CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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December 1, 2020

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

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

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment the Bureau's request for information ("RFI") on the Equal Credit Opportunity Act ("ECOA") and Regulation B.

The business community is strongly opposed to discrimination in all forms. Lenders work hard to support all members of their communities on their economic journeys. They are committed to extending credit fairly and to enable all of their customers equal access to the benefits provided by credit, from covering emergency expenses, to sending a child to college, or buying a home. We particularly appreciate the Bureau's broad focus on "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 . . . without unlawful discrimination."[1] We agree that expanding fair access to credit would have enormous benefits for Americans. We would welcome any opportunity to partner with the Bureau to achieve these shared goals.

We believe that the Bureau can help expand fair access to credit by removing regulatory barriers to outreach to underserved communities, by clarifying relevant legal provisions, and supporting innovation in lending and compliance. By doing so, the Bureau would facilitate broader economic opportunity for historically underserved communities while also maintaining its focus on preventing unlawful discrimination. We accordingly urge the Bureau to consider the following three principles as it evaluates its implementation of ECOA and Regulation B:

- Encourage lending to underserved markets;
- Support innovation in lending and compliance; and
- Clarify the extent of regulatory and statutory harmonization.

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[1] Request for Information on the Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46600 (Aug. 3, 2020).

Analysis

1. Encourage lending to underserved markets.

Access to credit is essential to full participation in modern life, and lenders are eager to ensure that all Americans have equal access to those opportunities. Regulatory uncertainty and fear of unintentional violations of ECOA or the Unfair, deceptive, or abusive acts and practices (UDAAP) prohibition, however, make it more difficult for lenders to reach every possible consumer. This, in turn, deprives consumers of the support that credit can provide as they ascend the economic ladder. We accordingly would urge the Bureau to take all reasonable steps to encourage lending to underserved markets. Following regulatory best practices—including engaging constructively with stakeholders, maintaining clear rules of the road for companies as they meet compliance expectations, and harmonizing approaches across fair lending and prudential regulators where possible—will be instrumental to achieving that goal. Here, we highlight four particular areas that the Bureau can focus on as it further encourages lending to underserved markets.[2]

a. Support service of Limited English Proficiency market.

As the Bureau recently explained in a blog post, "[o]ver 65 million people, or about 21 percent of the U.S. population over the age of five, speak a language other than English at home and two-fifths of these have limited proficiency in English. Limited English Proficient (LEP) consumers often face numerous obstacles to accessing financial products and services, many stemming from language barriers."[3] Lenders work very hard to support the diverse and rapidly evolving communities that they serve, including by offering services in numerous languages other than English. We are glad that the Bureau shares the goal of expanding communications to LEP consumers and have appreciated the Bureau's efforts to preserve flexibility for lenders in how they achieve this goal. We would urge the Bureau to consider three principles as it continues to support the expansion of services to LEP consumers in an evolving marketplace.

No one size fits all approach. A diverse set of lenders serve very different communities with very different products and services across the United States. As a result, different lenders will serve customers with very different language needs. The Bureau consequently should not attempt to pursue any one-size-fits-all strategy. Rather, it should follow a principles-based approach that reflects the diversity of customers served by U.S. lenders. It should support that approach, to the extent possible, by providing concrete examples of permissible lender activities.

Allow flexibility for lenders. Lenders are well-positioned to determine what limited English proficiency services would be most important for their customers. The Bureau consequently should allow lenders sufficient flexibility to determine how best to serve their limited English proficiency customers. For example, a lender should be permitted to determine which materials it will translate for an applicant and which it will present in English. Lenders should be empowered to make such judgments about how best to serve their customers without concern about potential ECOA or UDAAP liability. The Bureau should take appropriate steps to encourage lenders to use their

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[2] The Bureau also correctly notes the important roles that small business lending can play in "fostering community development and fueling economic growth." RFI, 85 Fed. Reg. at 46602. We would refer the Bureau to our forthcoming comment in the Bureau's Section 1071 SBREFA process for our perspective on such issues.

[3] Elena Babinecz and J. Frank Vespa-Papaleo, CFPB Blog, *Bureau seeks formal comments to inform forthcoming guidance on serving LEP consumers* (Nov. 16, 2020).

discretion to best serve their customer base, including through working with stakeholders to the extent that it addresses whether particular type of documents warrant consideration for translation, how lenders can best document decisions to make translations into certain languages (but not others), or related topics.

Eliminate undue ECOA risk. Lenders must collect language preference data to effectively serve consumers in their preferred language. This information is highly likely to correlate to information about protected characteristics, however, raising the risk that a lender could be subject to claims under ECOA. The Bureau should clarify that collection of language preference data does not itself expose the lender to liability under ECOA.

b. Encourage affirmative advertising to disadvantaged groups.

Lenders welcome the opportunity to engage with traditionally disadvantaged groups. To that end, the official interpretations to Regulation B explain that a lender 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."[4] We welcome the Bureau's recent encouragement to lenders to pursue such affirmative advertising and the opportunity it presents to expand service to underbanked individuals.[5] Unfortunately, however, uncertainty about potential ECOA liability and UDAAP liability associated with such affirmative advertising often prevents lenders from undertaking such campaigns. We accordingly ask the Bureau to work to remove these impediments and enable affirmative advertising to meet its potential as a tool for enhancing financial inclusion. To achieve this goal, we would ask the Bureau: (1) to explain how rules governing collection of information about minority status apply in the affirmative advertising context; and (2) clarify key terms used to define an affirmative advertising program.

Explain application of rules governing collection of information about minority status in this context. Affirmative marketing to disadvantaged groups is very challenging if the creditor is unable to collect and retain information about minority status. For example, it is challenging to determining whether a disadvantaged group normally would seek credit from a creditor without reference to information about an applicant's minority status. Such collection and retention of information is generally prohibited under ECOA and Regulation B, however. We would accordingly urge the Bureau to explain how creditors should best pursue affirmative advertising to disadvantaged groups consistent with rules governing the collection and retention of information regarding minority status. In doing so, we would ask the Bureau to provide concrete examples of permissible activities to the extent possible.

Clarify key terms used to define an affirmative advertising program. Uncertainty persists around key terms used to define affirmative advertising programs. For example, it remains unclear how a creditor should identify "traditionally disadvantaged groups" and "groups that might not normally seek credit from that creditor." Available guidance likewise does not clearly state that a "traditionally disadvantaged group" may include a racial or ethnic minority group. We would urge the Bureau to clarify these key terms, including in the context of concrete examples, and, more generally, work with creditors to identify and remove practical impediments to the pursuit of these valuable programs.

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4 12 C.F.R. Part 1002, Supp. 1. ¶ 4(b), comment 2.

5 *See* Susan M. Bernard and Patrice Alexander Ficklin, CFPB Blog, *Expanding access to credit to underserved communities* (July 31, 2020).

c. **Facilitate the use of special purpose credit programs, including by allowing collection of necessary information.**

ECOA and Regulation B generally prohibit lenders from taking race and other prohibited factors into account in a lending decision.[6] However, governing law has long permitted lenders to pursue "special purpose credit programs" that are intended to facilitate the extension of credit to historically underserved populations. We welcome the Bureau's focus on the use of special purpose credit programs to that end.[7] Lenders support these important programs, which allow the offering of special underwriting or pricing. Lenders welcome the opportunity these programs provide to serve an even broader range of their communities. The potential of these programs has not been realized, however, in large part because of legal uncertainty that has chilled lender participation. The Bureau consequently should take steps to clarify how lenders can safely pursue those programs, particularly with respect to the permissible collection of necessary information by lenders.

Regulation B does not clarify a range of important questions for lenders contemplating undertaking a special purpose credit program. In particular, numerous questions persist around what data lenders may collect and analyze in the context of special purpose credit programs. We urge the Bureau to support lenders in their use of special purpose credit programs by resolving these persistent questions. For example, we would welcome concrete examples of how lenders can conduct a data-driven assessment for credit products within the constraints of existing rules governing the collection and retention of information about borrowers, including their race. Likewise, we would encourage the Bureau to make clear how lenders can collect credit access information so that they can measure whether a product qualifies for such a program. More broadly, we also would encourage the Bureau to provide lenders with an opportunity to work with the Bureau in the development of a special purpose credit program. Whether through existing programs, such as the no-action letter process, or by providing concrete examples of successful approaches, we would ask the Bureau to engage with lenders in the development process to maximize the benefit to consumers and to ensure compliance with the law.

d. **Clarify how lenders should evaluate prospective income continuity for recipients of public assistance income.**

Lenders welcome the opportunity to serve all consumers responsibly. This includes consumers who receive public assistance income—and, indeed, ECOA prohibits a lender from discriminating against a consumer based on their receipt of public assistance income.[8]

Uncertainty can arise, however, when underwriting loans to individual borrowers who rely upon public assistance income. In particular, banks can be unsure when they may assume that a borrower may continue to receive public assistance income. We consequently would ask the Bureau to further explain how a lender should evaluate prospective income continuity for recipients of public assistance income, including through concrete examples to the extent feasible.

2. **Support innovation in lending and compliance.**

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[6] 15 U.S.C. § 1691(a); 12 C.F.R. § 1002.6(b)(9).
[7] *See* Susan M. Bernard and Patrice Alexander Ficklin, CFPB Blog, *Expanding access to credit to underserved communities* (July 31, 2020).
[8] 15 U.S.C. § 1691(a)(2).

Financial services innovation benefits consumers. It promotes financial inclusion, can help reduce the cost of credit, and expands availability of information, which in turn supports informed decision-making and financial well-being. Moreover innovation strengthens banking infrastructure, increases efficiency, and facilitates compliance. Unfortunately, however, regulatory uncertainty or second-guessing can discourage banks from pursuing innovative tools, products, or approaches, including the advantages promised by artificial intelligence and machine learning. Lenders are particularly sensitive to any risk that innovative technologies would unfairly burden any group, rather than fulfill their promise as a tool for financial inclusion and opportunity.

We welcome the Bureau's recognition of the importance of innovation to fair lending. We urge the Bureau to support innovation both with respect to service delivery and compliance generally, as well as more specifically relating to the use of artificial intelligence and machine learning.

a. Continue to support innovation in lending products and ECOA compliance.

Lenders work constantly to develop innovative new lending products, as well as to create new methods and tools for ensuring compliance with ECOA and other fair lending laws. These innovations benefit consumers, whether directly by increasing credit availability and ensuring legal compliance, or indirectly by reducing costs. We appreciate that the Bureau shares this appreciation of the importance of innovation and that it has focused on enabling innovation that benefits consumers. We were pleased, for example, that the Bureau focused its recent tech sprint on adverse action notices required by ECOA, as well as the Fair Credit Reporting Act. (Separately, we congratulate the Bureau for hosting such a successful tech sprint.) We would urge the Bureau to continue to take all available opportunities to explore and encourage innovation in lending products and in the refinement of ECOA compliance programs.

b. Facilitate innovation in the use of artificial intelligence and machine learning.

The Bureau should work with lenders to facilitate innovation in the use of artificial intelligence and machine learning. In particular, the Bureau should ensure that uncertainty about the application of disparate impact liability does not unduly constrain innovations that would benefit consumers. We would particularly urge the Bureau to avoid a post-hoc, enforcement-based approach to compliance in this context. Lenders want to ensure that innovative technologies do not cause bias. The Bureau should work with lenders to help them achieve that goal rather than simply question good-faith approaches after the fact. To that end, we have welcomed the Bureau's public engagement on this important topic, including its recognition of potential regulatory uncertainty in this field, its emphasis on maintaining flexibility for businesses, and its interest in companies harnessing emerging technologies to better serve their communities.[9] The Bureau should build on this work by collaborating with stakeholders to identify appropriate approaches for measuring, monitoring, and mitigating fair lending risk when using artificial intelligence and machine learning, as well as by coordinating with other agencies to ensure a consistent approach. We look forward to opportunities to collaborate on these important topics in the months and years ahead.

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[9] *See* Patrice Alexander Ficklin, Tom Pahl, and Paul Watkins, CFPB Blog, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 7, 2020) ("AI has the potential to expand credit access by enabling lenders to evaluate the creditworthiness of some of the millions of consumers who are unscorable using traditional underwriting techniques."). *See also id.* ("Despite this flexibility, there may still be some regulatory uncertainty about how certain aspects of ECOA or other consumer financial services laws apply in the context of AI.").

3. Clarify the extent of regulatory and statutory harmonization.

The Bureau has primary, but not exclusive, authority to enforce ECOA. A range of other agencies also supervise compliance with the statute by entities within their jurisdiction; namely, the Office of the Comptroller of the Currency, the Federal Trade Commission, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Association.[10] In addition, the Department of Justice has authority to bring suit over "pattern and practice" violations under ECOA.[11] Adding further complexity, the fair lending requirements imposed by ECOA overlap significantly with the requirements of the Fair Housing Act, which is enforced by the Department of Housing and Urban Development, along with "pattern and practice" enforcement by the Department of Justice.[12]

The overlapping statutory frameworks and the roles of multiple agencies increase the risk of inconsistent interpretations of ECOA. We believe that, generally speaking, harmonization of approaches would benefit financial institutions—and ultimately consumers. As a starting point, we think it would be particularly helpful for the relevant agencies to explain the extent to which their ECOA examination approaches are consistent with each other, as well as to identify areas of consistency across similar provisions of the FHA and the ECOA. There may well be good reason for inconsistences in approach or interpretation across agencies or across statutes, but we think that lenders would benefit significantly from understanding areas of consistency—and inconsistency—so that they can appropriately calibrate their approach in different contexts. We thus would ask the Bureau to work with its sister agencies to provide clarity for lenders about areas of consistency—and of inconsistency—between agency approaches and governing laws.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Julie Stitzel

[10] *See* 15 U.S.C. § 1691c.
[11] *See* 15 U.S.C. § 1691e(g)-(h).
[12] *See* 42 U.S.C. § 3610 (administrative enforcement by FHA); 42 U.S.C. § 3614 (Attorney General enforcement).