

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2020-0026]

Request for Information on the Equal Credit Opportunity Act and Regulation B

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for information.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) seeks comments and information 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.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit responsive information and other comments, identified by Docket No. CFPB-2020-0026, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* 2020-RFI-ECOA@cfpb.gov. Include Docket No. CFPB-2020-0026 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier.

- *Instructions:* The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-9169.

All submissions in response to this request for information (RFI), including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Please do not include in your submissions sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, or other information that you would not ordinarily make public, such as trade secrets or confidential commercial information. Submissions will not be edited to remove any identifying or contact information, or other information that you would not ordinarily make public. If you wish to submit trade secret or confidential commercial information, please contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section below. Information submitted to the Bureau will be treated in accordance with the Bureau's Rule on the Disclosure of Records and Information, 12 CFR part 1070 *et seq.*

FOR FURTHER INFORMATION CONTACT: For general inquiries and submission process questions, please call Pavy Bacon, Senior Counsel, Office of Regulations at 202-435-7700. If

you require this document in an alternative electronic format, please contact

CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹ granted primary authority to the Bureau to supervise and enforce compliance with ECOA and its implementing regulation, Regulation B, for entities within Bureau’s jurisdiction and to issue regulations and guidance to interpret ECOA. The Dodd-Frank Act requires the Bureau to report on its efforts “to fulfill the fair lending mission of the Bureau,”² and authorizes it to “engage in . . . requests for information, [which] includes matters relating to fair lending.”³

The Dodd-Frank Act clearly states the Bureau’s purpose as follows: “to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that *all* consumers have access to . . . markets for consumer financial products and services are fair, transparent, and competitive.”⁴ The Bureau’s mission includes both protecting consumers from unlawful discrimination and fostering innovation. Specifically, the Dodd-Frank Act makes clear that “[t]he Bureau is authorized to exercise its authorities under [F]ederal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services . . . (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination . . . and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”⁵ This RFI is

¹ Public Law 111-203, 124 Stat. 1376 (2010).

² 12 U.S.C. 5496(c)(8).

³ 12 U.S.C. 5562(a)(2).

⁴ 12 U.S.C. 5511(a) (emphasis added).

⁵ 12 U.S.C. 5511(b).

one method by which the Bureau is continuing to explore ways to ensure nondiscriminatory access to credit as well as cutting-edge issues at the intersection of fair lending and innovation, including how innovation can increase access to credit for all consumers—and especially unbanked and underbanked consumers (referred to as “credit invisibles” in a May 2015 Bureau research report⁶)—without unlawful discrimination.

The Equal Credit Opportunity Act (ECOA),⁷ which is implemented by Regulation B, applies to creditors. The statute makes it unlawful for “any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant’s income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act].”⁸ The Bureau has recognized the following methods of proving lending discrimination: overt evidence of discrimination, evidence of disparate treatment, and evidence of disparate impact.⁹ ECOA prohibits discrimination “with respect to any aspect of a credit

⁶ See The CFPB Office of Research, *Data Point: Credit Invisibles* (May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

⁷ 15 U.S.C. 1691 *et seq.*

⁸ 15 U.S.C. 1691(a).

⁹ See Comment 4(a)-1 (“Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate”); Comment 6(a)-2 (“The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”); Bureau of Consumer Fin. Prot., *Equal Credit Opportunity Act (ECOA) Examination Procedures* (Oct. 30, 2015), https://files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf; see also CFPB Bulletin 2012-04 (Fair Lending), *Lending Discrimination* (Apr. 18, 2012), https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf (concurring with Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending*, 59 FR 18266 (Apr. 15, 1994) (noting that “courts have recognized three methods of proof of lending discrimination under the ECOA . . . : [(1)] ‘Overt evidence of discrimination,’ when a lender blatantly discriminates on a prohibited basis; [(2)] Evidence of ‘disparate treatment,’ when a lender treats applicants differently based on one of the prohibited factors; and [(3)] Evidence of ‘disparate impact,’ when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.”).

transaction.”¹⁰ As such, Regulation B covers creditor activities before, during, and after the extension of credit.¹¹ Creditors are also prohibited from making any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage, on a prohibited basis, a reasonable person from making or pursuing an application.¹² A creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor.¹³ Creditors may also meet special social needs and benefit economically disadvantaged groups through the Special Purpose Credit Program provisions of ECOA and Regulation B.¹⁴

II. Request for Information

The Bureau seeks comments on the actions it can take or should consider taking 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 ECOA and Regulation B. The information provided will help the Bureau identify how it can continue to create a regulatory environment that expands access to credit, help to ensure that all consumers and communities are protected from discrimination in all aspects of a credit transaction, and develop approaches to address regulatory compliance challenges. The Bureau encourages comments from all interested members of the public. The Bureau anticipates that the responding public may include (among others) financial entities or institutions and their service providers; trade associations that

¹⁰ 15 U.S.C. 1691(a).

¹¹ 12 CFR 1002.4(a). *See also* Comment 4(a)-1 (providing that “1002.4(a) covers all dealings, without exception, between an applicant and a creditor, whether or not addressed by other provisions of the regulation . . . for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts”).

¹² 12 CFR 1002.4(b).

¹³ Comment 4(b)-2.

¹⁴ See 12 CFR 1002.8.

represent these entities; individual consumers; fair lending, civil rights, consumer and community advocates; Federal, Tribal, State, and local regulators and agencies; researchers or members of academia; or attorneys that represent any of the above. The Bureau encourages commenters to share their views on all or a subset of the questions included in this RFI. These questions are not meant to be exhaustive; the Bureau welcomes additional relevant comments on these important topics. For answers to specific questions, please note the number associated with any question to which you are responding at the top of each response.

In particular, the Bureau requests commenters to respond to the following questions:

1. **Disparate Impact:** Regulation B provides that ECOA may prohibit creditor practices that have a disparate impact—Regulation B specifically states that “Congress intended an ‘effects test’ concept . . . to be applicable to a creditor’s determination of creditworthiness.”¹⁵ The official interpretation to Regulation B states that ECOA/Regulation B “may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.”¹⁶ The official interpretation also provides an example of how to evaluate a creditor practice for disparate impact.¹⁷ 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)?

¹⁵ 12 CFR 1002.6(a).

¹⁶ Comment 6(a)-2.

¹⁷ *Id.*

2. Limited English Proficiency: The Bureau seeks to foster greater access to credit markets, including to consumers who face obstacles because they are Limited English Proficient (LEP). The Bureau did some work on the challenges LEP consumers encounter in 2016 and 2017.¹⁸ In its continued outreach on these topics, the Bureau has heard from a variety of stakeholders that institutions want to serve LEP consumers but face regulatory uncertainties and perceived fair lending risks in serving LEP consumers because the language spoken by a consumer may correlate with prohibited bases under ECOA, including national origin. Some financial institutions may decide against providing any LEP products or services due to these regulatory uncertainties, while others may vary how and when they offer products and services in non-English languages.

The Bureau seeks to understand the challenges specific to serving LEP consumers and to find ways to encourage creditors to increase assistance to LEP consumers. 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? If so, in what way(s)?

3. Special Purpose Credit Programs: The Special Purpose Credit Program (SPCP) provisions of ECOA/Regulation B provide targeted means by which creditors, under certain circumstances, can meet “special social needs” and “benefit economically disadvantaged groups.”¹⁹ The official interpretation to Regulation B states that “a for-profit organization

¹⁸ See Bureau of Consumer Fin. Prot., *Financial education programs serving immigrant populations* (July 2016), https://files.consumerfinance.gov/f/documents/20160714_cfpb_report_fined_immigrant_May_20_2016_FINAL.pdf; Bureau of Consumer Fin. Prot., *Spotlight on serving limited English proficient consumers* (Nov. 2017), https://files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf; Bureau of Consumer Fin. Prot., *Supervisory Highlights* (Oct. 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13_Final_10.31.16.pdf.

¹⁹ 12 CFR 1002.8(a).

must determine that the program will benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms. This determination can be based on a broad analysis using the organization’s own research or data from outside sources, including governmental reports and studies.”²⁰ ECOA and Regulation B also allow for special purpose credit offered under “[a]ny credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons.”²¹ Through stakeholder engagement and its supervisory activity, the Bureau has learned that stakeholders are interested in additional guidance on SPCPs that may be helpful to them in developing SPCPs while ensuring regulatory compliance. In its Summer 2016 *Supervisory Highlights*, the Bureau set forth observations regarding credit decisions made pursuant to the terms of programs that for-profit institutions have described as SPCPs.²²

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

4. **Affirmative Advertising to Disadvantaged Groups:** The official interpretation to Regulation B states that “[a] creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor.”²³ The Bureau understands from its stakeholder

²⁰ Comment 8(a)-5.

²¹ Comments 9(b)(2)-4, 5.

²² See, e.g., Bureau of Consumer Fin. Prot., *Supervisory Highlights* (June 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.

²³ Comment 4(b)-2.

engagement that creditors are interested in additional guidance that may be helpful to them in developing such marketing campaigns while ensuring regulatory compliance. Should the Bureau provide clarity under ECOA and/or Regulation B to further encourage creditors to use such affirmative advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?

5. **Small Business Lending:** As the Bureau noted in its May 2017 white paper on small business lending, small businesses play a key role in fostering community development and fueling economic growth both nationally and in their local communities.²⁴ Women-owned and minority-owned small businesses play a particularly important role in supporting their local communities.²⁵ Access to credit is a crucial component of the success of these businesses. ECOA and Regulation B protect business owners from discrimination because of race, color, national origin, sex, and other protected characteristics.²⁶ 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?
6. **Sexual Orientation and Gender Identity Discrimination:** On June 15, 2020, in *Bostock v. Clayton County*, the Supreme Court ruled that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) encompasses sexual orientation discrimination and gender identity discrimination.²⁷ The majority opinion in *Bostock* interpreted Title VII and did not address ECOA. Should the Supreme Court’s decision in

²⁴ Bureau of Consumer Fin. Prot., *Key dimensions of the small business lending landscape* (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf.

²⁵ *Id.*

²⁶ 15 U.S.C. 1691(a); 12 CFR 1002.4(a).

²⁷ 590 U.S. ___, 140 S. Ct. 1731 (2020) (*Bostock*).

Bostock affect how the Bureau interprets ECOA’s prohibition of discrimination on the basis of sex? If so, in what way(s)?

7. **Scope of Federal Preemption of State Law:** Regulation B alters, affects, or preempts only those state laws that are inconsistent with ECOA and/or Regulation B and then only to the extent of the inconsistency.²⁸ A state law is not inconsistent with ECOA or Regulation B if it is more protective of an applicant.²⁹ A creditor, state, or other interested party may request that the Bureau determine whether a state law is inconsistent with the requirements of ECOA and/or Regulation B.³⁰ 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?
8. **Public Assistance Income:** ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program.”³¹ ECOA provides that making an inquiry whether the applicant’s income derives from any public assistance program does not constitute discrimination “if such inquiry is for the purpose of determining the amount and probable continuance of income levels [among other things].”³² The official interpretation to Regulation B further provides that “[i]n considering the separate components of an applicant’s income, the creditor may not automatically discount

²⁸ 12 CFR 1002.11(a).

²⁹ *Id.*

³⁰ 12 CFR 1002.11(b)(2).

³¹ 15 U.S.C. 1691(a)(2).

³² 15 U.S.C. 1691(b)(2); *see also* 12 CFR 1002.6(b)(5) (“[A] creditor may consider the amount and probable continuance of any income in evaluating an applicant’s creditworthiness . . .”).

or exclude from consideration any protected income. Any discounting or exclusion must be based on the applicant’s actual circumstances.”³³ The Bureau previously issued guidance (through a May 2015 bulletin on the Section 8 Housing Choice Voucher Homeownership Program³⁴ and a November 2014 bulletin on Social Security Disability Income Verification³⁵) to help creditors comply with these and other regulatory provisions. The Bureau understands that stakeholders continue to have questions about these provisions under ECOA and/or Regulation B.

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?

9. Artificial Intelligence and Machine Learning: As the Bureau noted in its annual fair lending report to Congress dated April 30, 2020³⁶ and a blog post dated July 7, 2020,³⁷ financial institutions are starting to deploy artificial intelligence (AI) and machine learning (ML) across a range of functions. For example, they are used as virtual assistants that can fulfill customer requests, in models to detect fraud or other potential illegal activity, as

³³ Comment 6(b)(5)-(3)(ii); *see also* Comment 6(b)(5)-(1) (“A creditor must evaluate income derived from . . . public assistance on an individual basis”).

³⁴ See CFPB Bulletin 2015-02, *Section 8 Housing Choice Voucher Homeownership Program* (May 11, 2015), https://files.consumerfinance.gov/f/201505_cfpb_bulletin-section-8-housing-choice-voucher-homeownership-program.pdf.

³⁵ See CFPB Bulletin 2014-03, *Social Security Disability Income Verification* (Nov. 18, 2014), https://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf.

³⁶ See Fair Lending Report of the Bureau of Consumer Financial Protection (Apr. 2020), 85 FR 27395, https://files.consumerfinance.gov/f/documents/cfpb_2019-fair-lending_report.pdf.

³⁷ See Patrice Alexander Ficklin *et al.*, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 7, 2020), <https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/>.

compliance monitoring tools, and in credit underwriting. 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)?

Another important issue is how lenders using complex AI/ML models satisfy ECOA's adverse action notice requirements. ECOA requires creditors to provide consumers with the principal reason(s) for a denial of credit or other adverse action.³⁸ These notice provisions serve important anti-discrimination, educational, and accuracy purposes. There may be questions about how institutions can comply with these requirements if the reasons driving an AI/ML decision are based on complex interrelationships.³⁹ 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)?

10. ECOA Adverse Action Notices: Under ECOA and Regulation B, a statement of reasons for adverse action must be specific and indicate the principal reason(s) for the adverse action.⁴⁰ The Bureau understands from direct engagement and its supervisory work that stakeholders continue to have questions about this requirement. Should the Bureau provide any additional guidance under ECOA and/or Regulation B related to when adverse action

³⁸ 15 U.S.C. 1691(d).

³⁹ See Fair Lending Report of the Bureau of Consumer Financial Protection (Apr. 2020), 85 FR 27395 (May 8, 2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-fair-lending_report.pdf; Patrice Alexander Ficklin et al., *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 7, 2020), <https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/>.

⁴⁰ 15 U.S.C. 1691(d)(3); 12 CFR 1002.9(b)(2).

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)?

AUTHORITY: 12 U.S.C. 5511(c).

III. Signing Authority

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register*.

Dated: July 28, 2020.

/s/ Laura Galban

Laura Galban,
Federal Register Liaison, Bureau of Consumer Financial Protection.