdf" ]

| | |
|---|---|
| *Alex Nongard* | *10/26/2020* |

**Recommendations:**

***60. The Bureau should modernize Regulation B in the following specific ways:***

- ***The Bureau should delete the required disclosure before asking about income from child support and similar sources in 12 CFR 1002.5(d) (2).***
- ***The Bureau should eliminate the ban on questions about plans for childbearing in 12 CFR 1002.5(d)(3) or should provide for an exception for credit intended to finance fertility treatments or other services for which childbearing plans are directly relevant.***
- ***The Bureau should eliminate the prohibition on considering whether an applicant has a telephone listing in the applicant's name.***
- ***The Bureau should remove the requirement that creditor must consider the credit history of accounts in the name of a spouse for which the applicant is not contractually liable but is authorized to use.***
- ***The Bureau should revise the Commentary to Paragraph 7(d)(1) to allow an intent to apply jointly to be determined by the totality of the circumstances, including the completion of information designated for a "joint applicant" on an application and a signature on a line for a "joint applicant."***

***61. The Bureau should adopt or consider adopting an interpretive rule on Disparate Impact that minimizes both false-positive and false-negative error in light of the Supreme Court's decision in Inclusive Communities.***

***121. Bureau should conduct research on the need for amending the ECOA to include disability as a prohibited basis group and then potentially recommend its inclusion to Congress.***

| TF Member acknowledgement | Todd: | Jean: | Howard: | Bill: | Tom: |
|---|---|---|---|---|---|
| *Please type "Approve," "Conditionally approve" (subject to specific edits), "Reject," or specific commentary (you may also use the Comment feature)* | | | | | |

| | |
|---|---|
| *Alex Nongard* | *10/26/2020* |

**Commented [NJ11]:** Add discussion to preamble.

**Commented [NA(12R11]:** So, I've read the Commentary to 7(d)(1) and I don't really understand it enough to write a discussion of it or a justification. I don't understand how what your proposing is different from what already exists: "signatures or initials on a credit application affirming applicants' intent to apply for joint credit may be used to establish intent to apply for joint credit." Yours just seems like a more specific case of the former. I also don't know how that fits into the larger framing of this as reforms to Reg B to get rid of burdensome requirements that have outlived their usefulness in advancing a social goal.

Can you either explain it to me, or add the discussion yourself?

[ HYPERLINK "https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/7/" \l "d" ]