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December 15, 2025

The Honorable Russell Vought
Acting Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20503

Re: Comments on Equal Credit Opportunity Act (Regulation B) Proposed Rule, Docket No. CFPB-2025-0039, RIN 3170-AB54

Dear Acting Director Vought:

The National Fair Housing Alliance® ("NFHA"™)[1] and the undersigned civil rights and consumer advocacy organizations urge the Consumer Financial Protection Bureau ("CFPB") not to finalize its proposed changes to Regulation B, which implements the Equal Credit Opportunity Act ("ECOA" or "Act"), and retain the regulation as it currently exists.[2]

Congress first enacted ECOA in 1974 to eradicate "widespread discrimination . . . in the granting of credit to women."[3] Two years later, Congress amended ECOA to further its "major purpose of extending the federal ban on discriminatory credit practices" to include additional protected classes, including race, religion, national origin, and age.[4] In extending the reach of the Act, Congress emphasized the statute was "intended to prevent the kinds of credit discrimination which have occurred in the past, and to anticipate and prevent discriminatory practices in the future."[5] Congress recognized that credit is not "a luxury item," because most consumers rely on credit for everything from home mortgages to auto purchases to everyday expenses.[6] The Act was thus meant to produce a market with "evenhanded treatment in the[] quest for what has become a virtual necessity of life"—credit.[7]

The proposed radical changes to Regulation B fundamentally conflict with Congress's intent, find no support in the statute, are not compelled by the Constitution, stand at odds with both the historical record and the current experience of discrimination, and—if promulgated—would unfairly exclude many from credit opportunity.

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[1] The National Fair Housing Alliance® (NFHA™) is the country's only national civil rights organization dedicated solely to eliminating all forms of housing and lending discrimination and is the trade association for over 200 fair housing and justice-centered organizations and individuals across the United States and its territories.
[2] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50901 (proposed Nov. 13, 2025) (to be codified as 12 C.F.R. pt. 1002).
[3] S. Rep. 93-278, 93rd Cong., 1st Sess., at 16 (1973).
[4] S. Rep. No. 94-589, 94th Cong., 2nd Sess. at 2, reprinted in 1976, U.S.C.C.A.N. 403, 404.
[5] *Id.* at 3.
[6] *Id.*
[7] *Id.*

I. DISPARATE IMPACT

As the CFPB acknowledges, the proposed rule's jettisoning of disparate impact would upend five decades of agency interpretation going back to ECOA's earliest days. The Bureau also concedes that agency interpretation has previously recognized authoritative legislative history directly on point as demonstrating that Congress specifically intended for ECOA to include protections against practices that have an unnecessary disparate impact. The CFPB nonetheless contends that it has suddenly discovered that ECOA's text cannot support disparate impact, but its cursory analysis fails to engage meaningfully with that text. This is not a close call under ordinary principles of statutory interpretation. Text, legislative history, statutory purpose, consistent agency interpretation, judicial interpretation, and Congressional acquiescence and ratification all point in the same direction—disparate impact is available under ECOA and always has been.

The CFPB makes conclusory assertions that disparate impact will lead creditors to disadvantage some people based on protected class, and that disparate impact under ECOA therefore is constitutionally suspect and bad policy. But these claims fundamentally misunderstand how disparate impact actually works under ECOA. Disparate impact analysis does not require creditors to disadvantage anyone based on protected class; quite to the contrary, it is instrumental in achieving ECOA's purpose of ensuring no one is disadvantaged on a prohibited basis. Tellingly, even though disparate impact has been part of ECOA since the beginning and is deeply embedded in many creditors' compliance functions, the CFPB cannot produce a single concrete example of the harms that the Bureau's proposed changes purportedly address. Unlike the proposed rule, this comment provides several examples of how disparate analysis functions in practice. In each case, it has led to creditors making their practices fairer and more inclusive for everyone.

A. *ECOA's "On the Basis Of" Protections Signal the Availability of Disparate Impact Claims*

In its proposal, the CFPB asserts that "[t]he text of ECOA . . . does [not] contain effects-based language of the type that has been found in other statutes to invoke disparate-impact liability."[8] Accordingly, the CFPB preliminarily determines "that Regulation B's conclusion that disparate-impact claims may be cognizable under ECOA is not the best interpretation of ECOA."[9] The CFPB supports its conclusion by arguing that Congress did not include in ECOA language similar to that the Supreme Court has found suggests the availability of disparate impact claims under to the Age Discrimination in Employment Act (ADEA) and Fair Housing

[8] *Id.* at 50902.
[9] *Id.* at 50904.

Act (FHA), which contain the phrases "otherwise adversely affect" and "otherwise make unavailable."[10]

The CFPB, however, fails to examine the language of ECOA itself. There, Congress prohibited discrimination "on the basis of" certain protected classes. 15 U.S.C. § 1691(a). As described below, "on the basis of" is effects-based language, and so the statute allows disparate impact claims. As the Supreme Court has instructed, "antidiscrimination laws *must be* construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc*., 576 U.S. 519, 520 (2015) (Inclusive Communities) (emphasis added). The plain language meaning of the term "on the basis of" refers to the consequences of actions, not just the mindset of actors. For example, if one intentionally separates a banana and an orange because of their shape, they also happen to be separated "on the basis" of their color, even if unintentional. None of the other anti-discrimination statutes the Bureau relies on include this distinctive language.[11]

Congress intentionally used the phrase "on the basis of" because that is the precise phrase the Supreme Court used just a few years earlier in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), where the Court first held that Title VII provides for disparate impact liability. In *Griggs*, the Court described Title VII's prohibition on practices that have an unnecessary disparate impact as one that eliminates discrimination "on the basis" of protected class.[12] ECOA, enacted shortly after *Griggs*, uses the same "on the basis of" language to codify the same disparate impact concept articulated in *Griggs*.

Not all of ECOA's discrimination prohibitions use the phrase "on the basis of." In contrast, ECOA makes it unlawful for a creditor to discriminate "because" an applicant's income derives from public assistance or "because" the applicant has exercised a right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)(2)–(3). The conspicuous textual difference between the "because of" and the "on the basis of" provisions indicate Congress's desire to set them apart. As the Supreme Court has explained, "[i]n a given statute, the same term usually has the same meaning and different terms usually have different meanings."[13] In this context, the distinctiveness of the term "on the basis of" emphasizes its broad reach to incorporate the

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[10] *Id.* at 50905 (citing Section 4(a)(2) of the Age Discrimination in Employment Act prohibiting "such actions that deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age," and Section 804(a) of the Fair Housing Act providing that it shall be unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin") (emphasis added).
[11] *Compare Id.* ("ECOA does not contain any language like "otherwise make unavailable" or "otherwise adversely affect" that suggests that disparate impact claims are cognizable.").
[12] *Id.* at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.") (emphasis added).
[13] *Pulsifer v. United States*, 601 U.S. 124, 151 (2024) (citing A. Scalia & B. Garner, Reading Law 170–71 (2012)).

concept described in *Griggs* and include disparate impact claims for each "on the basis of" group, namely race, color, religion, national origin, sex, marital status, or age.

Congress has used the phrase "on the basis of" or substantially equivalent language in other anti-discrimination statutes to signify discrimination that includes disparate impact liability or otherwise does not require proof of intent.

Title II of the Americans with Disabilities Act ("ADA") intentionally mimicked the language of the Rehabilitation Act and its implementing regulations, which bar discrimination "on the basis of" disability to prohibit disability discrimination in public services, programs or activities.[14] The ADA was passed in 1991, six years after the Supreme Court assumed that the Rehabilitation Act extended to discrimination by effect, and thus the drafters would have understood they were adopting language that did not require proof of discriminatory intent. Indeed, the drafters made this parallel explicit, noting that "[t]he remedies, procedures, and rights set forth [in the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination *on the basis of* disability in violation of section 12132 of this title."[15] By using the phrase "on the basis of disability" to characterize the scope of the ADA's Title II coverage, and by closely following key components of the Rehabilitation Act, Congress clearly affirmed that coverage extended beyond intentional discrimination claims.[16]

Other provisions of the ADA—which, like ECOA, were enacted after *Griggs*—further confirm the congressional understanding, since *Griggs*, that discrimination "on the basis of" a protected class encompasses effects-based claims. Title I of the ADA, for example, prohibits employment discrimination "on *the basis of* disability," which it explicitly defines to include "utilizing standards, criteria, or methods of administration . . . that have the *effect* of discrimination on the basis of disability."[17] Similarly, Title III of the ADA prohibits discrimination "*on the basis of* disability" in public accommodations, which includes "utiliz[ing] standards or criteria or methods of administration . . . that have the *effect* of discriminating on the basis of disability."[18] The message could not be clearer: discrimination "on the basis of" a protected category includes both intentional and disparate impact discrimination.

Even prior to *Griggs,* "on the basis of" had been understood to signal effects-based liability. Thus, the Equal Pay Act ("EPA"), enacted in 1963, made it illegal for an employer to

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[14] *See* 45 C.F.R. § 84.1(a) (Rehabilitation Act regulations). The statutory and regulatory text regarding Title II follows the Rehabilitation Act, prohibiting discrimination by public entities "by reason of such disability," *see* 42 U.S.C. 12132, and the Department of Justice's regulations implementing the ADA's Title II refer to Title II as prohibiting discrimination "on the basis of disability." *See* 28 C.F.R. 35.101.
[15] 42 U.S.C. § 12133 (emphasis added).
[16] *See also Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003) ("To establish discrimination under . . . the ADA, plaintiffs have three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation."), *superseded by regulation on other grounds*.
[17] 42 U.S.C. § 12112(a), (b)(3) (emphasis added).
[18] 42 U.S.C.§ 12182(b)(1)(D).

"discriminate . . . between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," subject to several exceptions.[19] There is a broad consensus among federal courts—stretching back to before enactment of ECOA—that the EPA "does not require a plaintiff to establish an employer's discriminatory intent."[20] Rather, it operates similar to disparate impact in that, once a pay disparity is shown, that disparity is unlawful unless an affirmative defense applies.[21]

The phrase "on the basis of" has been used in various other parts of the U.S. Code to include effects-based claims and where the phrase would be illogical if it were used only to reach intent-based claims.[22] The phrase is also used across the U.S. Code when referring broadly to anti-discrimination statutes, many of which encompass disparate impact liability, as discussed above.[23]

Similar "on the account of" language, used in prior landmark anti-discrimination legislation, has long been held to include disparate impact liability. Thus, the Supreme Court continues to recognize the Voting Rights Act prohibition of discrimination "on account of" race or color "to mean with respect to race or color, and not to connote any required purpose of racial discrimination."[24]

ECOA also provides that one factor considered when imposing punitive damages is whether the violation was "intentional," thus assuming that some violations are not intentional. 15 U.S.C. § 1691e(b). As described below, in debates over this language, some House members objected that this limitation would mean punitive damages would not be available for disparate impact violations, confirming that such claims are cognizable.[25] The Supreme Court has held that, where Congress includes text that operates only to limit the scope of disparate-impact claims, it must have "assume[d] the existence of disparate-impact claims" or else this text would be superfluous.[26]

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[19] 29 U.S.C. § 206(d)(1) (emphasis added).
[20] *See, e.g., Eisenhauer v. Culinary Inst. of Am.,* 84 F.4th 507, 518 n. 47 (2d Cir. 2023) ("[T]he EPA does not require a plaintiff to establish an employer's discriminatory intent."); *EEOC v. Md. Ins. Admin*., 879 F.3d 114, 120 (4th Cir. 2018) ("An EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute.").
[21] *Id.*
[22] *See, e.g.*, 42 U.S.C. § 1395b-10(a) (requiring the HHS secretary to collect data to facilitate the evaluation of that data "on disparities in health care services and performance *on the basis of* race, ethnicity and gender."); 20 USC § 1703(e) (prohibiting transfers of students "if the purpose and effect of such transfer is to increase segregation of students *on the basis* of race . . .").
[23] *See, e.g.*, 29 U.S.C. 2651(a) (clarifying that nothing in the Family and Medical Leave Act shall be construed to modify or affect "any Federal or State law prohibiting discrimination *on the basis of* race").
[24] *Allen v. Milligan*, 599 U.S. 1, 25 (2023) (internal quotation marks and citations omitted).
[25] S. Rep. No. 94-589 at 4–5 (1976) (accompanying Pub. L. 94-239, 90 Stat. 241 (1976)).
[26] *Inclusive Communities,* 576 U.S. at 537.

That ECOA's operative language includes disparate impact is confirmed by Congress's statement of ECOA's purposes, which was also enacted by Congress together with the statute. In calling out in its name ECOA's equality of opportunity goal, Congress found "that there is a need to [e]nsure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to *make credit available* with fairness, impartiality, and without discrimination on the basis of sex or marital status."[27] Without limitation to intentional discrimination, Congress further declared: "It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit to *make that credit equally available* to all credit-worthy customers without regard to [prohibited basis]."[28] That is, Congress made clear that ECOA's scope was intended to be as expansive as the Fair Housing Act, which bars practices that "make unavailable or deny" housing, a term that the Supreme Court held includes disparate impact.

As discussed below, the conclusion that the statute's text provides for disparate impact liability is confirmed by ECOA's statutory purpose, legislative history, statutory history, and judicial and longstanding regulatory interpretation, none of which are discussed in the CFPB's proposed rule.[29]

B. *ECOA's Legislative History Details Congress's Intent to Provide for Disparate Impact Claims*

1974 ECOA Statute

Just three years after the Supreme Court described disparate impact in *Griggs* as prohibiting discrimination "on the basis of" protected characteristics, Congress incorporated "on the basis of" language into the new ECOA statute. ECOA's legislative history repeatedly calls attention to the fact that Congress's intent was to do exactly what its legislative language indicates—aligning ECOA with the disparate impact standard the Supreme Court articulated in *Griggs*.

An early draft of the bill prohibited discrimination "on the basis of" protected group status but then defined "discriminate" as "to make any invidious distinction."[30] During hearings on the bill, Secretary of the Federal Trade Commission Charles Tobin objected to the definition, stating:

> Use of the phrase "invidious distinction" may be an unnecessarily narrow or restrictive standard within which to define liability here. In *Griggs v. Duke Power Co.*, 401 U.S.

[27] Pub. L. 93-495, 88 Stat. 1500, 1520 (1974).
[28] *Id.*
[29] *See Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 653 (2020). ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").
[30] A Bill to Prohibit Discrimination on the Basis of Race, Color, Religion, National Origin, Age, Sex, or Marital Status in the Granting of Credit, H.R. 14856, 93rd Cong. § 3(5) (1974).

424, 431 (1971), the Supreme Court . . . defined discrimination as any "artificial, arbitrary, and unnecessary barrier to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." The definition adopted in this bill is designed to take advantage of judicially interpreted civil rights legislation, but the term "invidious" does not appear in the Civil Rights Act of 1964. There is some concern that the use of this term, rather than leaving "discriminate" undefined or defining it as "any arbitrary or unnecessary distinction," will be construed by the courts as imposing a degree of willfulness, malice, intent or pattern of discriminatory purpose not intended.[31]

As requested, the subcommittee removed the definition of "discriminate," leaving in place language that was generally understood to encompass disparate impact.

In addition, the House Report on a prior version of the bill explained that even though it did not impose per se liability when a creditor failed to provide credit in direct proportion to a group's representation in the creditor's lending area, this was "not, however, intended to limit the use of population statistics to establish a prima facie case of discrimination in accordance with the 'effects' test established by the Supreme Court in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), or otherwise to overrule the holding of the case."[32]

Thus, it is abundantly clear that Congress, by drawing operative language directly from *Griggs* and explicitly declining to limit that language's effect, understood that it had enacted a statute providing for disparate impact. This legislative history simply confirms what is already evident from the statutory language.

1976 ECOA Amendments

In 1976, ECOA was amended to add race, color, national origin, religion, and age to the sex and marital status categories falling under the "on the basis of" protections against discrimination. The Senate report accompanying the 1976 amendments stated that "courts or agencies are free to look at the effects of a creditor's practices" in determining the existence of discrimination, and that "cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)

[31] Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 93d Cong., 2d Sess. 86 (1974); *see also, e.g., id.* at 35 (1974) (testimony of Stanley Pottinger, Assistant Attorney General of the Civil Rights Division) ("The purpose for eliminating a new definition is to eliminate confusion that would be caused by it in light of the fact that the courts have for a number of years defined the word "discrimination" in the context of race or sex or similar grounds as invidious or arbitrary classifications . . . if [courts] have to make sense out of a new and additional requirement in light of the previous one, they are going to probably—at least some will say that the Congress must mean something different from what we have been doing in the past."); *id* at 84 (testimony of Charles Tobin): *id.* at 30 (testimony by Jefferey Bucher, Governor of the Federal Reserve Board) ("The [Federal Reserve] Board is concerned that the use of the term invidious impose too strict and narrow a standard in terms of achieving the bill's broad remedial purpose. Invidious connotes malicious, hateful, nearly willful or intentional conduct."); *id.* at 354 (testimony of Patricia Massey, on behalf of the Women's Equity Action League) ("The term "invidious" . . . is likely to be associated with willful, intentional behavior. The definition thus creates a higher standard or greater burden of proof for the plaintiff.").

[32] H.R. Rep. No. 94-210 at 5 (1975) (accompanying Pub. L. 94-239, 90 Stat. 241 (1976)).

and *Albemarle Paper v. Moody*, [422 U.S. 405 (1975)] are intended to serve as guides in the application of this Act."[33] As noted above, Congress also limited the availability of punitive damages to "intentional" discrimination at this time, which standard textual analysis assumes the existence of disparate impact. The legislative history confirms as much: Some House members objected to limiting the availability of punitive damages to "intentional" discrimination because full recovery would not be possible for disparate impact violations, which the members assumed were available under ECOA. [34] As one House member pointed out:

> Where credit criteria, though discriminatory, are on their face legitimate, it would become nearly impossible to demonstrate an intent to discriminate. This would mean that plaintiffs who rely on the effects test would be limited to the recovery of actual damages.[35]

Thus, while the question that divided Congress was whether disparate impact claims would permit punitive damages, there was no question that disparate impact claims existed, and, in their absence, this debate would make no sense. The same member of Congress concluded "disallowing any civil penalties, except in the rare case of proven willful discrimination, would be a full retreat from effective private enforcement."[36] Another Congress member agreed that "the present law does not contain the word 'willfully.'"[37] Although these attempts to allow for punitive damages for effects-based claims failed, the efforts confirm what is clear from the text itself: that disparate impact liability is available, even if punitive damages for such conduct are not.

Later Congressional Activity

As described below, agencies implementing ECOA immediately construed it to encompass disparate impact liability, as did the courts. Congress was well aware of how ECOA was being implemented and did not change that course.

For example, Congress later rejected bills introduced in 1995 and 1997 to restrict ECOA liability to intentional discrimination.[38] The legislation would have amended the statute to prohibit the use of "statistical data which tends to show that the credit decisions of a creditor have a disparate impact on various classes of credit applicants" and thus to show an ECOA violation without "additional evidence that" the creditor discriminated "on a prohibited basis,"

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[33] S. Rep. No. 94-589 at 4–5 (1976) (accompanying Pub. L. 94-239, 90 Stat. 241 (1976)).
[34] Legislative History of the Equal Credit Opportunity Amendments of 1976 Pub. L. 94-239, 1, 18 (1976).
[35] H.R. 6516, 94th Cong., at 16746.
[36] *Id.*
[37] *Id.*
[38] *See* Equal Credit Opportunity Act Amendments of 1995, H.R. 1699, 104th Cong. (1995); Equal Credit Opportunity Act Amendments of 1997, H.R. 229, 105th Cong. (1997). H.R. No. 210, 94th Cong., 1st Sess. 9 (1975); *see also* Statement by Rep. Bill McCollum, 143 Cong. Rec. E74 . (Jan. 7, 1997) ("this legislation requires the party bringing suit to prove the lender intended to discriminate when making its lending criteria").

and "engaged in such a pattern or practice with the purpose or intent to engage in an activity in violation of [ECOA]."[39] But Congress chose not to do so.

Instead, demonstrating awareness of ECOA's impact on lenders' compliance function, Congress amended ECOA in 1996 to provide incentives for lenders to engage in self-testing and self-correction. *See* 15 U.S.C. 1691c-1. Congress thus amended ECOA, well aware of the law's prevailing construction to include disparate impact but left disparate impact itself untouched even as it provided other protections for lenders.

In discussing similar unsuccessful attempts to eliminate disparate impact, even as Congress was otherwise amending that law, the Supreme Court concluded –in the case of the Fair Housing Act—that Congress's intent to provide for disparate impact liability can be shown by Congress's "reject[ion of] a proposed amendment that would have eliminated disparate-impact liability" in certain instances.[40] Congress's failure to act on ECOA amendments that would have eliminated disparate impact, even as it was otherwise amending ECOA, clearly indicates an intent to maintain the statute's protections against disparate impact discrimination.

Congress has amended ECOA several other times since its enactment without altering its original "on the basis of" language or in any other way suggesting the presumption that it provides for disparate impact liability has changed.[41] "[I]f Congress leaves in place a unanimous or near-unanimous judicial interpretation for a sufficiently long period of time, it can be deemed to have acquiesced in or ratified that judicial interpretation."[42] In addition, refusing "to overrule an agency's construction" that Congress was aware of—and specifically asked to review—provides strong "evidence of the reasonableness of that construction."[43]

C. *ECOA's Broad Remedial Purpose Confirms the Availability of Disparate Impact Liability*

In both *Griggs* and *Inclusive Communities*, the Supreme Court relied on the statutory purposes of Title VII and the FHA, respectively.[44] Just as the Court in *Griggs* explained that the

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[39] *Id.*
[40] *Inclusive Communities,* 576 U.S. at 536 (citing H.R. Rep. No. 100-711, 89–93).
[41] Dodd-Frank Wall Street Reform and Consumer Protective Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.) (transferring ECOA authority to the CFPB; Federal Deposit Insurance Corporation Improvements Act of 1991, Pub. L. 102-242, §§ 212, 223,105 Stat. 2236 (1991) (amending enforcement provisions).
[42] *In re Lion Air Flight JT 610 Crash*, 110 F.4th 1007, 1016 (7th Cir. 2024), *cert. denied sub nom. Smith v. Boeing Co.*, 145 S. Ct. 1912 (2025); *see also Inclusive Communities*, 576 U.S. at 536 ("If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 322 (2012)).
[43] *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 137 (1985).
[44] *Griggs*. 401 U.S. at 430–31 (The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); *Inclusive Communities*, 576 U.S. at 539 ("Recognition of disparate-impact claims is consistent with the FHA's central purpose. The FHA, like Title VII

availability of disparate impact helps to achieve Title VII's goal of "equality of employ opportunities and remov[ing] barriers that have operated in the past,"[45] and the Court in *Inclusive Communities* recognized "disparate impact claims as consistent with the FHA's central purpose . . . to eradicate discriminatory practices within a sector of our Nation's economy,"[46] disparate impact claims help fulfill ECOA's goal of achieving equality of credit opportunity. Nothing in ECOA suggests Congress meant to limit the statute's accomplishment of those purposes by addressing discrimination only through disparate treatment liability.

D. ***Courts Have Repeatedly Affirmed that Disparate Impact Claims Are Available Under ECOA***

Beginning in 1979, only three years after ECOA was expanded to include its current discrimination prohibitions, the courts first recognized that "[i]t is thus clear that the use of the 'effects' test was intended by Congress" to apply "to the determination of whether discriminatory practices exist" under ECOA.[47] Since then, at least seventeen other judicial decisions have acknowledged that ECOA provides for disparate impact liability. In one early Court of Appeals case, the Ninth Circuit explained "ECOA was meant to protect women, among others, from arbitrary denial or termination of credit," and establishes "as clear national policy that no credit applicant shall be denied . . . on the basis of characteristics that have nothing to do with his or her creditworthiness."[48] In the decades that followed, no court has diverged from this consensus.[49]

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and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy.") (internal citations omitted).

[45] *Id.* at 429–30.

[46] *Inclusive Communities*, 576 U.S. at 539.

[47] *Vander Missen v. Kellogg-Citizens Nat. Bank of Green Bay*, 481 F. Supp. 742, 745–46 (E.D. Wis. 1979) (noting ECOA's legislation history and implementing regulation).

[48] *Miller v. Am. Exp. Co.,* 688 F.2d 1235, 1239 (9th Cir. 1982) (internal citations omitted) (citing to prior case law and ECOA's legislative history).

[49] *Bhandari v. First Nat'l Bank of Com.*, 808 F.2d 1082, 1101 (5th Cir.1987), vacated and remanded on other grounds, 492 U.S. 901 (1989) (national origin discrimination under ECOA can be shown "by analogy to *Griggs v. Duke Power* and its progeny" based on showing the effect of a credit policy); *Haynes v. Bank of Wedowee*, 634 F.2d 266, 270 (5th Cir. 1981) (agreeing that disparate impact claims are cognizable under ECOA); *Golden v. City of Columbus*, 404 F.3d 950, 963 n. 11 (6th Cir.2005) (assuming that "disparate impact claims can permissible under ECOA"); *Midkiff v. Adams Cnty. Reg'l Water Dist*., 409 F.3d 758, 772 (6th Cir. 2005) (same); *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("[a]ssuming without deciding that a disparate impact claim is cognizable under ECOA"); *Vander Missen*, 481 F. Supp. at 745 (E.D. Wis. 1979); Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980); *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi.*, 962 F. Supp. 1056, 1060 (N.D.Ill.1997); *Coleman v. Gen. Motors Acceptance Corp*., 196 F.R.D. 315, 325 (M.D. Tenn. 2000) (collecting authorities) *vacated on other grounds*, 296 F.3d 443 (6th Cir. 2002); *Miller v. Countrywide Bank, N.A*., 571 F. Supp.2d 251 (D. Mass. 2008); *Ramirez v. GreenPoint Mortg. Funding, Inc*., No. 07 C 4315, 2008 WL 2051018 (N.D. Cal. 2008) (finding disparate impact claims cognizable under both the FHA and the ECOA); *Masudi v. Ford Motor Credit Co.*, No. 07-CV-1082 (CBA)(LB), 2008 WL 2944643 (E.D.N.Y. 2008) (recognizing the ECOA allows disparate impact actions); *Zamudio v. HSBC N. Am. Holdings, Inc*., No. 07 C 4315, 2008 WL 517138 (N.D. Ill. 2008) (filing disparate impact claims are available under both the ECOA and the FHA); *Taylor v. Accredited Home Lenders, Inc*., 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008); *Barrett v. H & R Block, Inc*., 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (listing cases); *Hernandez v. Sutter W. Cap.*, No. C 09-03658 CRB, 2010 WL 3385046, at *4 (N.D. Cal. Aug. 26, 2010) (providing

E. ***For Nearly Fifty Years, Federal ECOA Interpretative Agencies Have Uniformly Found That ECOA Provides for Disparate Impact Liability***

In the same year Congress passed the 1976 ECOA amendments, the Board proposed ECOA implementing regulations noting incorporation of the "effects" test and finalized those regulations the following year.[50] Long-standing implementing regulations finalized soon after a statute's enactment have always been afforded particular respect by the courts, long before and continuing after *Chevron* deference. As the Supreme Court has instructed, "'[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.'"[51]

The regulatory proposal discussed the information a creditor can use in evaluating a credit application.[52] For general information that is "not causally related to a determination of creditworthiness where the effect of using such information would be to discriminate against an applicant on a prohibited basis, even though the creditor may have no intent to discriminate," the proposed rule emphasized that:

> The legislative history of the Act indicates that Congress intended this concept, as enunciated in the cases of *Griggs v. Duke Power Co*., 401 U.S. 424 and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, to be applicable in connection with a creditor's evaluation of applications. See Senate Report to accompany HR. 6518, No. 94-589, pp. 4-5; House Report to accompany H.R. 0510, No. 04-210, p. 5.[53]

The final rule also refers to ECOA's legislative history as "indicat[ing] that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness. [under ECOA]."[54]

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the pleading standard "[t]o state a claim for disparate impact discrimination under the FHA or the ECOA"); *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp.2d 481, 487 (N.D.N.Y.2004) (recognizing disparate impact claim under ECOA); *Duarte v. Quality Loan Serv. Corp*., No. 217CV08014ODWPLA, 2018 WL 2121800, at *4 (C.D. Cal. May 8, 2018) ("ECOA allows for a cause of action for either overtly discriminatory policies or facially neutral policies that have a discriminatory effect."); *Mora v. US Bank, No*. CV1502436DDPAJWX, 2015 WL 4537218, at *6 (C.D. Cal. July 27, 2015) (same); *Palmer v. Homecomings Fin*. LLC, 677 F. Supp. 2d 233, 240 (D.D.C. 2010) ("There appears to be agreement among the federal courts that disparate impact claims are permissible under the ECOA.").

[50] 41 Fed. Reg. 29870, 29874 (July 20, 1976).

[51] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385–86 (2024) (quoting *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827)); *see also id.* (citing *United States v. Vowell,* 5 Cranch 368, 372 (1809) (Marshall, C. J., for the Court) ("If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.").

[52] Amendments to Regulation B To Implement the 1976 Amendments to the Equal Credit Opportunity Act, 42 Fed Reg. 1242 (January 6, 1977) (codified12 C.F.R. § 202).

[53] *Id.* at 1255.

[54] *Id.*

The next year, the Board published the ECOA Official Interpretations, addressing when age may be used as a factor in credit scoring systems. Even when a credit system complies with these rules, the Board reminded creditors that "[t]he entire system including the scoring and non-scoring components is, of course, subject to the general rule of 202.4, prohibiting discrimination, and to the full impact of the *effects test*."[55]

The next year, when it exempted certain transactions from Regulation B's requirement to provide notices to credit applicants of adverse actions, the Board pointed out that these creditors are not relieved "of the obligation to make credit available to creditworthy customers without regard to race, color, national origin, sex, or any other prohibited basis. In particular, the Board reminds creditors that the judicially constructed 'effects test' is applicable to credit transactions."[56]

In 1985, when the Board republished Regulation B rule text and commentary incorporating existing Board interpretations and "addressed questions about regulatory matters on which creditors and enforcement agencies have sought guidance on over the years," it restated with "[n]o substantive change" the same indication of congressional intent:

> The legislative history of the act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness. [See Senate Report to accompany H.R. 6516, No. 94-589, pp. 4-5; House Report to accompany H.R. 6516, No. 94-210, p. 5.][57]

Regulation B's Official Interpretations confirmed the burdens of proof for disparate impact claims:

> Effects test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964. Congress intended this doctrine to be applicable to a creditor's determination of creditworthiness. This Congressional intent is documented in the Senate Report that accompanied H.R 6516, No. 94-589, pp. 4-5; and in the House Report that accompanied H.R. 6516, No. 94-210, p. 5. Thus, the act and regulation prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a protected class, even though the creditor has no intent to discriminate, and even though the practice appears neutral on its face. The fact that a credit standard has a disproportionately negative impact on a prohibited basis does not make it necessarily

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[55] Fed. Reg. 21605, 21606 (March 24, 1977) (emphasis in the original).
[56] 43 Fed. Reg. 11967, 11968 (March 23, 1973)
[57] 50 Fed. Reg. 10890-01 n. 2 (March 18, 1985) (codified as 12 C.F.R. § 202.6 n.2).

unlawful if use of the standard meets a legitimate business need that cannot be achieved by means that are less disparate.[58]

In 2011, after the Dodd-Frank Act transferred ECOA rule writing and interpretative authority to the CFPB, it recodified Regulation B without any substantive changes to its discussion of disparate impact.[59]

In addition, the Department of Justice and other regulators—HUD, the OCC, the Federal Reserve Board, the FDIC, the FHFB, the FTC, and the NCUA—have uniformly confirmed that disparate impact claims are cognizable under ECOA.[60] The CFPB, upon its creation, concurred with that joint agency affirmation.[61]

F. *Consideration of Impacts Advances ECOA's Purposes and Does Not Raise Constitutional Concerns*

The CFPB also justifies its proposed elimination of disparate impact liability under ECOA based on concerns that it "may lead some creditors to consider prohibited characteristics in developing policies and procedures, contrary to ECOA's purposes, in order to minimize potential liability."[62] Specifically, the Bureau expresses concern that creditors, in order to ensure compliance with ECOA may "adjust [their] policies with the goal of achieving particular protected class outcomes," and make "changes that disadvantage certain protected classes in an effort to reduce the disadvantages for others," leading to "intentional protected class discrimination" the statute is intended to prohibit.[63] These actions could also raise constitutional concerns, the CFPB asserts, if they "would functionally require creditors to engage in such deliberate balancing of protected class outcomes."[64]

As an initial matter, we note that five decades into the consistent interpretation of ECOA as including disparate impact, the most the Bureau can claim is that this interpretation "may" result in harm. If such harms were real, we would have expected them to have revealed themselves.

It is unsurprising that the Bureau can point to no examples in practice, because its conclusory statements that disparate impact is inconsistent with the achievement of ECOA's

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[58] *Id.* at 10912 (codified at comment 6(a)-2)).
[59] *See* 76 Fed. Reg. 79442-01 (Dec. 21, 2011).
[60] *See, e.g.,* Dep't of Hous. and Urb. Dev., Dep't of Justice, Dep't of the Treasury, Fed. Reserve Sys., Fed. Deposit Ins. Corp., Fed. Hou. Fin. B., Fed. Trade Comm., Nat'l Credit Union Admin., *Policy Statement on Discrimination in Housing*, 59 Fed. Reg. 18266, 18269 (Apr. 15, 1994) (Interagency Policy Statement) (providing guidance on the interpretation of ECOA and the FHA) ("Evidence of Disparate Impact . . . Although the precise contours of the law on disparate impact as it applies to lending discrimination are under development, it has been clearly established that proof of lending discrimination using a disparate impact analysis encompasses several steps.").
[61] CFPB, *Lending Discrimination*, 2012 WL 11423379 (April 18, 2012).
[62] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50905.
[63] *Id.*
[64] *Id.* at 50906.

purposes gets it precisely backwards. Consideration of impacts, rather than only the intentions that motivated them, is fundamental to achieving ECOA's goal of achieving equal credit opportunity—not just the elimination of intentional discrimination—and is consistent with long-standing Supreme Court precedent.[65] The Supreme Court has confirmed that "[r]ecognition of disparate-impact claims is consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discrimination practices within a sector of the Nation's economy."[66] The proposal's rationale—to the extent there is one—is directly contradicted by these Supreme Court holdings. The Bureau simply ignores these precedents. Moreover, in suggesting that complying with longstanding disparate impact requirements will lead creditors to engage in discriminatory conduct, the proposed rule appears to fundamentally misunderstand how disparate impact actually operates.

G. *How Disparate Impact Operates in Practice*

We begin by reviewing how disparate impact has functioned over the nearly fifty years it has been applied in the credit markets. As Regulation B indicates, the analysis begins by determining whether a policy or practice "has a disproportionately negative impact on a prohibited basis."[67] If it does, the analysis proceeds to examine whether "the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact."[68] Nothing in the regulation requires creditors to ever *disadvantage* credit applicants of a certain race or other protected class or otherwise engage in intentional discrimination. Quite to the contrary, the current rule requires creditors to take steps to *avoid* disadvantaging credit seekers.

One key to understanding how disparate impact operates under ECOA is the fact that credit is not a zero-sum game as are certain employment or housing opportunities. Indeed, essential to a creditor's business is trying to qualify as many applicants as possible. Thus, granting credit to one individual or group does not require denying it to another individual or group. The question, rather, is simply whether the creditor's practice properly excludes someone from credit, without reference to whether someone else will receive it. As the Seventh Circuit explained, "A bank does not announce, 'We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan.'"[69]

In this way, it is a positive-sum game resulting in economic growth and mutual gain, rather than a zero-sum game benefiting only one party.[70] It is thus unclear how a lender's

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[65] Pub. L. 93-495, 88 Stat. 1500, 1520 (1974).
[66] *Inclusive Communities*, 576 U.S. at 521.
[67] 12 C.F.R. § 1002.6, Comment 6(a)(2).
[68] *Id.*
[69] *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998).
[70] Thus, Justice Alito's assertion that tax credit apportionment will benefit just one party and disadvantage all others—an example that the CFPB uses to suggest that disparate impact will always advantage just one protected

compliance with disparate impact requirements can "disadvantage certain protected classes in an effort to reduce the disadvantages for others," as the proposed rule contends. That disparate impact under ECOA operates to avoid unnecessarily disadvantaging credit applicants, without disadvantaging others, is demonstrated through the following examples showing that disparate impact has been and continues to be vital to accomplishing ECOA's purposes.

Example: Artificial Credit Barriers Rooted in Past Intentional Discrimination

One area where disparate impact has been effective is in removing artificial barriers to credit that resulted from conscious or unconscious bias for which intentional discrimination may be difficult to prove. The proposed rule does not acknowledge these successes, much less explain how ECOA can continue to serve the same vital purposes in the absence of disparate impact.

For example, even after ECOA was enacted, many lenders continued as a matter of policy to deny mortgage applications on row homes predominantly located in many minority neighborhoods. Though some of these restrictions may have been rooted in past redlining of minority neighborhoods, it remained difficult to draw a sufficient causal link as to establish intentional discrimination.

When asked to justify their policies, lenders would argue that the homes sometimes were overvalued by fraudulent appraisals, but they could not show that outright exclusion of these homes from credit opportunities was necessary to remedy the claimed problem. Disparate impact claims were essential in challenging this justification where lenders had other, more accurate and less exclusionary means of detecting fraud. Disparate impact claims produced settlements around the country that opened housing opportunities for all affected by the policy—not just members of one protected group.[71] And no one lost housing opportunities as a result.

Disparate impact has also been successful in challenging discriminatory pricing of auto loans. In indirect auto lending, consumers submit their financial information to a dealership that determines the "buy rate" for financial institutions stated as an APR based on objective creditworthiness factors. The dealer then decides how much discretionary "mark up" or profit it will add and presents the consumer the total cost without disclosing the added mark up.[72] Both statistical studies and paired testing have demonstrated that some dealers persistently charge people of color and women more than others with the same credit profiles, indicating dealers generally added more mark up for those groups because they are accustomed to paying more or might be less apt to negotiate.[73] Proving that individual salespeople had this unconscious prejudice or disguised animus as it relates to people of color, however, would be extremely

group while disadvantaging others—has no relevance in this context. *See* 90 Fed. Reg. at 50906 n. 47 (quoting *Inclusive Communities,* 576 U.S. at 585-86 (Alito, J. dissenting)).

[71] *See, e.g.,* HUD announcement: https://archives.hud.gov/news/2007/pr07-080.cfm.

[72] *See generally* Nat. Fair Hous. All., *Discrimination When Buying a Car: How the Color of Your Skin Can Affect Your Car Shopping Experience* (2018), https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.

[73] *Id.*

difficult to show for any individual transaction. Under a disparate impact claim, however, once non-credit related price disparities were identified for which there was no legitimate business justification, dealers could be required to adopt less discriminatory alternatives such as establishing a standard markup for all borrowers that would ensure dealers profited but did so in a way that was fair for all borrowers.[74] Once again, the result was that more people got access to fairly priced auto loans, disadvantaging no one.

As the Supreme Court has observed, disparate impact liability thus "plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[75] Under the Fair Housing Act, for example, disparate impact has played a vital role in challenging "zoning laws and other housing restrictions that function unfairly to exclude minorities without any sufficient justification."[76]

Example: Arbitrary Credit Restrictions Unsupported by Business Needs

Disparate impact has also improved outcomes—without disadvantaging any applicants—by removing credit access barriers that do not have a demonstrable relationship to creditworthiness. These barriers are often encountered by those who find it difficult to qualify for mainstream credit. They may have "thin" credit files with little prior credit history, or no credit history at all. Or they may have good credit histories tarnished by a medical bill that it took time to pay off. These challenges affect particularly lower-income individuals across racial and ethnic lines, but their burdens may fall disproportionately on people of color. They also fall disproportionately on Southerners. The three-part effects test first measures the potential disparate impact and, if such an impact is found, the creditor can justify the challenged policy or practice as needed for a legitimate business reason. If there is a legitimate business justification, but a less discriminatory policy or practice achieves the business purpose as well, the creditor needs to adopt it. The adoption of a less discriminatory alternative benefits *all* those affected by an arbitrary barrier to credit, not just those of a particular race or ethnicity. Indeed, it benefits the creditor by creating a potential new customer.

One example demonstrating how this works involves creditors treating taxable and nontaxable income the same in qualifying borrowers even though nontaxable income—by definition—leaves the borrower more money to pay debt than does taxable income.[77] The policy often has a disparate impact on the elderly, who frequently rely on nontaxable retirement

[74] *See, e.g., Id.* at 8–9 (summarizing actions brought by the National Consumer Law Center and the CFPB).
[75] *Inclusive Communities*, 576 U.S. at 540.
[76] *Id.*
[77] *See, e.g.,* Fannie Mae, *Originating & Underwriting Selling Guide*, B3-3.1-01, https://selling-guide.fanniemae.com/sel/b3-3.1-01/general-income-information (providing mortgage underwriting guidelines explaining "If the income is verified to be nontaxable, and the income and its tax-exempt status are likely to continue, the lender should develop an 'adjusted gross income') for the borrower by adding an amount equivalent to 25% of the nontaxable income to the borrower's income.").

benefits. From an underwriting perspective, treating taxable and non-taxable income differently would result in more accurate predictions of residual available income available to pay debt.

In analyzing this example of disparate impact, federal enforcement and supervisory agencies concluded:

> The lender's policy is likely to be proven discriminatory. First, the lender is unlikely to be able to show that the policy is compelled by business necessity. Second, even if the lender could show business necessity, the lender could achieve the same purpose with less discriminatory effect by "grossing up" nontaxable income (i.e., making it equivalent to gross taxable income by using formulas related to the applicant's tax bracket).[78]

Here, too, the policy change is made without advantaging one protected group at the expense of another. Moreover, it results in more accurate income considerations, which benefits not only all applicants but also creditors themselves. Yet the Bureau's proposed rule would eliminate the requirement that a lender justify the unnecessary and arbitrary policy.

Another example is the denial of credit based on an applicant's prior criminal history, exclusions sometimes framed so broadly as to include both arrests and conviction and minor crimes that would have no bearing on the applicant's likelihood of repaying debt.[79] The policies may have a disparate impact on a prohibited basis and a creditor's legitimate concerns for repayment of the debt could likely be better served by denying credit only when a criminal conviction directly relates to the likelihood the borrower will repay.[80] Once again, requiring a creditor to justify these policies and, if necessary, stop excluding people from credit unnecessarily does not favor one protected group only, nor does it disfavor another group as the

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[78] Dep't of Hous. and Urb. Dev., Dep't of Justice, Dep't of the Treasury, Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., Fed. Hou. Fin. B., Fed. Trade Comm'n., Nat'l Credit Union Admin., *Policy Statement on Discrimination in Housing*, 59 Fed. Reg. 18266-01, 18267 (Apr. 15, 1994) (Interagency Policy Statement) (providing guidance on the interpretation of ECOA and the FHA); *see also* Office of the Comptroller of the Currency, Fed. Deposit Ins. Corp, Fed. Res. Bd, Office of Thrift Supervision, Nat'l Credit Union Admin., *Interagency Fair Lending Procedures iv* (Aug. 2009) (providing as potential example of disparate impact under ECOA and FHA a creditor minimal loan amount policy "shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live").

[79] *See, e.g.,* CFPB, *Justice-Involved Individuals and the Consumer Financial Marketplace*, at 34–36 (Jan. 2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf; Small Bus. Admin, *Justice-Involved Individuals and the Consumer Financial Marketplace; Criminal Justice Reviews for the SBA Business Loan Programs, Disaster Loan Programs, and Surety Bond Guaranty Program*, 89 Fed. Reg. 34094 (Apr. 30, 2024) ("removing unnecessary restrictions that limit access to capital for qualitied people" after finding "no evidence of a negative impact on repayment for qualified individuals with criminal history records"); Small Bus. Admin., *Business Loan Program Temporary Changes; Paycheck Protection Program-Additional Eligibility Revisions to First Interim Final Rule*, 85 Fed. Reg. 38301 (June 26, 2020) (narrowing criminal history exclusions applicable to the Paycheck Protection Program to only bar individuals with felonies for "fraud, bribery, embezzlement, or a false statement in a loan application," because "such felonies are most relevant to the applicant's business integrity and responsibility, and may indicate a greater risk of potential misuse of PPP loan funds").

[80] *See* Taja-Nia Henderson, *New Frontiers in Fair Lending: Confronting Discrimination Against Ex-Offenders*, 80 N.Y. Univ. L. Rev. 1237, 1248-1253 (Oct. 2005); Anneliese Lederer, *The Disparate Impact of Using "Ever Charged" on a Commercial Loan Application*, Nat. Cmty. Reinvestment Coal. (Jan. 13, 2022), https://www.ncrc.org/the-disparate-impact-of-using-ever-charged-on-a-commercial-loan-application/.

Bureau fears. It simply requires the creditor to adopt policies more closely tied to their business needs and, in doing so, qualify more applicants.

Example: Automated Credit Decision Making

Disparate impact is, if anything, even more important today in ensuring that ECOA continues to make credit opportunities equal in the rapidly changing and expanding world of automated models that decide who gets credit offers, which applicants are approved, and the price each pays for credit. Requiring a showing of intentional discrimination for ECOA to apply to these decisions—many of which are difficult to attribute to a human at all—would dramatically increase unnecessary adverse outcomes and leave unchecked model performance issues.

When assessing statistical credit models for disparate impact, the same rules apply, requiring that any alternative must achieve the creditor's business need "as well" as the challenged model. In this way, the disparate impact framework does not require discriminating against someone else, nor does it require a creditor to degrade its model's performance in predicting risk. It simply asks the question of whether the model can work for everyone.

Left unchecked, discriminatory outcomes are liable to arise from the data modelers' use of information in predicting outcomes that can "bake-in" prior disparities. In the employment context, for example, Amazon developed an automated model to screen job applicants using resumes submitted over the past ten years. Reflecting and then replicating gender disparities in tech jobs, the model penalized resumes with information suggesting applicants were women because it "learned" that women previously occupied few such positions and thus were inferior candidates.[81] In the health context, a UnitedHealth Group company developed an algorithm to recommend patient care. Because less money is spent on Black patients than white patients with the same level of need, the algorithm concluded that Black patients were less sick and thus required less care. The algorithm had not considered the race of patients, but rather the cost of care that, itself, contained racial biases.[82]

The same danger exists in lending that algorithms will freeze and recreate status quo disparities in underwriting and pricing. There is ample evidence that these systems make decisions that are rooted in and reflect the dual and discriminatory credit market that developed in our country's long history of discrimination and ongoing practices. Without review for unnecessary disparate impact, these systems may also learn to include factors "that do not just assess the risk characteristics of the borrower; they also reflect the riskiness of the environment

[81] Jeffrey Dastin, *Insight – Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women* (Oct. 20, 2018) *available at* https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/.
[82] Ziad Obermeyer, et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 Science 447 (Oct. 25, 2019) (noting Black patients incurred about $1,800 less in medical costs each year than White patients for the same level of illness).

in which a consumer is utilizing credit, as well as the riskiness of the types of products a consumer uses."[83]

Entities are increasingly using artificial intelligence models to make decisions regarding creditworthiness, marketing, and other key issues. These models raise serious risks of discrimination including for decisions made by algorithms inside a "black box."[84] But, like any model, they can reflect and perpetuate the bias and historical and current discrimination that are baked into the historical data from which they learn.[85] These new models and the large amounts of data they rely on can be discriminatory and unnecessarily perpetuate segregation and disparities.[86]

Scholars have pointed out that discrimination can be introduced, often unintentionally, during at least three stages of modeling: "defining the output variable and labeling its constituent classes, collecting and labeling the training data, and selecting the input variables."[87] As mentioned above, models are trained on historical data. If that data reflects existing discriminatory patterns or biases—and much of it will—the model will perpetuate those same problems.[88]

For example, some borrowers of color with high credit scores that should have qualified them for prime credit historically have been steered into subprime mortgages.[89] Not only have communities of color thus been presented with unnecessarily limited choice in lending products, but many of the products made available to these communities have been designed to fail, resulting in devastating defaults including, most recently, the impacts of the financial and housing crisis of 2008.[90] Models trained on this tainted data can learn lessons that make them recreate the discriminatory steering that resulted in defaults for some borrowers.[91] They may

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[83] *See, e.g.,* Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 Suffolk U. L. Rev. 935, 936, 938 (2013).
[84] *See, e.g.,* Cary Coglianese & David Lehr, *Transparency and Algorithmic Governance*, 71 Admin. L. Rev. 1, 4 (2019); Cary Coglianese & David Lehr, Regulating by Robot: Administrative Decision Making in the Machine-Learning Era, 105 Geo. L.J. 1147, 1159 (2017).
[85] *See, e.g.,* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671, 677-87 (2016) (discussing how data mining for models may reflect societal discrimination).
[86] Carol A. Evans, Federal Reserve, *Keeping Fintech Fair: Thinking About Fair Lending and UDAP Risks, Consumer Compliance Outlook* (2017), https://www.frbsf.org/banking/files/Fintech-Lending-Fair-Lending-and-UDAp-Risks.pdf; FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf; Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discri mination.pdf; Mark MacCarthy, *Standards of Fairness for Disparate Impact Assessment of Big Data Algorithms*, 48 Cumb. L. Rev. 67, 75–76 (2018).
[87] David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. Davis L. Rev. 653, 662-63 (2017) (citing Barocas, supra note 121 at 677–92.
[88] Evans, *supra* note 78; Barocas, *supra* note 77 at 674.
[89] *Id*. at 944–45.
[90] *Id.* at 944.
[91] *Id.* at 949.

"learn" that borrowers that have had payday or other nontraditional loans can or "should" be charged higher-interest rates for mortgage loans, because borrowers that have had payday loans as a group are more likely to have default. They may apply this rule even to borrowers who have performed well on subprime products despite the odds. In effect, the models will punish a group of people, disproportionately people of color, for having previously been the victim of intentional discrimination.

Thus, in this context, review for unnecessary disparate impact is essential to ensuring that credit is made available equally and on a non-discriminatory basis. The proposed rule has it backwards in contending that disparate impact will cause creditors "to consider prohibited characteristics" in making lending decisions. Quite to the contrary: left to their own devices, models are likely in certain circumstances to learn to consider prohibited characteristics or close proxies for them. The requirement to search out and correct unnecessary disparate impact is the corrective for such discrimination, not its cause. Disparate impact analysis detects situations in which people who should be similarly situated are treated worse for no good reason. It attempts to ensure similar borrowers and applicants receive the same outcomes, regardless of their race, sex, or other protected class, rather than equalizing outcomes on the basis of protected class membership without regard to other qualifications.

Financial institutions know this, and they know how to do such disparate impact review. The testing of models for disparate impact compliance falls within the general testing regimes financial institutions maintain for model risk management ("MRM") to manage credit risk and assess safety and soundness. These MRM expectations foster responsible model development, accuracy, validation, use, and monitoring.[92]

Disparate impact has played a key role in ensuring fair markets. Particularly given these emerging technologies and risks, a robust and effective disparate impact regime is more important now than ever. The Bureau should be expanding Regulation B's protections to ensure that these technologies are not used to evade or circumvent ECOA. Instead, the Bureau ignores these serious risks and instead proposes to interpret ECOA so as to minimize its effectiveness based on an apparent misunderstanding of the disparate impact doctrine.

H. *The Disparate Impact Standard Ensures Fair, Thriving Markets*

Accordingly, these corrective measures required through disparate impact analysis do not result in "intentional protected class discrimination" as the CFPB asserts.[93] In all these examples, disparate impact analysis begins by examining whether significant disparities based on protected class can be addressed by changes that serve existing business needs just as well as current

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[92] *See, e.g.,* Bd. of Governors of the Fed. Res. Sys. & Off. of Comptroller of the Currency, *Supervisory Guidance on Mondel Risk Management* (Apr. 4, 2011) (providing guidance on model development, implementation, use, validation, governance, policies, and controls), https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-12a.pdf.

[93] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50905.

policy. The benefits achieved by removing unjustified, unnecessary, or arbitrary barriers to credit are enjoyed by all market participants, and not just the group that experienced these impediments most harshly. For this reason, disparate impact has sometimes been characterized as resolving "market failures," that is, policies that are bad for business and consumers but have not been corrected through the normal operation of competitive markets.[94] Former Federal Reserve Chair Alan Greenspan observed that, quite simply, discrimination distorts markets and its correction is good for all:

> To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital.[95]

Studies have shown that discrimination restricts markets and causes economic inefficiencies, while fair practices benefit businesses and municipalities.[96] If one component of the lending ecosystem is not fulfilling its fair lending obligations, consumers are deprived of economic opportunity and businesses lose profits.[97]

Thus, requiring creditors to modify practices that have unnecessary disparate impact has the effect of improving markets for everyone. It remains necessary today, just as it has been since ECOA's enactment, for the efficient operation of credit markets and to combat public or private actions that distort those markets.

I. ***Disparate Impact Under ECOA Does Not Raise Constitutional Concerns***

The Bureau also voices concern that "deliberate balancing of protected class outcomes" or an "attempt to achieve certain outcomes for protected classes" may violate the Constitution's guarantee of equal protection.[98] As the basis for its concerns, the CFPB cites to the Supreme

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[94] *See, e.g.,* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 Cal. L. Rev. 669, 674 (2007) ("Although civil rights law has historically been understood to be at odds with a free market, . . . disparate impact law can complement antitrust and consumer protection law to make markets more competitive and more equitable.").

[95] Alan Greenspan, *Remarks before the Annual Conference of the National Community Reinvestment Coalition, Economic Challenges in the New Century* (March 22, 2000), http://www.federalreserve.gov/boarddocs/speeches/2000/20000322.htm.

[96] *See, e.g.*, K.J. Arrow, K. J., *What Has Economics to Say About Racial Discrimination?*, 12 J. of Econ. Persp. 91 (1998) (demonstrating that discrimination leads to inefficiencies in resource allocation and market performance).

[97] *See, e.g.*, Dana M. Peterson & Catherine L. Mann, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, Citigroup (2020), https://www.citigroup.com/global/insights/closing-the-racial-inequality-gaps-20200922.

[98] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50906.

Court's admonition in the context of race-based higher education affirmative action that "[o]utright racial balancing is patently unconstitutional."[99]

Whatever the merits of such concerns in other contexts, they are wholly inapplicable here. In *SFFA* and earlier cases date back decades, the Court has rejected a practice requiring the selection of "some specified percentage of a particular group merely because of its race or ethnic origin" such that student outside group may be disadvantaged.[100] As an initial matter, this is not a new development in the law, and thus it cannot justify the abrupt changes proposed by the CFPB. It has comfortably coexisted with disparate impact under ECOA for decades. As outlined above, disparate impact analysis does not establish racial or other quotas. It merely requires that, if a facially neutral policy or practice disadvantages people in a certain group disproportionately, alternatives be tested for whether they (a) satisfy a legitimate business needs as well as the current policy or practice; and (b) lessen the adverse impact of the challenged policy or practice. This analysis often concludes that there are no less discriminatory alternatives, in which case there is no obligation to do anything. Or it may identify an alternative that lowers or eliminates the disparate outcomes, to the benefit of all who were affected by the changed policy. But it never requires parity of outcomes or demands that creditor grant credit to a certain number of people of some race or other protected class.

Last, as noted above, the benefits of disparate impact analysis in diminishing significant outcome disparities for protected classes are produced without disadvantaging non-members. Indeed, all enjoy the removal of arbitrary barriers to credit access.

None of these results raise the constitutional concerns identified in the Court's higher education affirmative action cases. More generally, courts hold that racial demographics can inform race-neutral policymaking.[101] In recognizing disparate impact liability under the Fair Housing Act, the Supreme Court held that disparate impact, as properly applied, raises no constitutional concerns. Such concerns, rather, would be applicable only to a situation where "liability was imposed based solely on a showing of a statistical disparity." [102] That is not how disparate impact analysis works under ECOA, just as it was not under the FHA in that case. The Court voiced no reservations over the initial use of statistics to identify demographic disparities. Just as it ignores Supreme Court precedent in arguing that disparate impact is inconsistent with ECOA's purposes, the Bureau simply ignores this Supreme Court precedent considering and

[99] *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*., 600 U.S. 181, 223-24 (2023) (SFFA)).
[100]*Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (internal quotation marks omitted).
[101] *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 62 (1st Cir. 2023) ("including racial diversity as a consideration and goal in the enactment of a facially neutral plan" does not call for strict scrutiny), *cert. denied*, 145 S. Ct. 15 (2024); *Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013) ("If consideration of racial data were alone sufficient to trigger strict scrutiny, then legislators and other policymakers would be required to blind themselves to the demographic realities of their jurisdictions and the potential demographic consequences of their decisions.").
[102] *Inclusive Communities*, 576 U.S. at 521.

rejecting the logic invoked in the proposal. Finally, we note that in the recent college admissions case cited by the Bureau, Justices Gorsuch, Kavanaugh, and Thomas all expressed approval for schools using race-neutral means to satisfy the goal of improving racial diversity,[103] in the same way disparate impact compliance improves outcomes for protected class members by race-neutral means.

Likewise, the collection of demographic data—a statutorily mandated governmental task in numerous contexts[104]—does not implicate the Equal Protection Clause.[105]

J. *The Bureau's Changes Would Create Conflicting Standards and Market Confusion*

If the Bureau finalizes its proposed changes, as the proposal fully acknowledges, creditors would be left trying to reconcile incompatible regimes. On the one hand, they remain obliged to identify and resolve any disparate impact risks in order to maintain compliance with the Fair Housing Act and state anti-discrimination laws under which lenders are susceptible to disparate impact claims.[106] On the other hand, they could reasonably conclude that doing so may risk the CFPB judging they have violated either ECOA or the Constitution, given the proposed rule's suggestion that complying with the decades-old disparate impact rules may suddenly be

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[103] *See* SFFA, 600 U.S. at 317 (Kavanaugh, J., concurring) ("governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."); *id.* at 300 (Gorsuch, J., concurring, joined by Thomas, J.) (citing approvingly race-neutral means schools can use to yield a diverse student body); *id.* at 284 (Thomas, J., concurring) ("Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 789 (Kennedy, J. concurring in part and concurring in the judgment) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way.").

[104] *See, e.g.*, 15 U.S. Code § 1691c-2 (mandatory collection of small business lending data); 12 U.S.C. 2801 et seq. (mandatory collection of home mortgage lending data); EEO-1 Component 1 report (mandatory annual data collection for large private sector employers and federal contractors of workforce demographic data, including data by job category and sex and race or ethnicity authorized by 42 U.S.C. 2000e, et seq.,). In addition, using demographic data collected under Title VII, federal law requires employers to "maintain and have available . . . information which will disclose the impact which its [employment] tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group . . . in order to determine compliance with these [Uniform Guidelines on Employee Selection Procedures]." 29 C.F.R. § 1607.3.

[105] *See, e.g., Caulfield v. Bd. of Educ. of the City of New York*, 583 F.2d 605, 611 (2d Cir. 1978) ("the Constitution itself does not condemn the collection of this [racial and ethnic] data" of public school employees); *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000) (rejecting plaintiffs' argument that the "prohibition against disparate treatment precludes the compilation of demographic data regarding protected groups").

[106] *See Inclusive Communities,* 576 U.S. at 545–46 (holding disparate impact claims are cognizable under the Fair Housing Act); *see also, e.g., Montana: Mont. Code Ann. § 49-2-306* (Montana fair lending law); Mont. Admin. R. § 24.9.612 (providing standards of proof for disparate impact claims); *Saint-Jean v. Emigrant Mortg. Co.*, 50 F. Supp. 3d 300, 319 (E.D.N.Y. 2014) (recognizing disparate impact cause of action under New York fair lending and fair housing law); see also 2025-S4067 (pending New York legislation codifying disparate impact standard); *Ohio: Oh. Civ. Rights Comm'n v. Wells Fargo*, No. 1:11–CV–623, 2012 WL 1288489, at *8 (N.D. Oh. 2012) (recognizing disparate impact cause of action under Ohio fair lending laws); *Hunter v. Ford Motor Co.,* No. 08–4980 (PJS/JSM), 2010 WL 3385225, *9 (D. Minn. 2010) (recognizing disparate impact cause of action under Minnesota fair lending law); *New Jersey: Assocs. Home Equity Servs. v. Troup,* 343 N.J. Super. 254, 269 (N.J. Super. Ct. App. Div. 2001) (recognizing disparate impact cause of action in reverse redlining claim under New Jersey law).

illegal. The proposed rule, having articulated this conflict, offers no suggestion on how the conflict might be resolved.

The simplest answer is also the correct one: no problem exists in the first place. As shown above, the Bureau is wrong to suggest any legal infirmity in continued disparate impact compliance.

K. *Disparate Impact Encourages Innovation that Is Fair and Equitable*

The Bureau also expresses concern "that creditors may be deterred from pursuing innovative and/or cost-reducing policies and procedures because they are uncertain about the impact on protected classes."[107] Once again, this betrays a lack of understanding of how disparate impact actually functions.

The practices that run afoul of disparate impact liability are not those that are innovative, but those that rely on outdated assumptions or stereotypes that cannot be justified. Companies that innovate do exactly what disparate impact liability requires: examine their policies and practices to determine if they have unintended discriminatory effects and, if so, see if any solutions are available to ameliorate unnecessary and unintended exclusions that are not actually based on creditworthiness. This is why many companies and trade groups have supported disparate impact,[108] and FinTech lenders have repeatedly described it as pro-innovation. For example, some of the country's largest fintech lenders explained:

> By assessing outcomes, rather than inputs, disparate impact addresses discrimination that can arise when decisions are the result of algorithms or data, rather than human intent. We also believe this outcomes-based approach establishes disparate impact as a pro-innovation framework for preventing discrimination. This is because it can accommodate advances in credit modeling, artificial intelligence, machine learning, and alternative data, which have the potential to increase financial inclusion, while at the same time holding these technologies accountable for addressing potential discriminatory impact. This combination of innovation and outcomes-based accountability will produce the most fair, inclusive, consumer friendly financial services ecosystem, and allow innovation to help address the "financial services deserts" by bringing the benefits of the financial system to those who are currently underserved.[109]

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[107] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. 50906.
[108] *See, e.g.,* Letter from Charles Oppler, Pres Nat'l Assoc. Realtors to Regulations Div., Office Gen. Counsel, HUD (Aug. 23, 2021), https://narfocus.com/billdatabase/clientfiles/172/3/4473.pdf (supporting reinstatement of HUD's discriminatory effects standard and emphasizing "[e]liminating disparate impact discrimination helps protect both the legitimate business interests of real estate professionals and the fair housing rights of consumers").
[109] Statement on Request for Guidance on Implementation of Disparate Impact Rules Under ECOA (June 29, 2021) (statement by Lending Club, affirm, Oportun, PayPal, Square, and Varo), https://ncrc.org/statement-on-request-for-guidance-on-implementation-of-disparate-impact-rules-under-ecoa/.

The Head of Public Policy and Regulatory Affairs for Upstart, another large fintech lender, observed that disparate impact analysis "doesn't just protect borrowers; it protects innovation." He explained:

> This disparate impact approach works under ECOA because it provides a baseline and an academically rigorous method for rooting out bias in lending. It also means that concerns about algorithmic discrimination based on personal anecdotes — such as differing credit limits offered to spouses in the same household — will get fairly scrutinized (along with a statistically significant data set) under the microscope of ECOA's disparate impact testing regime.[110]

For these reasons, he concluded that "proposals to abandon the long-standing disparate impact testing for lenders could unnecessarily chill innovation in new techniques or data sources that may produce better products, more inclusion and less unfair disparity for future borrowers."[111]

L. *Disparate Impact Under ECOA Remains Needed to Help Ensure Credit Market Fairness*

The CFPB also suggests that disparate impact compliance can be eliminated because "consumers would remain protected under ECOA from disparate treatment, including facially neutral policies and procedures that creditors adopt as proxies for intentional discrimination."[112] As noted above, intentional credit discrimination is often difficult to prove, given that a creditor normally does not announce its intention or otherwise provide overt evidence of discrimination and the process by which credit decisions are made is generally hidden from credit applicants and borrowers. Disparate impact liability thus "plays a role in uncovering discriminatory intent."[113] And this is even more true with respect to today's market in which decisions are increasingly made by models that have no intent at all.

For those on the business end of discriminatory exclusions, discriminatory intent can not only be unknowable, it is often irrelevant. Many of the biggest obstacles to equal credit access are found in facially neutral policies or practices that cause at least as much damage as any intentional discrimination. As one court put it, "a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[114]

Today, people of color often reside disproportionately in credit deserts. Subprime and fringe lenders, which seldom report positive payment information to credit repositories, are hyper-concentrated in communities of color, while banks and credit unions are hyper-

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[110] Nathaniel Hoopes, *Don't Ditch Disparate Impact*, Am. Banker (March 5, 2020), *available at* https://www.americanbanker.com/opinion/dont-ditch-disparate-impact.
[111] *Id.*
[112] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50906.
[113] *Inclusive Communities*, 576 U.S. at 540.
[114] *Smith v. Anchor Building Corp.,* 536 F.2d 231 (8th Cir. 1976).

concentrated in predominantly White communities. Some banks close branches in high-income, affluent Black neighborhoods at higher rates than they are closing branches in low-income non-Black areas.[115] In addition, policies that use geography as a proxy for creditworthiness will often cause negative disparate impacts based on race and national origin.

Disparate impact liability can—and should—continue to play an important role in identifying and eliminating arbitrary and unnecessary barriers to credit, just as it has in the decades since ECOA was enacted. In surveying the history of disparate impact claims under the Fair Housing Act, the Supreme Court concluded:

> [S]ince the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.[116]

For fifty years, disparate impact under the Equal Credit Opportunity Act has played a similar role in making our credit markets more fair. It will continue to do so if retained.

II. DISCOURAGEMENT OF APPLICANTS

Since its promulgation five decades ago, Regulation B has been a critical tool to challenge discriminatory discouragement from applying for credit in all its pervasive forms. The current rule's discriminatory discouragement prohibition is essential to truly equal credit opportunities, since discrimination often prevents an application from being submitted at all. Through its proposed rule, however, the CFPB now seeks to drastically narrow and undermine these key discouragement provisions, thus permitting creditors to engage in discriminatory practices that have long been properly forbidden.

First, the proposed rule seeks to narrow what constitutes an "oral or written statement" to no longer include "acts or practices directed at prospective applicants that could discourage" a reasonable person from applying.[117] Rather, under the proposed rule, an "oral or written statement" would encompass only "spoken or written words, or visual images."[118] With this revision, Regulation B would no longer prohibit discriminatory "business practices" such as choosing to advertise credit products or to open branches only in predominantly white

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[115] Zach Fox, Zain Tariq, Liz Thomas, & Ciaralou Palicpic, Bank Branch Closures Take Greatest Toll on Majority-Black Areas, S&P Global (July 25, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/latestnews-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925.
[116] *Inclusive Communities*, 576 U.S. 546–57 (quoting the Report of the National Advisory Commission on Civil Disorders 1 (1968)).
[117] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50907.
[118] *Id.*

neighborhoods, even if they have “some communicative effect” that could discourage some consumers.[119]

Second, the proposed rule would no longer prohibit creditors’ “selective encouragement” of certain groups through, for example, geographically targeted advertisements that are directed only to primarily white neighborhoods avoiding primarily Black neighborhoods. Rather, the proposed rule provides that encouraging one group of consumers cannot discourage other groups who are not the “intended recipients of the statements[,]”[120] no matter the context or evidence suggesting otherwise.

Finally, under the proposed rule statements that would discourage a reasonable person from applying for credit based on race or protected class could be legal. They would violate ECOA only: (a) where a creditor “knows or should know” the statement would cause a reasonable person to be discouraged; (b) where “the creditor’s statement would cause a reasonable person” not just to be discouraged, but “to believe that the creditor would deny, or would grant on less favorable terms, a credit application” because of the applicant’s protected characteristics; and (c) where the discouraging statement does not simply “imply” or “suggest” a exclusionary credit policy but rather explicitly “express[es]” a discriminatory preference or policy of exclusion.

The proposed rule also adds three examples of types of “non-prohibited statements that a creditor may make” under all circumstances: statements supporting law enforcement, recommending that consumers investigate a neighborhood’s schools and crime statistics before buying a home there, or encouraging them to develop their financial literacy.[121]

The CFPB sets forth no data, case law, or other legal or factual support justifying these sweeping changes. Instead, it relies on unsupported and erroneous claims that the rule’s current protections are overbroad, out of scope, and have a “chilling effect” on creditors’ business practices, speech, and activities.

As detailed below, the proposed changes should be rejected for six reasons: *First*, the proposed rule is inconsistent with ECOA’s text, purpose, and interpretation, all of which support the existing regulation’s comprehensive discouragement prohibition. *Second*, the proposed rule would do away with provisions critical to address redlining, digital targeting, and other unequal pre-application treatment faced by protected groups. These emerging technologies may permit creditors to circumvent or evade ECOA’s requirements, and the Bureau would do well to expand Regulation B to prevent such conduct, rather than restrict its applicability. *Third*, the existing Regulation does not raise constitutional free speech concerns or otherwise chill legitimate business practices and speech. *Fourth*, statements directed outside the target group may in fact

119 *Id.*
120 *Id.* at 50908.
121 *Id.* at 50909.

result in the relative discouragement of protected groups. *Fifth*, the revised standard for discouragement would not cover many pervasive practices that discriminatorily discourage applicants. *Finally*, the proposed changes are not needed and would drastically limit any meaningful scrutiny of pre-application discouragement.

The proposal is not a serious exercise in reasoned decision making and reflects no understanding of or engagement with ECOA's text, structure, or agency and court interpretations of ECOA, common evidence of discrimination and risks to consumers, or the potential consequences of the changes it proposes. Instead, it appears to represent an attempt by CFPB leadership in this Administration to improperly nullify the Seventh Circuit's reasoned interpretation of ECOA's application to discouragement in *CFPB v. Townstone Financial, Inc.*, giving free rein to lenders to engage in redlining and other forms of harmful discouragement. Because these drastic changes would upend longstanding protections and severely hamper ECOA's effectiveness in addressing pervasive pre-application discouragement, we strongly oppose the proposed rule.

A. *The Proposed Rule Is Inconsistent with ECOA's Text, Purpose, and Interpretation by the Courts*

The proposed revisions—and the CFPB's underlying reasoning—are wholly inconsistent with ECOA's text, purpose, and court interpretation, all of which support the existing, longstanding discouragement provisions. They fly in the face of almost five decades of agency interpretation that has correctly viewed a comprehensive ban on discouragement as a key part of ECOA's bar on discriminatory practices in credit.

Regulation B's Longstanding Discouragement Provision

For five decades, Regulation B has prohibited "statements to applicants or prospective applicants which would, on [a prohibited basis], discourage a reasonable person from applying for credit or pursuing an application for credit."[122] In 1985, the Federal Reserve Board issued additional guidance through its Staff Interpretations providing that "[i]n keeping with the purpose of the Act—to promote the availability of credit on a nondiscriminatory basis—[§ 1002.4(b)] covers acts or practices directed at prospective applicants that could discourage a reasonable person, on a prohibited basis, from applying for credit."[123] The Staff Interpretations then provided examples of practices prohibited under Section 1002.4(b), including "[t]he use of words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion in violation of the Act."[124] In 2011, the CFPB republished Regulation B without material change, to prohibit "any oral or written

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[122] 40 Fed. Reg. 49298, 49307 (Oct. 22, 1975) (prohibiting discouragement on the basis of sex); amended under 42 Fed. Reg. 1242, 1253–54 (1977) (adding other protected bases).
[123] Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48026, at Comment 5(a)-1, (Nov. 20, 1985).
[124] *Id.* at Comment 5(a)(1).

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."[125] The Staff Interpretations continue to be codified as the agency's Official Interpretations.[126]

The Proposed Rule

The CFPB acknowledges that prohibiting discouragement is necessary to "protect[] ECOA's purpose of making credit available on a non-discriminatory basis[,]" as "[i]n the absence of a discouragement provision, creditors could sidestep [ECOA's discrimination] prohibition entirely by discouraging applicants from applying for credit in the first place."[127] However, the CFPB proposes a set of sweeping revisions that allow creditors to do just that. To justify these changes, the CFPB claims that the discouragement provision under Regulation B "has been interpreted to prohibit conduct that it is not necessary or proper to prohibit to prevent the circumvention or evasion of ECOA's purposes[,]" resulting in an "unnecessarily chilling effect on creditors' business practices and exercise of their rights to speak about matters of public interest" and "constrain[ing] free speech and commercial activity."[128]

But the Bureau offers no legal or factual support for these claims. Instead, each change is justified merely by the CFPB's conclusory assurances that the provisions they replace "do not reflect the circumvention or evasion of ECOA's prohibition of discrimination that the discouragement provision was designed to address," are "overbroad relative to the intended purposes of the discouragement provision," concern conduct that need not be prohibited "to achieve the purposes of ECOA," or "apply to scenarios that should not be characterized as prohibited discouragement under ECOA."[129]

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[125] 12 C.F.R. § 1002.4(b).
[126] 12 C.F.R. § 1002, at Comment 4(b)(1), , (Dec. 2011) (explaining that "[i]n keeping with the purpose of the Act—to promote the availability of credit on a nondiscriminatory basis—§ 1002.4(b) covers acts or practices directed at prospective applicants that could discourage a reasonable person, on a prohibited basis, from applying for credit).
[127] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50907.
[128] *Id.*
[129] Specifically, to support its proposed limits on what constitutes an "oral or written statement," the CFPB relies on its preliminary determination that Section 1002.4(b) was "being interpreted overly broadly to apply to business practices that . . . do not reflect the circumvention or evasion of ECOA's prohibition against discrimination that the discouragement provision was designed to address," and asserts the contracted provision would "facilitate compliance" and "result in more targeted and effective enforcement[.]" *Id*. As to its decision to allow selective "encouragement," the CFPB claims that Regulation B's' current prohibition is "overbroad relative to the intended purposes of the discouragement provision," arguing "when a creditor directs *encouraging* statements to certain applicants or prospective applicants, this is not an action intended to (or even likely to) discourage *other* applicants or prospective applicants, who did not receive the statements and might, in fact, have been entirely unaware of them, from applying for credit." *Id.* at50908 (emphasis added). The CFPB concludes "[s]uch conduct is not typically an evasion of ECOA's prohibitions, nor is prohibiting it necessary or proper to achieve the purposes of ECOA." *Id.* And the standard to establish discouragement should be revamped, the Bureau says, because Section 1002.4(b) "has been interpreted to apply to scenarios that should not be characterized as prohibited discouragement under ECOA." *Id.* That is, they "may involve potentially controversial statements by creditors [but] do not involve statements that an objective creditor would know, or should know, would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms than other borrowers." *Id.*

The proposed changes, however, do away with critical protections needed to effectuate ECOA's mandate that—contrary to the CFPB's assertion—have for decades worked to "prevent the circumvention or evasion of ECOA's purposes." A review of ECOA's text, purpose, and interpretation makes clear that the proposed rule serves only to undermine the purposes of the statute, facilitate its circumvention, and render the statute dead letter as to some of the most pervasive forms of pre-application discouragement.

ECOA's Text and Purpose

ECOA's text and purposes support comprehensive discouragement provisions that reach persistent forms of discrimination that frustrate equal access to credit. ECOA prohibits discrimination against any applicant "with respect to any aspect of a credit transaction" on the basis of a protected status.[130] The Act then delegates to the CFPB[131] the authority to prescribe regulations "to carry out the purposes of [ECOA]" and provide for adjustments that are "necessary or proper *to effectuate the purposes of [ECOA]*" and to "*prevent circumvention or evasion* thereof."[132] As the proposed rule acknowledges, relying on this authority to bar the discouragement of applications, and not just discrimination against actual applicants, is vital to accomplishing ECOA's purposes: "In the absence of a discouragement provision, creditors could sidestep [ECOA's] prohibition entirely by discouraging prospective applicants from applying for credit in the first place."[133]

Congress ratified this understanding when, in 1991, it amended ECOA to require among the matters referred to the Attorney General those where there is reason to believe that a creditor has engaged in a "pattern or practice of *discouraging* or denying applications for credit in violation of [ECOA]."[134] In amending the Act to add this requirement, Congress considered "troubling statistics which showed that blacks and minority neighborhoods got fewer loans and got rejected for loans more often than whites and white neighborhoods—even when incomes were comparable," noting the prior "inadequate regulatory response to this situation."[135] It thus explained that "[d]iscouraging applicants on a prohibited basis and advertising which implies a discriminatory preference are also prohibited."[136]

As the leading judicial decision construing the discouragement bar observed, by endowing first the Board and later the Bureau with this authority, "Congress indicated that []ECOA must be construed broadly to effectuate its purpose of ending discrimination in credit

[130] 15 U.S.C. § 1691(a).
[131] This power was initially assigned to the Federal Reserve Board until 2010, when Congress transferred ECOA rulemaking authority to the CFPB. Pub. L. 111-203, 124 Stat. 1376, 2083-84 (2010).
[132] 15 U.S.C. § 1691b(a) (emphasis added).
[133] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50907.
[134] FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 223, 105 Stat. 2236 (1991) (emphasis added) (codified as15 U.S.C. § 1691e(g)).
[135] 137 Cong. Rec. S2519 (daily ed. Feb. 28, 1991) (statement of Sen. Dixon).
[136] S. Rep. No. 102-167, at 86 (1991).

applications."[137] It is impossible for ECOA to achieve this purpose by limiting Regulation B as the Bureau proposes to do.

The CFPB does not point to anything in ECOA's text or history that supports the view that discouragement consumers experience in the form of redlining, selective "encouragement," or statements implying or suggesting a discriminatory preference are beyond ECOA's intended reach. Nor could it. On the contrary, at every stage, the text and legislative history of ECOA show that Congress envisioned comprehensive protections that would prevent and address the kinds of discriminatory practices consumers experience, including those the CFPB now seeks to allow. The proposed rule, however, abandons that purpose to advance a view of discouragement that is driven more by concerns about how creditors may be inconvenienced than by how consumers may be excluded from access to a "virtual necessity of life."[138]

In fact, rather than "prevent[ing] discriminatory practices"[139] as Congress intended, by the CFPB's own admission, "[t]he proposed provisions may result in consumers not applying for credit and facing greater barriers to accessing credit than they otherwise would have under the existing rule."[140] Specifically, as explained below in more detail, the proposed changes would do away with longstanding protections against some of the most pervasive forms of pre-application discrimination, including redlining, and digital steering, *see infra pages* 33–39; protect creditors (instead of consumers) by limiting liability for business practices and statements that have in fact been shown to discourage consumers based on protected traits; and make it exponentially harder to hold creditors accountable for discouragement.

Thus, where the current rule has long worked to prevent evasion and circumvention of the Act's fundamental purposes, the proposed rule would instead *facilitate* such evasion. The proposed rule is not just unsupported by ECOA's text and purpose, but it conflicts directly with the CFPB's authority to prescribe regulations "to carry out the purposes of [ECOA]." [141]

Court Interpretations

In *CFPB v. Townstone Financial, Inc.*, the Seventh Circuit confirmed that the existing "Regulation B's prohibition on discouraging prospective applicants is [] consistent with ECOA's text and purpose."[142] The CFPB had sued a mortgage lender and its owner alleging that for years they had, in violation of ECOA, discouraged Black prospective applicants from applying for mortgage loans by making disparaging and derogatory statements about Black neighborhoods on their commercial advertisement radio show.[143] The Seventh Circuit reversed the district court's holding that ECOA and its implementing regulations did not reach pre-application discriminatory

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[137] *Consumer Fin. Prot. Bureau v. Townstone Fin., Inc.*, 107 F.4th 768, 776 (7th Cir. 2024).
[138] *See* S. Rep. No. 94-589, at 2 (1976); Pub. L. No. 94-239, 90 Stat. 251 (1976).
[139] *Id.*
[140] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50916.
[141] 15 U.S.C. § 1691b(a) (emphasis added).
[142] *Townstone*, 107 F.4th at 771.
[143] *Id.*

conduct.[144] The Court of Appeals concluded that "[i]n endowing the Board with authority to prevent 'circumvention or evasion,' Congress indicated that ECOA must be construed broadly to effectuate its purpose of ending violation of the statute."[145] It explained"[r]eading the statutory language as a whole, including the strong congressional direction that the cognizant agencies [] prevent 'circumvention and evasion,' makes clear that the prohibition against discouragement must include the discouragement of prospective applicants."[146]

Courts generally interpret ECOA and its regulations broadly, consistent with ECOA's remedial purposes[147] and to avoid causing its promises to become dead letter.[148] Nothing in ECOA case law supports the CFPB's conclusion that Regulation B has been "interpreted to prohibit conduct that is not necessary or proper to prohibit," nor does the CFPB point to any authorities supporting its narrow view of ECOA's discouragement prohibition. Instead, the proposed rule would render the statute dead letter for some of today's most common forms of pre-application discouragement, as described *infra*.

We note that the Bureau's proposed changes cannot be squared with, and appear to be a rejection of the Seventh Circuit's recent interpretation of the scope of ECOA in *Townstone*. This is consistent with other steps the Bureau has taken during this Administration to immunize the discriminatory acts identified in that case. To review: in 2020, after a three-year investigation conducted during the first Trump administration, the CFPB filed suit against Townstone for illegal discrimination. The Bureau then litigated the case for over four years—eventually prevailing in the Seventh Circuit—before entering into a settlement agreement with Townstone, memorialized in a stipulated final judgment. In 2025, under new leadership, the CFPB reversed course and asked the court to vacate its prior judgment, on the unfounded grounds that the CFPB had acted inappropriately in pursuing the case in the first place. At the same time, it issued a wildly inaccurate blog post about the case.[149] NFHA filed an amicus brief opposing the CFPB's

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[144] *Id.* at 773.
[145] *Id.* at 776.
[146] *Id.*
[147] *See, e.g.*, *Bros. v. First Leasing*, 724 F.2d 789, 793–794 (9th Cir. 1984) ("We must construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose."); *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487, 489 (9th Cir. 1986) (same); *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239 (9th Cir. 1982) (restrictive interpretations of Regulation B are not warranted in light of ECOA's purpose to protect women against the arbitrary denial or termination of credit); *Williams v. AT & T Wireless Servs.*, Inc., 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998) (ECOA should be interpreted broadly).
[148] *See, e.g.*, *Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 580 (6th Cir. 2016) (rejecting interpretation of ECOA that would make statute "a paper tiger"); *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004) (interpreting ECOA so as to avoid an "absurd result[]"); *cf. Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1148-49 (7th Cir. 2001) (rejecting interpretation that would "eviscerate" the statute at issue).
[149] CFPB Newsroom, CFPB Seeks to Vacate Abusive, Unjust Case Against Townstone (Mar. 28, 2025), https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-to-vacate-abusive-unjust-case-against-townstone/ (stating the "CFPB abused its power, used radical 'equity' arguments to tag Townstone as racist with zero evidence, and spent years persecuting and extorting them – all to further the goal of mandating DEI in lending via their regulation by enforcement tactics." and the Bureau "wanted a de-facto mortgage quota, a policy aligned with the views of radical DEI proponents like Robin DiAngelo and Ibram X Kendi.").

motion, explaining that there were no grounds to vacate the judgment.[150] The district court rejected the CFPB's "unprecedented" motion and found that the CFPB's assertions about the case, the same made in its blog post, were "breathtaking, [but] unpersuasive."[151] The court characterized CFPB's new legal position as an "act of legal hara-kiri that would make a samurai blush."[152]

It appears that the Bureau is not done acting on behalf of Townstone. Now the Bureau is proposing not only to generally disarm the discouragement provision, but to create specific carveouts from liability precisely for the kind of discriminatory statements Townstone made regarding law enforcement, grocery stores, and crime that the CFPB previously pointed to as proof of Townstone's illegal discouragement—carve outs that could appear as though they were written by Townstone's defense counsel.

B. *The Proposed Rule Would Eliminate Protections Necessary to Address Unequal Pre-application Treatment*

The proposed rule would remove longstanding protections against discriminatory credit practices—including redlining and other forms of discouragement—that create powerful barriers to equal credit, helping entrench severe gaps in homeownership, small business funding, and wealth across protected traits.[153] These practices have contributed to a dual credit market, where some communities have access to affordable and safe credit, while historically underserved communities of color are disproportionately unbanked at every income level and relegated to subprime credit alternatives.[154] Pre-application discouragement persists as one of the contributing forces to this dual credit market. Below we highlight some of the ways in which the proposed rule would undermine protections necessary to address persistent credit discrimination.

Redlining

Redlining—the denial or unequal provision of credit to residents of specific neighborhoods because of the protected-class demographics of those areas—is largely carried out through pre-application discouragement, as opposed to outright denial of individual applications.[155] For decades, the CFPB, Board, DOJ, and other federal financial regulators have

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[150] Brief of Amici Curiae National Fair Housing Alliance, et al., Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc.. 1:20-cv-04176, Doc. 147-1 (N.D. Ill. Apr. 4, 2025).
[151] *Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc..* 1:20-cv-04176, Doc. 152 (N.D. Ill. June 6, 2012).
[152] *Id*.
[153] Lisa Rice, *Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color*, National Fair Housing Alliance (Feb. 26, 2019), available at: https://nationalfairhousing.org/wp-content/uploads/2019/04/Missing-Credit.pdf; Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 Suffolk U. L. Rev. 935 (2013).
[154] *See generally id.*; *FDIC National Survey of Unbanked and Underbanked Households*, FDIC 2, 6–7, 37 (2021), available at: https://www.fdic.gov/analysis/household-survey/2021report.pdf.
[155] *See, e.g.*, Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining under the Fair Housing Act*, 32 J. Marshall L. Rev. 617, 637 (1999) (discussing study concluding that lack of loan applications, rather than low application approval rates, was the immediate cause of the most severe negative

acknowledged that "[r]edlining violates both the [Fair Housing Act] and the ECOA."[156] Specifically, redlining often involves "marketing, advertising, and [] outreach only to predominantly white communities [while] avoiding communities of color"; excluding communities of color from "assessment areas" where the creditor focuses its products, branches, and resources; and adopting other practices that discourage prospective applicants and significantly limit loan applications from communities of color.[157] Since at least 2009, the Federal Financial Institutions Examination Council (FFIEC) agencies (including, since its creation, the Bureau) have articulated indicators of discriminatory redlining risk that reflect these forms of pre-application discouragement, including: demarcation of markets that exclude areas with high concentrations of minority residents, difference in services or hours available at different branches, employee statements "that reflect an aversion to doing business in areas with relatively high concentrations of minority residents," or evidence that "an institution omits or excludes such an area from efforts to market residential loans or solicit customers for residential credit."[158] The CFPB has adopted these FFIEC exam procedures[159] and, in its own guidance, it articulates the same types of criteria, including asking if an entity engaged in any "geography- or neighborhood-based advertising that may indicate that certain geographies/neighborhoods are either favored or disfavored."[160]

Discriminatory redlining—one of the primary ways in which creditors can circumvent ECOA's protections—has been a major contributor to stark disparities in credit access, homeownership, and wealth across racial lines. For instance, while Black people comprise 12.1% of the U.S. population, only approximately 4.5% of home purchase loans went to Black borrowers in 2024.[161] And Black borrowers are disproportionately steered to risky subprime loans, even when they have higher incomes.[162] Accordingly, there is a wide homeownership gap

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lending patterns, and that those low volumes resulted from lender strategies related to marketing, delineating lending territory, and other policies).

[156] Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (April 15, 1994). After it was established, the CFPB "concur[ed]" with this Policy Statement. Lending Discrimination, 2012 WL 11423379 (April 18, 2012).

[157] Samantha Ondrade, *Enforcement of the Fair Housing Act and Equal Credit Opportunity Act to Combat Redlining*, 70 DOJ J. Fed. L. & Prac. 247, 253 (2022) (noting that indicia of redlining include "marketing, advertising, and conducting outreach only to predominantly white communities and avoiding communities of color"); Nier, *supra* note 155.

[158] FFIEC Manual at 11, 30 (2009), https://www.ffiec.gov/sites/default/files/media/press-releases/2020/2020-june-24-fairlending.pdf.

[159] CFPB Exam Manual, ECOA 2 (Oct. 2015), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-01.pdf.

[160] *Id*. at 20 (Apr. 2019).

[161] Federal Housing Finance Agency, *2025 Annual Housing Report* at 11 (Oct. 2025), available at: https://www.fhfa.gov/document/annual-housing-report-2025; United States Census Bureau, *Demographic and Housing Estimates* (2024), available at: https://data.census.gov/table?q=DP05:+ACS+DEMOGRAPHIC+AND+HOUSING+ESTIMATES&tid=ACSDP1Y2021.DP05.

[162] Alanna McCargo & Jung Hyun Choi, *Closing the Gaps: Building Black Wealth Through Homeownership*, Urban Institute at 7 (Nov. 23, 2020), available at: https://www.urban.org/research/publication/closing-gaps-building-black-wealth-through-homeownership.

between Black, Latino, and White families.[163] As of 2025's second quarter, homeownership rates for Black and Latino households lagged at 43.9% and 48.8% , respectively, far behind that of non-Hispanic White households, at 74%.[164]

In recent years, relying in part on Regulation B's current definition of "discouragement," the DOJ, CFPB, and other federal financial regulators have challenged dozens of financial institutions' discriminatory redlining across the country, resulting in impactful court-approved settlements.[165] These have been critical in countering redlining and its pernicious effects. For example, just through consent decrees with the DOJ and CFPB, lenders have established loan subsidy funds totaling more than $170 million that will benefit residents of redlined communities of color, and invested millions more in "community partnerships, targeted advertising and outreach, and consumer education initiatives to benefit communities of color."[166]

The proposed rule, however, would eliminate Regulation B's ability to bar redlining. For example, the proposed rule seeks to narrow what constitutes an "oral or written statement" to "spoken or written words, or visual images such as symbols, photographs, or videos[,]" and end its current coverage of "acts or practices directed at prospective applicants that could discourage" prospective applicants.[167] Such a revision would no longer prohibit "business practices" such as decisions on where (and where not) to "locate branch offices, [] to advertise, or [] to engage with the community through open houses or similar practices,"[168]—the drivers behind redlining. Under the proposed rule, a creditor's selective encouragement through, for example,

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[163] Jung Hyun Choi, et al., *Explaining the Black-White Homeownership Gap*, Urban Institute (Oct. 2019), available at: https://www.urban.org/sites/default/files/publication/101160/explaining_the_blackwhite_homeownership_gap_2.pdf ; McCargo and Hyun Choi, *supra* note 154, at 4.
[164] United States Census Bureau, *Quarterly Residential Vacancies and Homeownership Second Quarter 2025* 9 (May 3, 2023), available at: https://www.census.gov/housing/hvs/files/currenthvspress.pdf.
[165] *See, e.g.*, Consent Order, *United States v. Mortg. Firm*, No. 25-cv-60038-WPD (S.D. Fl. Jan. 10, 2025), ECF No. 7; Consent Order, *United States v. Patriot Bank*, No. 2:24-cv-02029-TLP-tmp (W.D. Tenn. Jan. 30, 2024), ECF No. 11; Consent Order, *United States v. OceanFirst Bank, Nat'l Assoc.*, No. 3:24-cv-09248-RK-JTQ (D.N.J. Oct. 1, 2024), ECF No. 9; Consent Order, *United States v. First Nat'l Bank of Penn.*, No. 1:24-cv-88 (M.D. N.C. Feb. 13, 2024), ECF No. 7; Consent Order, *United States v. Citadel Fed. Credit Union*, No. 2:24-cv-05426 (E.D. Penn. Oct. 10, 2024), ECF No. 2; Consent Order, *CFPB v. Fairway Indep. Mortg. Corp.*, No. 2:24-cv-1405-SGC (N.D. Al. Oct. 15, 2024), ECF No. 3-1; Consent Order, *United States v. The Washington Trust Co.*, No. 1:23-cv-399-MSM-LDA (D.R.I. Oct. 31, 2023), ECF No. 8; Consent Order, *United States v. Park Nat'l Bank*, No. 2:23-cv-822-EAS-CMV (S.D. Ohio Feb. 28, 2023); Consent Order, *United States v. ESSA Bank & Trust*, No. 23-cv-2065-MMB (E.D. Penn. June 9, 2023), ECF No. 6 ; Consent Order, *CFPB, et al. v. Trident Mortg. Co. LP*, No. 2:22-cv-02936-GEKP (E.D. Pa. Sept. 14, 2022), ECF No. 13; Consent Order, *CFPB, et al. v. Hudson City Sav. Bank*, F.S.B., No. 2:15-cv-07056-CCC-JBC (D.N.J. Nov. 4, 2015), ECF No. 9; *United States v. First Merchants Bank*, No. 1:19-CV-02365-JPH-MPB, 2019 WL 3779768 (S.D. Ind. Aug. 12, 2019); Consent Order, *United States, et al. v. BancorpSouth*, No. 1:16-cv-001118-MPMDAS (N.D. Miss. July 25, 2016), ECF. No, 8; Consent Order, *United States, et al. v. Trustmark Nat'l Bank*, No. 2:21-cv-2664 (W.D. Tenn. Oct. 27, 2021), ECF No. 26; Consent Order, *United States v. City Nat'l Bank*, No. 2:23-cv-00204-DMG-RAO (C.D. Cal. Jan. 30, 2023), ECF. No. 20; Consent Order, *United States v. Lakeland Bank*, No. 2:22-cv-05746 (D.N.J. Sept. 29, 2022), ECF No. 4.
[166] U.S. Dep't of Justice, *Combatting Redlining Initiative*, available at: https://www.justice.gov/crt/page/file/1580441/dl.
[167] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50907.
[168] *Id.*

geographically targeted advertisements, would be expressly *allowed*, even if the creditor did so with discriminatory intent. The proposed rule would thereby dismantle the tools effectively used, up until now, to combat discouragement of applications from predominantly minority communities.

The CFPB does not acknowledge—let alone reasonably explain—the abandonment of this longstanding approach taken by the federal regulatory and enforcement agencies, including the Bureau. Nor does it acknowledge that, by doing so, it would permit creditors to engage in practices that constitute redlining.

Other Pre-Application Discrimination

Pre-application discrimination also plays a significant role in disparities in access to small business loans, as discussed *infra*. Discriminatory discouragement of small business entrepreneurs is widespread, with entrepreneurs of color, women, and religious-affiliated entities facing heightened obstacles in their search for credit.[169] For instance, a November 2024 study conducted by the CFPB and DOJ used matched-pair testing to measure the treatment of testers purporting to be well-qualified Black and White small business owners seeking credit at large bank lenders.[170] Through 100 visits across 23 financial institutions, the study revealed that Black testers received less encouragement to apply, were more often discouraged from applying than White testers, and were more often steered towards products they did not request.[171]

Discouragement is also present in auto loans, the third largest category of household debt (behind mortgages and student loans).[172] For example, a 2018 investigation into the car-buying process conducted by NFHA using matched-pair testing found that non-White testers with better financial profiles were treated considerably worse, received more costly financing options; were provided fewer financing options, incentives, and rebates; and were less likely to be taken seriously as buyers than White testers.[173]

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[169] *See, e.g.*, Andre Perry, et al., *Black-owned Businesses in U.S. Cities: The Challenges, Solutions, and Opportunities for Prosperity*, Brookings Metro (Feb. 14, 2022), available at: https://www.brookings.edu/wp-content/uploads/2022/02/Black-business-report_PDF.pdf; Maura L. Scott, et al., *Revealing and Mitigating Racial Bias and Discrimination in Financial Services*, J. of Mktg. Rsch. 3, available at: https://doi.org/10.1177/00222437231176470; CFPB, *Supervisory Highlights 8* (Fall 2021), available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-25_2021-12.pdf; Federal Reserve System, 2020 Fair Lending Interagency Webinar 36, 39 (Dec. 2020), available at: https://www.consumercomplianceoutlook.org/Outlook-Live/2020/2020-Fair-Lending-Interagency-webinar/.
[170] CFPB, *Matched-Pair Testing in Small Business Lending Markets* (Nov. 2024), https://www.consumerfinance.gov/data-research/research-reports/matched-pair-testing-in-small-business-lending-markets/.
[171] *Id.* at 2, 26, 48.
[172] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (Nov. 2023), available at: https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2025Q.
[173] Lisa Rice & Erich Schwartz Jr., *Discrimination When Buying a Car: How the Color of your Skin Can Affect your Car-Shopping Experience*, NFHA (Jan. 2018), available at: https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-aCar-FINAL-1-11-2018.pdf.

Currently, under Regulation B, these actions may amount to actionable discouragement. But as detailed *supra pages* 29–34, the proposed rule would drastically limit the effectiveness of ECOA to challenge these forms of pre-application discouragement *inter alia*, severely limiting its coverage to oral or written statements; allowing for selective encouragement and requiring that discouraging statements be directed at the protected groups; requiring a heightened showing that the creditor knew or should have known that the statements would discourage the prospective applicant and that the applicant believed they would not be offered a loan or would be offered lesser terms based on their protected class; and explicitly allowing broad categories of statements that can, depending on the facts, convey discriminatory preferences. This is particularly concerning given that, outside of the mortgage context, ECOA is the main federal recourse to challenge discriminatory credit practices.[174]

As these and the below examples illustrate, the proposed rule would eviscerate longstanding provisions that remain crucial to addressing pervasive pre-application discrimination.

C. *The Existing Discouragement Definition Does Not Raise Constitutional Concerns*

The proposed changes are needed, the CFPB argues, to avoid "overbroad coverage of the regulation and its potential interpretations [that] may constrain free speech and commercial activity in ways that are unwarranted."[175] The CFPB provides no support for that claim, nor can it, as the existing discouragement definition is fully consistent with constitutional guarantees of free speech.[176]

The First Amendment does not implicate government restrictions "directed at commerce or conduct imposing incidental burdens on speech."[177] And "commercial speech," or "speech that proposes a commercial transaction[,]" is accorded lesser protection under the First Amendment.[178] That is especially so when the speech at issue concerns illegal commercial activity that is "categorically excluded from First Amendment protection."[179] As one example, in the employment context, the Supreme Court has held that a congressional ban on "discriminating

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[174] *See* Ondrade, *supra* note 15, at 252 ("Although the FHA outlaws lending discrimination related to housing, other types of lending discrimination, such as discrimination in consumer or auto lending, were without federal recourse until 1974, when the Equal Credit Opportunity Act (ECOA) was enacted . . . .").

[175] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50907.

[176] In fact, the CFPB correctly argued the contrary in the *Townstone* litigation, asserting that "Regulation B's prohibition of discouragement of prospective applicants (which covers 'acts or practices' that could 'discourage a reasonable person, on a prohibited basis, from applying for credit,' and is designed to prevent the core antidiscrimination provision of ECOA from being a dead letter) fall squarely within [the] category of permissible regulation of commercial conduct that may impose incidental burdens on expression." CFPB's Opp'n to Mot. to Dismiss, Case No. 1:20-cv-4176 (ND. Ill.), Doc. No. 35, at 16-17. Neither the Seventh Circuit nor the district court reached the issue. *Townstone Fin., Inc.*, 107 F.4th at 776.

[177] *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 769 (2018); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 62 (2006).

[178] *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (2014).

[179] *United States v. Williams*, 553 U.S. 285, 297 (2008).

in hiring on the basis of race . . . may require employers to remove 'White Applicants Only' signs[,]" and this in no way would offend the First Amendment.[180]

This conclusion holds for the "acts or practices" the Bureau proposes to remove from Regulation B's reach. There is no serious argument that a business has a First Amendment right to refuse to serve consumers on the basis of their protected class status by, for example, ensuring that its product offerings—including, for example, digital offerings that are *only* available to recipients of digital advertisements—reach only consumers of specific protected classes. The Bureau provides no rationale, let alone authority, supporting that position.

The Fair Housing Act's restrictions on discriminatory statements are instructive in this context. The FHA prohibits making, printing, or publishing statements that indicate "any preference, limitation, or discrimination based on [a protected basis]" with respect to selling or renting a dwelling.[181] HUD regulations define "statement" under Section 3604(c) as "all written or oral . . . statements by a person engaged in the . . . rental of a dwelling."[182] And courts construe "make," "print," and "publish" to cover all forms of communication.[183]

In response to challenges to the constitutionality of Section 3604(c) and related regulations, "courts have consistently found that commercial speech that violates [Section 3604(c)] is not protected by the First Amendment."[184] That is because statements by a landlord to a prospective tenant are part of a rental transaction and thus amount to "commercial speech."[185] Moreover, because housing discrimination is illegal, discriminatory statements are "related to illegal activity" and thus receive no First Amendment protection.[186]

So too, here, longstanding discouragement provisions under Regulation B target speech both commercial in nature and related to discrimination "with respect to any aspect of a credit transaction" on the basis of a protected status.[187] Thus, constitutional free speech concerns do not justify the CFPB's proposed changes.

Moreover, the Bureau has provided no evidence supporting its assertion that Regulation B has had *any* "chilling effect on creditor's business practices" other than preventing discrimination, which is ECOA's aim.

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[180] *RAV v. City of St. Paul*, 505 U.S. at 389; *see also Sorrell*, 564 U.S. at 567; *Pittsburgh Press v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 378 (1973) (finding that ordinance barring employers and others from publishing advertisements "which indicate[] any discrimination because of . . . sex" were not protected under First Amendment as the ads "signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions").
[181] 42 U.S.C. § 3604(c).
[182] 24 C.F.R. § 100.75(b).
[183] *See, e.g., Campbell v. Robb*, 162 Fed. Appx. 460, 466 (6th Cir. 2006).
[184] *United States v. Space Hunters, Inc*., 429 F.3d 416, 425 (2d Cir. 2005).
[185] *Campbell*, 162 Fed. Appx. at 469–70.
[186] *Id.*; *see also United States ex rel. Jackson v. Racey*, 112 F.3d 512, 1997 WL 226373 at *1 (4th Cir. May 7, 1997); *Ragin v. NY Times*, 923 F.2d 995, 1002–05 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 211–13 (4th Cir. 1972).
[187] 15 U.S.C. § 1691(a).

At a bare minimum, the Bureau has provided no reasonable explanation for its purported concern, nor has it identified or apparently considered any alternatives to its proposal that would better accomplish ECOA's objectives other than the sweeping changes it proposes.

D. *The Proposed Rule Fails to Recognize That Inferior Pre-Application Treatment Can Discourage Applicants*

In practice, discriminatory discouragement often involves a comparison, namely of whether one group of prospective applicants gets better pre-application treatment than another based on their race or other protected class. This is common sense: assessments of "discrimination" nearly always include assessing whether one group is treated less favorably than another. The proposed rule would eliminate such a comparison as the basis for an ECOA violation and have ECOA compliance turn only on how a creditor addresses some people without reference to how it addresses others. That is, so long as a creditor does not fall short of the extremely low bar the proposed rule sets in its conduct towards Black people or predominantly Black neighborhoods, it would make no difference that the creditor is far more encouraging towards others and thus acts in a blatantly discriminatory manner. The proposal's rationale flies in the face of the plain meaning of discrimination. These proposed changes would also leave consumers unable to challenge many forms of pre-application discrimination even when it is clear that, for example, Black people or people living in predominantly Black neighborhoods receive far worse treatment.

Under the proposed rule, "encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements[,]" with intended recipients limited to only those whom the creditor "could reasonably expect to receive" the particular statement.[188] Moreover, the proposed rule would revise examples of what is and what is not prohibited discouragement. Thus, under the proposal, statements "directed at the public" may be prohibited discouragement, while "statements directed" only "at a particular group of consumers, encouraging that group of consumers to apply for credit" would *not* be prohibited discouragement.

First, the proposed rule fails to acknowledge how discouragement—like nearly all forms of discrimination—is often understood in relative terms, by comparing how protected groups and other non-protected groups are treated in the pre-application stage. To illustrate, studies looking to better understand the disparities in access to financing across small business entrepreneurs show that one way in which minority and women entrepreneurs may be discouraged from applying for financing is by receiving less encouragement and assistance when they seek out loans, compared to white applicants. [189] As an example, a 2019 study considered whether and

[188] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50908.
[189] Maura L. Scott, et al., *Revealing and Mitigating Racial Bias and Discrimination in Financial Services*, J. of Mktg. Rsch. 3, available at: https://doi.org/10.1177/00222437231176470; Fed. Rsrv. Banks, *Small Business Credit Survey: 2022 Report on Firms Owned by People of Color* (June 2022), available at: https://www.fedsmallbusiness.org/reports/survey/2022/2022-report-on-firms-owned-by-people-of-color; Fed. Rsrv.

how Black small business entrepreneurs seeking loans were discouraged from applying by conducting matched-pair tests of Black and white prospective applicants.[190] The tests revealed significant differences in the level of encouragement and assistance offered to the Black testers as compared to their white counterparts, with Black testers less frequently offered a future appointment (11.5% vs. 23.1%), offered help to complete the application (11.5% vs. 26.9%), asked how they could be helped (92.3% vs. 100%), or thanked for coming into the bank (80.8% vs. 96.2%).[191] Black testers also reported substantially worse treatment than their white counterparts, such as being subjected to a higher level of scrutiny about their business status and standing. [192]

Similarly, as noted *supra* page 37, the CFPB in a November 2024 matched-pair study measured the differential treatment between Black and white testers purporting to be small business owners seeking credit at large bank lenders.[193] The study found that Black testers received worse objective treatment and reported feeling less encouragement than white testers, and were more likely to be steered to other products, such as home equity products that could place the owner's personal residence at risk.[194] The encouragement and assistance received by an applicant cannot be viewed in a vacuum—comparison to the level of encouragement and assistance received by the comparison group often is what demonstrates discriminatory treatment. As with other evidence of discrimination, the critical question is how an individual is treated in comparison to others. Yet, under the proposed rule, lenders—on a prohibited basis—could intentionally encourage some but not others, producing different credit outcomes.

Second, the proposed rule would also expressly allow creditors' use of digital targeted marketing tools to reach only certain consumers, thus contributing to "digital redlining" or "digital steering" with wide exclusionary effects. Digital targeted marketing allows creditors to advertise their products on websites, social media, and other online platforms through

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Banks, *2023 Report on Startup Firms Owned by People of Color: Findings from the 2022 Small Business Credit Survey* (June 2023), available at: https://www.fedsmallbusiness.org/reports/survey/2023/2023-report-on-startup-firms-owned-by-people-of-color; Robert W. Fairlie & Alicia M. Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, Minority Business Development Agency* (Jan. 2010), available at: https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf; Fed. Rsrv. Banks, *Small Business Credit Survey: 2016 Report on Women-Owned Firms* (Nov. 2017), available at: https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-WomenOwnedFirms-2016.pdf; Christine Kymn, *Access to Capital for Women- and Minority-owned Businesses: Revisiting Key Variables*, SBA Office of Advocacy (Jan. 29, 2014), available at: https://advocacy.sba.gov/2014/01/29/access-to-capital-for-women-and-minority-owned-businesses-revisiting-key-variables/.

[190] Sterling A. Bone et al., *Shaping Small Business Lending Policy Through Matched-Pair Mystery Shopping*, Journal of Public Policy & Marketing 38:3 (July 2019), 391-99, available at: https://journals.sagepub.com/doi/epub/10.1177/0743915618820561.

[191] *Id.*

[192] *Id.*

[193] CFPB, *Matched-Pair Testing in Small Business Lending Markets* (Nov. 2024), https://www.consumerfinance.gov/data-research/research-reports/matched-pair-testing-in-small-business-lending-markets/.

[194] *Id.* at 31, 35.

"sophisticated data analytics that effectively preselect a precise target audience."[195] This may allow creditors to curate detailed information about consumers, such as where they live, their habits, and preferences, and place advertisements for financial products targeting or excluding certain consumers.[196] These technologies are fast becoming a pre-application screening tool for creditors and others who are able to draw on a trove of consumers' personal characteristics, including their demographics. Algorithmic marketing and advertising can thus steer certain consumers to traditional products while steering others into products that are inferior to products they might otherwise qualify for.[197]

NFHA, DOJ, and others have successfully challenged these evolving forms of digital redlining and steering. NFHA, for example, has challenged Facebook's distribution of housing, credit, and employment ads that excluded or targeted individuals on the basis of their protected status, resulting in a settlement that changed Facebook's advertising platform.[198] Similarly, the Attorney General of Washington entered into a consent order in which Facebook agreed to cease giving advertisers the option to use exclusionary advertising tools that had allowed creditors to discriminate based on protected status.[199] And DOJ entered into an agreement resolving allegations that Meta (formerly known as Facebook) enabled and encouraged advertisers to target housing ads by relying on protected class status and used algorithms that relied in part on protected characteristics to help determine which subset of advertisers' targeted audience would receive a housing ad.[200] Meta then announced it would expand protections required by the DOJ consent order to credit ads.[201]

The proposed rule appears to give free rein to the discriminatory behavior that these cases successfully altered. It establishes a complete safe harbor for creditors sending credit offers to "a particular group of consumers," even if the creditor seeks thereby to discriminatorily exclude others from such credit offers. That is, it would permit creditors and others to use digital targeted

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[195] Jason Cover, *Digital Targeted Marketing, Business Regulation & Regulated Industries* (Feb. 9, 2022), available at: https://businesslawtoday.org/2022/02/digital-targeted-marketing-fair-lending-clickbait/.
[196] *Id.*
[197] *See, e.g., id.*; Jinyan Zang, *Solving the Problem of Racially Discriminatory Advertising on Facebook*, The Brookings Institution (Oct. 19, 2021), available at: https://www.brookings.edu/research/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/; Carol Evans and Westra Miller, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*, Federal Reserve Board Consumer Compliance Outlook (2019), available at: https://www.consumercomplianceoutlook.org/2019/third-issue/from-catalogs-to-clicks-the-fair-lending-implications-of-targeted-internet-marketing/.
[198] See *Nat'l Fair Hous. All., et al. v. Facebook, Inc.*, No. 1:18-cv-02689-JGK (S.D.N.Y. June 25, 2018); Facebook Settlement, NFHA (Mar. 14, 2019), available at: https://nationalfairhousing.org/facebook-settlement/#:~:text=NFHA%20and%20the%20other%20plaintiffs,%2C%20Hispanics%2C%20and%20Asian%20Americans.
[199] Consent Order, *In re Facebook, Inc.*, No. 18-2-18287-5SEA (Wa. Super. Ct., July 24, 2018), ECF No. 4.
[200] Dep't of Justice, *Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising* (June 21, 2022), available at: https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlementagreement-meta-platforms-formerly-known.
[201] The DOJ resolution had focused on the FHA because it originated with HUD, which has authority over the FHA, but Meta's decision underscores the risks of similar claims under ECOA.

marketing and other algorithmic advertising as tools of discrimination. The Bureau does not explain how this can possibly be consistent with ECOA's purpose of establishing equal credit opportunity.

Third, the proposed revisions could have the effect of allowing financial institutions to issue expressly discriminatory statements and advertisements as long as those messages are reasonably expected to be received only by the groups targeted for positive treatment. For example, under the proposed rule, a creditor could create an advertisement expressly inviting only white men to apply for credit. So long as the creditor is successful in targeting only members of that group, it would not be considered unlawful discouragement of women, or non-white persons even if it clearly discourages receipt of applications from those groups in the objective sense.

Fourth, the CFPB's position on selective encouragement is also at odds with HUD's regulations concerning discriminatory statements under the Fair Housing Act, which specifically provide that discriminatory statements and advertisements may include "[s]electing media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing" on a prohibited basis.[202] The CFPB does not acknowledge that it is creating such a split from another agency's regulatory regime, much less explain why it would do so in light of the overlap between the FHA and ECOA regarding mortgage lending.

Finally, the proposed rule and commentary providing that "statements directed at a particular group of consumers, encouraging that group of consumers to apply for credit, do not constitute prohibited discouragement," are ripe for abuse, given how encouragement and discouragement are often two sides of the same coin. To illustrate, the CFPB in *Townstone* pointed out to the Seventh Circuit that, under the defendant's cramped reading of ECOA, a "Whites Only" sign on the door of a lending office would no longer be actionable discrimination.[203] Yet under the CFPB's proposal, a creditor may avoid liability with a simple reframing: "Whites Encouraged to Apply." The proposal would threaten to immunize this conduct, and the discouragement of others via the selective encouragement of some would no longer be actionable. This result is not only illogical but the product of the Bureau's misunderstanding that discrimination very often requires a comparison of the treatment of two groups.

As noted above, the Bureau's proposal would mark a drastic change of course from years of CFPB and other federal agency practice. Stretching as far back as 1978, the Board recognized the dangers of discriminatorily selective advertising, explaining that it would be unlawful "[f]or

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[202] 24 C.F.R. § 100.75.

[203] *See, e.g.*, Br. of Appellant , *Consumer Fin. Prot. Bureau v. Townstone Fin., Inc.*, Case No. 23-1654 (7th Cir.), ECF No. 12, at 14 ("A creditor need not wait to rip up an African American's completed application if he can just hang a 'Whites Only' sign in front of the lending office."); 34 ("Hanging a 'Whites Only' sign in front of a loan office can be just as effective as ripping up an application because of the applicant's race.").

example, if a creditor advertises only for deposits in minority areas but directs loan advertising only to white neighborhoods," a violation that would require the creditor to remediate by, among other things, "extend[ing] similar loan advertising to the minority areas."[204] The CFPB does not acknowledge, let alone explain, its deviation from decades of prior practice.

Rather than curtailing Regulation B's prohibitions against discriminatory discouragement, the Bureau should do just the opposite. The serious discriminatory risks that emerging technologies like targeted digital advertising pose have been clear for years.[205] These technologies present novel and powerful means for unscrupulous creditors to circumvent and evade ECOA. The Bureau should explore ways to extend Regulation B's treatment of discouragement to ensure that discrimination does not occur in these important areas. Instead, the Bureau ignores these risks and proposes to restrict Regulation B's coverage, without any reasoned basis.

E. *The Proposed Revisions Would Allow Harmful Statements that Can Discourage Applicants and Impermissibly Restrict Evidence of Discrimination*

The proposed rule also introduces a standard that would permit creditors to engage in considerable discriminatory discouragement that is currently barred. The CFPB argues, again without support, that the current regulation does not sufficiently differentiate between statements "that an applicant or potential applicant may not like or may disagree with, and a statement that would cause a reasonable person to be discouraged from applying for credit with that creditor."[206] It thus proposes to: (a) prohibit discouragement only where a creditor "knows or should know" the statement would cause a reasonable person to be discouraged; (b) establish that discouragement "occurs only if the creditor's statement would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application" because of the applicant's prohibited basis characteristics; and (c) to narrow discouraging statements from those that "express, imply, or suggest" a discriminatory preference or policy of exclusion to only those that "express" it. The proposed rule would also add three examples of types of statements "a creditor would *not* or (should *not*) know" would meet these standards and that are "non-prohibited statements that a creditor may make":

> (1) in support of law enforcement, (2) recommending that, before buying a home in a particular neighborhood, consumers investigate, for example, the neighborhood's schools,

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[204] Federal Reserve System, OCC, FDIC, FHLBB, NCUA, ECOA Joint Notice of Proposed Enforcement Guidelines, 43 Fed. Reg. 29256, 29257 (July 6, 1978).
[205] *See, e.g.,* Carol Evans and Westra Miller, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*, Federal Reserve Board Consumer Compliance Outlook (2019), available at: https://www.consumercomplianceoutlook.org/2019/third-issue/from-catalogs-to-clicks-the-fair-lending-implications-of-targeted-internet-marketing/.
[206] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50908.

its proximity to grocery stores, and its crime statistics, and (3) encouraging consumers to seek out resources to develop their financial literacy.[207]

These proposed revisions, including the examples of "non-prohibited statements," would raise the standard of proof in impracticable ways, allow for harmful discrimination without accounting for relevant context, and allow creditors to avoid accountability for unlawful discouragement even in the presence of circumstantial evidence of discrimination.

The Proposed Standard Is Impracticable

The proposed rule's standard to establish discouragement violations is impracticable and inconsistent with other prevailing standards.

First, the proposed rule raises the bar to establish discouragement by requiring a showing that a creditor "know or should know" the statement would discourage. But the CFPB does not explain why such a showing is necessary here, or how to prove it. This standard has never been applied by any court considering an ECOA discouragement claim, and it is inconsistent with the standard of proof courts apply to similar claims. For example, to establish that a defendant violated the FHA's discriminatory statements prohibition, evidence of intent is not required.[208] Rather, courts apply an "ordinary reader" test: if the statement "suggests to an ordinary reader that a particular [protected group] is preferred or dispreferred for the housing in question[,]" that is enough to establish a violation.[209] And that makes sense for consistent application by regulators and ease of compliance by creditors: creditors should all be held responsible for following the same rules, regardless of what their subjective intent may be. Similarly, a more practicable standard for discouragement under ECOA, mirroring the well-established standard under the FHA's parallel prohibition, is a reasonable person test: if the statement suggests to a reasonable person, given all the facts and circumstances, that a protected group would be disfavored in an application for credit, that should be enough to support a claim.

The proposed rule would also limit discouragement to only instances where the creditor's statements would cause a reasonable person to believe they would be denied or would be granted less favorable terms based on protected class. But, as courts in the housing context have established, "'discriminatory preference,' not an outright ban, is the basis for [a discriminatory statements] violation."[210] That is, the statement need not suggest to the prospective applicant that they would be *necessarily* denied, it is enough that the statement indicate that they are disfavored on a prohibited basis. And this makes sense practically. In the real world, a woman may be discouraged from submitting an application when subjected to a creditor's statements indicating

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[207] *Id.* at 50909.
[208] *Jancik v. Dep't of Hous. & Urb. Dev.*, 44 F.3d 553, 556 (7th Cir. 1995); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir.), cert. denied, 502 U.S. 821 (1991); *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir.1991).
[209] *Id.*
[210] *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1291 (C.D. Cal. 1997).

that she will have a harder time applying without a husband. It should not matter that the creditor never explicitly says she cannot *possibly* obtain a loan with reasonable terms, yet under the proposed rule, the creditor's discriminatory statements would be immunized so long as it does not outright promise a negative outcome.

Moreover, the proposed rule would require that a discouraging statement "express," rather than "imply" or "suggest" a discriminatory preference or policy of exclusion. The Bureau does not explain how a consumer could draw the line between statements that "express" a discriminatory preference, and those that "imply" or "suggest" it, but the effect obviously will be to further narrow prohibited statements to only the most explicitly discriminatory ones. As explained below, prohibited discrimination—by its very nature—often occurs though implication or suggestion. The CFPB also fails to explain how this change would be consistent with Congress's acknowledgement that under the regulation, "advertising which *implies* a discriminatory preference [is] also prohibited."[211]

Establishing the Per Se Legality of Certain Statements Is Improper

The Bureau has no authority to create ad hoc safe harbors from liability for statements that, based on their context, may demonstrate prohibited discrimination. Such an action is inconsistent with well-established standards of adjudication of discriminatory statements. Moreover, the Bureau has offered no explanation for why it would want to control how courts or juries assess circumstantial evidence of discrimination.

In considering whether a statement indicates an impermissible preference in violation of the FHA, courts have consistently emphasized that context is crucial.[212] That is, just because challenged statements are facially neutral "does not mean that they do not indicate an impermissible preference in the context in which they were made."[213] Thus, whether a statement indicates an impermissible preference is difficult to assess in the absence of information beyond the statement itself. In assessing how an ordinary listener can perceive a statement, courts highlight "the importance of inflection, intent, and other circumstances in communicating meaning."[214] A court "cannot say at the pleading stage that an ordinary listener could *never* reasonably infer [an impermissible preference]."[215] Yet, that is precisely what the CFPB proposes—a blanket license for statements that, under the proposed rule, could *never* cause a

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[211] *See, e.g.*, S. Rep. No. 102-167, at 86 (1991) (considering that under ECOA regulations, "[d]iscouraging applicants on a prohibited basis and advertising which *implies* a discriminatory preference are also prohibited") (emphasis added); *supra* page 30.

[212] *See Soules v. U.S. Dep't of Hous. & Urb. Dev.*, 967 F.2d 817, 824 (2d Cir. 1992).

[213] *Id.*

[214] *Meyer v. Bear Rd. Assocs.*, 124 F. App'x 686, 689 (2d Cir. 2005) (summary order); *Soules*, 967 F.2d at 825 ("The written content of questions and statements does not demonstrate the inflection of the speaker, and out of necessity courts must turn to other evidence in determining whether a violation of the FHA occurred.").

[215] *Meyer*, 124 F. App'x at 689.

reasonable person to be discouraged, no matter if the evidence in a particular instance indicates otherwise.

The proposed categorical exclusions are also inconsistent with courts' longstanding acknowledgement of how discriminatory meanings are communicated and perceived. "[L]anguage appearing neutral at first blush can nonetheless" have discriminatory meanings.[216] Accordingly, courts recognize that defendants can use "code words" that are not "overtly race-based" but may still carry "racial motivations and implications."[217] That is because while "[d]iscrimination continues to pollute the social and economic mainstream of American life, [it] is often simply masked in more subtle forms."[218] "[R]acially charged code words may [therefore] provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications."[219]

Recognizing how discrimination evolves, courts have repeatedly found references to "crime" and "shared values," for example, can be "nothing more than 'camouflaged racial expressions.'"[220] That is also the case with references to "overburdened and overcrowded schools,"[221] and "high crime neighborhood[s]."[222] These same issues arise among the proposed rule's examples of non-discriminatory statements which may, depending on the facts, provide evidence of discrimination. Consider, for example, a statement such as: "Why don't you read a couple of books on how to handle your money and then come ask me about a loan." The Bureau has no basis for asserting that this type of statement could *never* impermissibly discourage an applicant on a prohibited basis, regardless of the context. Nor has the Bureau explained its rationale for this proposal.

Moreover, the Bureau cannot dictate to a court or jury that they cannot consider certain types of circumstantial evidence, including potentially coded expressions. The Supreme Court has repeatedly emphasized the importance of circumstantial evidence in discrimination cases: "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[223] Indeed, the Supreme Court has explicitly cautioned courts against limiting the types of evidence that can be presented to prove discrimination. *Id*. ("It is not

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[216] *Children's All. v. City of Bellevue*, 950 F. Supp. 1491, 1496 (W.D. Wash. 1997).
[217] *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 608-09 (2d Cir. 2016).
[218] *Aman v. Cort Furniture Rental Corp.,* 85 F.3d 1074, 1081-82 (3d Cir.1996) (noting that as civil rights laws and challenges "have 'educated' would-be violators" about the threat of liability of "extreme manifestations of discrimination[,]" they have learned to "coat various forms of discrimination with the appearance of propriety").
[219] *Smith v. Fairview Ridges Hosp.,* 625 F.3d 1076, 1085 (8th Cir. 2010) (quoting *McGinest v. GTE Serv. Corp*., 360 F.3d 1103, 117 (9th Cir. 2004)) (internal quotation marks and alterations omitted).
[220] *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 571 (E.D. La. 2009) (listing cases).
[221] *Mhany Mgmt., Inc.*, 819 F.3d at 610.
[222] *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 506 (9th Cir. 2016).
[223] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pacific R. Co*., 352 U.S. 500, 508, n. 17 (1957)).

surprising, therefore, that neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.").

F. *The Proposed Changes Are Unneeded and Their Costs Outweigh Any Benefits*

Pursuant to Section 1022(b) of the Dodd Frank Act, the CFPB must consider the potential benefits, impacts, and costs of the proposed rule, including "the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets; and the impact on consumers in rural areas[.]"[224] The Bureau's superficial analysis is inadequate, as it makes no attempt to quantify costs or benefits, it ignores existing data and studies that would inform that analysis, and it fails even to grapple in any meaningful way with potential costs and benefits. Regardless, even the cursory analysis set forth in the proposed rule makes clear that the impacts and costs to consumers and lenders far outweigh any asserted benefits.[225]

Although the CFPB does not identify any significant compliance challenges caused by the existing discouragement definition, it emphasizes the deregulatory nature of the proposed revisions to the discouragement provision. The CFPB claims that it will mostly benefit lenders by limiting their legal liability and reducing their compliance burden, as well as increasing their profitability by allowing additional operational flexibility.[226] But the opposite will more likely be the case. In reality, lenders' compliance burden may in fact increase, as they will be met with conflicting legal landscapes and resulting uncertainty.

Moreover, the CFPB does not take into account the potential benefits to lenders in preventing and addressing redlining and other discouragement, including expansion of their market opportunities, enhancement of their reputation, and increased community trust.

As to consumers, the only benefit CFPB can identify is that the proposed rule "*may* result in ongoing cost savings for covered entities, which *could* be passed on to consumers through lower prices."[227] This superficial assertion, without support, is insufficient. As explained above, lenders are unlikely to realize significant cost savings, and even if they do, the extent to which any savings are passed through to consumers is a matter for debate and is unlikely here, where any costs savings would be obscure to consumers.[228]

On the other hand, the costs to consumers would be significant. As the CFPB recognizes, "[t]he proposed rule may result in consumers not applying for credit and facing greater barriers

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[224] *Nat'l Cmty. Reinvestment Coal. v. Consumer Fin. Prot. Bureau*, No. CV 20-2074 (BAH), 2022 WL 4447293, at *10 (D.D.C. Sept. 23, 2022) (quotations omitted).
[225] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50914.
[226] *Id.* at 50914.
[227] *Id.* at 50916 (emphasis added).
[228] *See, e.g.*, Ryan Westphal, *What You Don't Know Can't Pass Through: Consumer Beliefs and Pass-Through Rates* (Oct. 2023), available at: https://dx.doi.org/10.2139/ssrn.4693216.

to accessing credit than they otherwise would have under the existing rule."[229] Consumers may be excluded from advertising campaigns or lose access to financial services if creditors alter branch location decisions because of the proposed rule. The CFPB notes this would particularly affect "elderly, minority, and low-income consumers" who are "more likely to rely on brick-and-mortar branch services" and "may no longer be able to easily access financial services or products." Overall, lenders "may be more likely to discourage or informally reject certain consumers" before they apply.[230]

Indeed, as detailed *supra* pages 3339, the proposed rule would do away with any meaningful scrutiny of pre-application discouragement, exacerbating inequalities and undoing hard-earned progress to provide equal credit to communities often shut out of the credit markets.

III. SPECIAL PURPOSE CREDIT PROGRAMS

The Bureau's proposal takes aim at SPCPs offered by for-profit organizations, only one of ECOA's three SPCP categories, but the one under which nearly all SPCPs are currently operating. The CFPB proposes two sets of new restrictions that would effectively eliminate entirely for-profit organization SPCPs and, thus, SPCPs more generally.

The CFPB's restrictions are based on the mistaken view that (1) SPCPs that take into account race, color, national origin, or sex—constituting nearly all SPCPs—are somehow at odds with the statute itself and thus for-profit organization SPCPs can no longer be organized on these bases; (2) isolated phrases from ECOA's legislative history justify additional obstacles to organizing them that no for-profit organization SPCP could overcome; (3) for-profit organization SPCPs raise constitutional concerns; and (4) due to the absence of discrimination in the credit markets, for-profit organization SPCPs are no longer necessary.

In fact, Congress explicitly authorized SPCPs that benefit applicants on the basis of ECOA's protected classes to meet special social needs without running afoul of ECOA. ECOA's statutory text does not support the restrictions that the CFPB imposes based on selected legislative history fragments. When viewed in its entirety, the legislative history confirms that Congress did not imagine for-profit organization SPCPs—intended to open up new credit opportunities—would later end under burdensome program requirements impossible to meet. The purported constitutional concerns the Bureau raises do not apply to for-profit organization SPCPs. And, as the Bureau itself has long documented, there is a continuing need for SPCPs.

A. *Congress Established the Protected Groups That Benefit from SPCPs Which the Bureau Has No Authority to Change*

Congress was unmistakably clear in ECOA's text that its permissions extend SPCPs to all of the statute's protected groups. SPCPs are among several explicit exceptions to ECOA's generally

[229] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50916.
[230] *Id.* at 50917.

applicable discrimination protections. In a subsection entitled "[a]dditional activities not constituting discrimination," the statute provides:

> It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—
>
> (1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
>
> (2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or
>
> (3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau;
>
> if such refusal is required by or made pursuant to such program.[231]

By its terms, the statute allows creditors the option of offering SPCPs "on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)," "because all or part of the applicant's income derives from any public assistance program," or "because the applicant has in good faith exercised any right under this chapter."[232] The Bureau does not appear to dispute this clear statutory meaning.

Despite this clear statutory authorization, however, the proposed rule explicitly eliminates SPCPs for profit-making organizations with respect to race, color, national origin, or sex. The Bureau seeks to justify this nullification by asserting that the Bureau should decide "what is necessary to meet the expressly limited congressional intent for such SPCPs," and which SPCPs are "working counter to ECOA's purpose of preventing discrimination."[233] Congress's purpose, however, is most clearly expressed in the text of ECOA,[234] which explicitly provides for SPCPs to extend to all of the statute's protected groups and nowhere imposes the limitations that the Bureau now proposes. And even if the Bureau believes that the SPCP provisions are at odds with ECOA's larger purposes (which they are not), it is a fundamental canon of construction that "no legislation pursues its purposes at all costs,"[235] and thus the Bureau is not at liberty to nullify statutory provisions that it believes Congress should not have included.

Nor has the Bureau offered a justification for rewriting the statutory SPCP provisions to cover certain protected classes and not others. For example, it eliminates altogether the option for

[231] 15 U.S.C. § 1691(c). Elsewhere, Congress provided in the statute five other distinct exceptions to ECOA's discrimination protections. 15 U.S.C. § 1691(b).
[232] 15 U.S.C. § 1691(a).
[233] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50910.
[234] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (where . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms") (internal quotation marks omitted).
[235] *CTS Corp. v. Waldburger,* 573 U.S. 1, 12 (2014) (a statutory purpose cannot serve as "a substitute for a conclusion grounded in the statute's text and structure").

profit-making organizations to offer SPCPs for "color," but not for "religion," and for "sex" but not for "marital status," without explaining why. And, as noted above, the proposed rule would eliminate these options only for profit-making organizations, and not for credit assistance programs expressly authorized by law for an economically disadvantaged class of persons, or credit assistance programs administered by a nonprofit organization for its members or an economically disadvantaged class of persons.[236] The CFPB offers no statutory or other basis for these arbitrary distinctions. The proposed rule seems to assume there is something amiss in ECOA allowing SPCPs for all of its protected groups or, more generally, when Congress created exceptions to its prohibitions. When legislating discrimination prohibitions, however, Congress frequently provides specific exceptions to general protections.[237]

B. *The Bureau's Further Restrictions on For-Profit Organization SPCPs Would Result in the Elimination of these SPCPs, Contrary to ECOA's Intent and Purpose*

Even after deleting certain protected groups that ECOA includes—for which nearly all current for-profit organization SPCPs are organized—the proposed rule creates new restrictions on any remaining for-profit organization SPCPs that, in practice, would fully eliminate all for-profit SPCPs, thereby nullifying Congress's provision for them.

Currently, an organization must show that applicants "*probably* would not receive such credit *or would receive it on less favorable terms* than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit."[238] The Bureau proposed that, instead, a for-profit organization would have to (1) explain why "under the organization's standards of creditworthiness, the class of persons *would not* receive such credit in the absence of the program;" (2) "provide[] evidence for *each* participant . . . that in the absence of the program the participant *would not receive* such credit as a result of" the protected class status that makes it eligible for the SPCP; and (3) demonstrate why the special social needs addressed by the

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[236] *Compare* Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50909 and 15 U.S.C. § 15 U.S. Code § 1691(a).

[237] For example, in Title VII, Congress generally prohibited discrimination in employment but allowed for discrimination "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). In the Fair Housing Act, Congress generally outlawed housing discrimination, but expressly allowed for it in, among other things, the sale or rental of certain single-family homes by an owner, 42 U.S.C. § 3603(b)(1), in the sale, rental, or occupancy of certain dwellings by some a religious organization, association, or society, or related nonprofit institutions, 42 U.S.C. § 3607(a), and in providing certain housing for older persons. 42 U.S.C. § 3607(b). Congress prohibited age discrimination in employment except, among other things, "when a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Title IX prohibits sex discrimination in education programs or activities receiving Federal financial assistance, except in certain situations involving religious institutions, military academies, certain single-sex institutions, social fraternities or sororities, voluntary youth service organizations, and more. 20 U.S.C. § 1681(a). In Title III of the Americans with Disabilities Act, Congress prohibited disability discrimination in public accommodations except for private clubs and religious organizations. 42 U.S.C. § 12101. Indeed, we could not identify any federal civil rights statue that does *not* provide for specific exceptions to its general discrimination prohibitions.

[238] 12 C.F.R. § 1002.8(a)(3)(ii).

program "[c]annot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria."[239]

Stated differently, the Bureau's proposal would require a for-profit organization to show for each SPCP participant that, absent the SPCP, the creditor would discriminate against each participant on the basis of their protected class status.

In sum, under the CFPB's proposal, to establish a protected group-based SPCP, a for-profit organization would need to show that—absent the SPCP—it, and perhaps any other creditor, would deny *every* SPCP applicant due to their membership in the protected group the SPCP serves and the SPCP is the only means to address this problem. No creditor could meet that standard. Nor would any creditor state, as a condition of establishing a SPCP, that—outside of the SPCP—it would violate ECOA by denying every SPCP applicant credit due to its protected group membership. No creditor would ever admit to ECOA liability as a condition of establishing a SPCP.[240]

To illustrate, to establish a SPCP only for Muslim borrowers, a for-profit organization would have to attest that, without the SPCP, it would deny all of the applicants credit because they were Muslims. That is, the lender would have to admit that it otherwise discriminates in violation of ECOA in order to create an SPCP. Obviously, no lender would ever do this voluntarily. The proposed changes, simply put, would put an end to for-profit organization SPCPs. The only example the Bureau proposes as passing muster under the proposed rule is of "an energy conservation program to assist the elderly, for which the creditor considers the applicant's age."[241] But such program—under the Bureau's proposed rule—could be established only if the for-profit organization establishing the program provides evidence it normally denies all elderly applicants for similar credit due to their age, rather than their credit characteristics. Nor does the Bureau explain why an SPCP would be necessary in this proposed example given that ECOA separately clarifies that it is not discriminatory to "consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant."[242] The Bureau's own example thus illustrates how the effect of its proposal—though the Bureau refuses to admit it—is to eliminate entirely for-profit organization SPCPs.

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[239] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50921 (emphasis added); 12 C.F.R. § 1002.8(a)(3) (current regulation) (emphasis added).
[240] Under the proposed rule, to establish an SPCP, a for-profit organization would also have to explain why the SPCP's goals "[c]annot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria." 90 Fed. Reg. 50921 (proposed 12 C.F.R. § 1002.8(a)(3)(i)(E)(1)). The obvious question raised by this additional requirement is why a creditor would not always be able to remedy the situation through other means, namely no longer discriminatorily denying applicants in the first place, again leading to the conclusion that for-profit SPCPs will cease to exist.
[241] 90 Fed. Reg. 50923 (proposed comment 8(c)-2).
[242] 15 U.S.C. § 1691(b)(4).

C. *The Proposal's Reasoning Justifying These Restrictions Is Fundamentally Flawed*

The Bureau appears to argue that for-profit organization SPCPs should be, for all practical purposes, eliminated because (1) fifty years ago when ECOA was enacted, discriminatory loan denials were common; (2) for that reason, Congress established for-profit SPCPs for the sole purpose of creating exceptional programs to allow loans to be approved when a lender would have otherwise denied them; (3) today, the Bureau "is not aware of any credit markets in which consumers would be effectively denied credit because of their race, color, national origin, or sex"[243]; and (4) therefore, after 50 years, SPCPs must be eliminated except when a lender admits it would have illegally denied every SPCP applicant had it not established the SPCP through which the applicants now apply. None of the assumptions in this convoluted syllogism is supported by either fact or law, and the Bureau's own reasoning is internally inconsistent.

The lynchpin of the Bureau's proposed approach is its new assertion that SPCPs should only be available if consumers otherwise would be "effectively denied credit" due to their membership in a protected group. The Bureau singles out this language by joining together two isolated phrases from different legislative record sources.[244] Below, we explain why these discrete phrases cannot be read in isolation and ECOA's entire legislative history paints a richer picture of Congress's more expansive approach, enacting precisely and authoritatively in the statutory text, which allows for SPCPs generally to "meet special social needs."[245]

In addition to failing to accurately present ECOA legislative history, the Bureau's deployment of this new phrase—"effectively denied credit"—is internally inconsistent, incoherent, and based on a misreading of ECOA's historical background. What does the Bureau mean by "effectively denied credit"? At times, the CFPB appears to use the term in the categorical sense that no credit is available at all—for example, it explains that it is not aware of any markets in which consumers would be "effectively denied credit" because of their protected class status, "[r]egardless of whether instances of credit discrimination continue to occur in the marketplace."[246] This categorical interpretation appears to assume that, at the time of ECOA's enactment, applicants were completely denied access to credit by all creditors in all credit markets due to their race, color, national origin, or sex.[247] But the Bureau provides no evidence this was ever true in the categorical manner it describes. And as a factual matter, it was not true. Some types of credit were available, even if many applicants experienced discriminatory denials and worse terms. And the proposal itself recognizes that in 1976, the 1968 Fair Housing Act and various state laws already prohibited credit discrimination, which we can assume had some

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[243] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50910.
[244] *Id.* (combined text from S. Rep. No. 944-589 (1976) and H. Rep. No. 94-879 (1976)).
[245] *Id.* at 50903 *Compare TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).
[246] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50910.
[247] *Id.*

effect.[248] To these laws should be added Sections 1981 and 1982 of the Civil Rights Act of 1866 whose antidiscrimination protections extend to credit.[249] To this is also added the history of Black-owned banks that persevered in offering credit before ECOA was enacted.[250] Thus, although some credit discrimination certainly existed in 1976, it would not satisfy the discrimination standard the Bureau appears to set for SPCPs today. The Bureau thus appears to attribute to the same Congress that took the trouble of enacting ECOA's the for-profit organization SPCP provision the intention of creating such a stringent standard that these SPCPs could not actually be created, either then or now.

Moreover, to support its effective shutdown of for-profit SPCPs, the Bureau states that today it "is not aware of any credit markets in which consumers would be effectively denied credit because of their race, color, national origin, or sex." Here, again, the Bureau is looking for entire "credit markets" in which applicants cannot find *any* loan from *any* creditor on *any* terms because they would be denied on a prohibited basis everywhere they apply. This was never true in 1976, and thus does not provide a reasonable standard to apply today or to be attributed to the Congress that enacted the SPCP provisions.

Does the Bureau instead intend to use the phrase "effectively denied credit" to mean some unspecified level of discrimination occurring in the market? That usage would be consistent with the legislative history the Bureau cites—which shows that legislators supported enactment of ECOA and the SPCP provisions because they were aware of "instances of discrimination against racial minorities" and the "strong probability of race discrimination in mortgage credit." But that usage, of course, would justify the *continuation* of SPCPs, not the Bureau's proposed elimination. Moreover, that usage is inconsistent with the Bureau summarily dismissing "instances of credit discrimination [that] continue to occur in the marketplace," as irrelevant to whether "consumers would be 'effective[ly] denied credit.'" On top of this inconsistency, if the Bureau means it remains unaware of any market in which individual applicants, on a prohibited basis, may either experience denials, receive credit on less favorable terms, or be effectively discriminatorily denied by lacking the same access to the same credit opportunities, the CFPB has failed to draw upon its own agency expertise—or any materials at all—to even explore the issue. Indeed, for the past fifteen years, the CFPB has been a preeminent source of information on the persistence of credit market discrimination through the CFPB's supervision, enforcement, research, outreach, convening, consumer education, and receipt and resolution of over 10 million consumer complaints. Below we highlight only some of the

[248] *Id.*
[249] 42 U.S.C. §§ 1981 and 1982.
[250] *See e.g.,* Maude Toussaint-Comeau & Robin Newberger, Minority-Owned Banks and Their Primary Local Market Areas, 41 Econ. Perspectives (2017) (describing the role of Black-owned banks in providing access to credit); Charles Gerena, Opening the Vault, 11 Region Focus 46, 48 (2007) (chronicling the rise in the number of Black-owned banks in the 1970s); Valentine Okonkwo, Analysis of the portfolio behavior of black-owned commercial banks, 1 J. of Academy of Bus. & Econ. (2003) (same).

voluminous facts, reports, and studies documenting the persistence of discrimination, all of which were readily available to the Bureau before it issued its proposal.

With this background, absent any evidence that, after 50 years, Regulation B's SPCP provisions require a change, and with no firm basis in law or fact to support the practical elimination of all for-profit organization SPCPs, the Bureau's changes are unwarranted, unsupported, and arbitrary.

D. *ECOA's Legislative History Does Not Support the Bureau's Extreme Restriction*

The Bureau justifies its changes as needed to "more closely align the regulation's written-plan standard with ECOA's purposes and the congressional intent expressed in the legislative history."[251] In support of this conclusion, the Bureau first cites a Senate report that explained that SPCPs should be ''designed to increase access to the credit market by persons previously foreclosed from it,"[252] and a second that explained that SPCPs serve those who "without such exemption . . . would effectively [be] denied credit."[253]

Far from compelling, the CFPB's paralyzing restrictions, ECOA's legislative history directly undermines the proposed changes and demonstrates Congress's expansive view of the opportunities SPCPs could offer the credit markets.

In its report on the bill, the Senate Committee on Banking, Housing and Urban Affairs broadly acknowledged "the utility and desirability of 'affirmative action' type credit programs whether offered under governmental auspices or by private credit grantors."[254] Indeed, the sections of both congressional reports from which the Bureau quotes are entitled "Affirmative Action Programs." The Senate Report goes on to explain, "[c]ertain credit programs are specifically designed to prefer members of economically disadvantaged classes, and the Committee does not intend to undermine these programs."[255]

Though the Bureau advocates for its changes as a return to what Congress envisioned in ECOA's legislative history to match the conditions at the time, the credit programs named in the legislative history on which SPCPs were modeled exhibit none of these restrictions.[256] Unacknowledged in this repeated narrowing is the further assumption that all denials are the product of intentional discrimination, and not disparate impact discrimination, even though the

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[251] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50911.
[252] *Id.* at 50910 (quoting Senate Report No. 94-589 (Jan. 21, 1976)
[253] *Id.* at 50910 (quoting H.R. Conf. Rep. 94-873 (March 4, 1976).
[254] S. Rep. No. 94-589 at 404 (Jan. 21, 1976); *see also id.*(recognizing that the bill "also permits and encourages 'affirmative action' type credit programs").
[255] *Id.* at 7.
[256] *See, e.g.,* Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50910 n.67 (citing a minority business lending program operated by the City of Columbus, banks establishing minority-focused urban affairs lending divisions, and the establishment of Feminist Federal Credit Unions).

same legislative history on which the Bureau relies undisputably recognizes both disparate impact and disparate treatment claims under ECOA.[257]

Finally, the CFPB provides no basis for why the extreme restrictions it proposes for profit-making organizations should not cover all SPCPs. The distinction is arbitrary and without any basis in the statute, its intent, purposes, or legislative history.

In short, as the Bureau appears to acknowledge, the SPCP provisions are designed to permit protected-class conscious programs. This statutory meaning is confirmed by the legislative history. And the Bureau appears to agree that Regulation B's approach was appropriate when promulgated. What has happened in the meantime to justify the Bureau's proposed radical departure? The proposed rule does not explain other than to offer speculation about discrimination abating. As described below, credit markets remain stubbornly unequal such that far more is needed before eliminating the possibility of for-profit organization SPCPs altogether.

E. *A Decision that SPCPs Are No Longer Needed Is Congress's Alone to Make*

The proposal "preliminarily concludes that significant changes in the legal landscape and in credit markets mean that . . . SPCPs based on certain prohibited bases no longer serve the particular social needs envisioned in the 1976 Act."[258] Moreover, the Bureau continues, "[r]egardless of whether instances of credit discrimination continue to occur in the marketplace, the Bureau is not aware of any credit markets in which consumers would be 'effectively denied credit' because of their race, color, national origin, or sex in the absence of SPCPs offered or participated in by for-profit organizations."[259]

The Bureau cites no authority—and we know of none—that provides the agency general authority to rewrite a statute because the agency believes the statute is no longer needed. To the contrary, that authority rests with Congress alone. And in any event, the entire premise of this policy justification—that the credit markets have been made equal—is false.

F. *Ample Evidence of Persistent Credit Discrimination Supports the Continued Need for SPCPs*

The proposal "preliminarily concludes that significant changes in the legal landscape and in credit markets mean that . . . SPCPs based on certain prohibited bases no longer serve the particular social needs envisioned in the 1976 Act." Rather, ample evidence supports the continued need for SPCPs to address the challenges protected groups face in obtaining credit. The Bureau presents no evidence to the contrary. Consider some of the evidence:

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[257] Thoughthe Bureau views ECOA's text failing to explicitly provide for disparate impact liability, there can be no doubt that ECOA's legislative history finds that the statute is intended to address both disparate impact and disparate treatment discrimination. *See* 90 Fed. Reg. at 50902-50903.
[258] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50909.
[259] *Id.* at 50910.

Cases

- The Department of Justice has continuously brought cases for credit denials in violation of ECOA alleging large scale violations: Complaint, U.S. v. SE. Bank, No. 3:25-cv-26 (E.D. Tenn Jan. 18, 2025) (alleging denial of student loan refinancing based on race); Complaint, U.S. v. Nationwide Nevada, No. 2:08-cv-01309 (D. Nev. Sep. 29, 2008) (alleging bank refused to finance car loans on the basis of race); Complaint, U.S. v. Deposit Guaranty Nat'l Bank, No. 3:99-cv-00670 (N.D. Miss Sep. 29, 1999) (alleging home improvement loan denials based on race); Complaint, U.S. v. Associates Nat'l Bank, No. 1:99-cv-00196 (D. Del Mar. 29, 1999) (alleging denial of bank cards on the basis of national origin); Complaint, U.S. v. Albank, No. 97-CV-1206 (N.D.N.Y Aug. 13, 1997) (alleging mortgage loan denials based on race and national origin); Complaint, U.S. v. First Nat'l Bank of Doña Ana County, No. 2:97-cv-00096 (D. N.M. Jan. 28, 1997) (alleging bank unfairly denied loans to Hispanics trying to purchase mobile homes); Complaint, U.S. v. Shawmut Mortgage Company, No. 3:93-cv-02453 (D. Conn. Dec. 13, 1993) (alleging mortgage loan denials on the basis of race); Complaint, U.S. v. Decatur Fed. Sav. & Loan, No. 1 92-CV-2198-CAM (N.D. Ga. Sep. 17, 1992) (alleging bank applied stricter underwriting standards to Black applicants).

- The Department of Justice, at times in conjunction with the CFPB, has recently brought other ECOA violation credit cases: Complaint, U.S. v. SE. Bank, No. 3:25-cv-26 (E.D. Tenn Jan. 18, 2025); Complaint, U.S. v. The Mortgage Firm, No. 0:25-cv-60038-XXXX (S.D. Fla. Jan. 7, 2025); Complaint, U.S. v. OceanFirst Bank, No. 3:24-cv-09246-RK-JTQ (D.N.J. Sep. 18, 2024); Complaint, U.S. v. Patriot Bank, No. 2:24-cv-02029 (W.D. Tenn. Jan 17, 2024); Complaint, U.S. v. Colony Ridge Development, LLC, No. No. 23-cv-4729 (S.D. Tex. Dec. 20 2023); Complaint, U.S. v. Ameris Bank, No. 3:23-cv-01232 (M.D. Fla. Oct. 19, 2023); Complaint, U.S. v. Am. Bank of Okla. No. 4:23-cv-00371-CDL (N.D. Okla. Oct. 3, 2023); Complaint, U.S. v. ESSA Bank, No. 2:23-cv-02065 (E.D. Pa. May 31, 2023); Complaint, U.S. v. Park Nat'l Bank, No. 2:23-cv-00822-EAS-CMV (S.D. Ohio Feb. 28, 2023); Complaint, U.S. v. City Nat'l Bank, No. 2:23-cv-00204 (C.D. Cal Jan. 12, 2023); Complaint, U.S. v. Evolve Bank & Trust, No. 2:22-cv-02667-SHL-tmp (W.D. Tenn. Sep. 29, 2022); Complaint, U.S. v. Lakel& Bank, No. 2:22-cv-05746 (D.N.J. Sep. 28, 2022); Complaint, U.S. v. Trident Mortgage Company, No. 2:22-cv-02936 (E.D. Pa. July 27, 2022); Complaint, U.S. v. Trustmark Nat'l Bank, No. 2:21-cv-02664 (W.D. Tenn. Oct. 22, 2021); Complaint, U.S. v. First Merchants Bank, No. 1:19-cv-02365-JPH-MPB (S.D. Inc. June 13, 2019); First Amended Complaint, U.S. v. Advocate Law Groups Florida, P.A., No. 6:18-cv-01836-JA-GJK, (W.D. Fla. Oct. 25, 2019); Complaint, U.S. v. Guaranteed Auto Sales, No. 1:19-cv-02855-RDB (D. Md. Sep. 30, 2019); Complaint, No. 1:17-cv-00347, U.S. v. JPMorgan Chase Bank, N.A. (S.D.N.Y. Jan. 18, 2017); Complaint, U.S. v. Hatfield, No. 5:17-cv-00121 (W.D.N.C., July 13, 2017); Complaint, U.S. v. Union Sav. Bank & Guardian Sav. Banks, No. 1:16-cv-01172-TSB (S.D. Ohio Dec. 28, 2016); Complaint, U.S. v. KleinBank, No. 0:17-cv-00136 (D. Minn. Jan. 13, 2017); Complaint, U.S. v. Charter Bank, No. 2:16-cv-00413 (S.D. Tex. Sep. 28, 2016); Complaint, U.S. v. First Fed. Bank of Fla., No. 3:16-cv-1148-J-34JBT (M.D. Fla. Sep. 9, 2016); Complaint, U.S. v. BancorpSouth Bank, No. 1:16cv118-GHD-DAS (N.D. Miss June 29, 2016); Complaint, U.S. v. Toyota Motor Credit Corp, No. 2:16-cv-00725-CBM-SS (C.D. Cal. Feb. 2, 2016); Complaint, U.S. v. Evolve Bank & Trust, No. 2:16-cv-02040 (W.D. Tenn. Jan. 19, 2016); Complaint, U.S. v. Sage Bank, No. 1:15-cv-13969 (D. Mass Nov. 30, 2015); Complaint, U.S. v. Eagle Bank & Trust Company of Mo., No. 4:15-cv-01492 (E.D. Mo. Sep. 29, 2015); Complaint, U.S. v. Fifth Third Bank, No. 1:15-cv-00626-MRB (S.D. Ohio Sep. 28, 2015); Complaint, U.S. v. Hudson City Sav. Bank, F.S.B., No. 2:15-cv-07056-CCC-JBC (D. N.J. Sep. 24, 2015); Consent Order, U.S. v. Am. Honda Fin. Co., No. CV 15-05264-MMM (RAOx) (C.D. Cal July 16, 2015); Complaint, U.S. v. Provident Funding Associates, No. 3:15-cv-02373 (N.D. Cal. May 28, 2015); Complaint, U.S. v. Evergreen Bank Group, No. 1:15-cv-04059 (N.D. Ill May 7, 2015); Complaint, U.S. v. First United Bank, No. 3:15-cv-00144-L (N.D. Tex. Jan. 15, 2015); Complaint, U.S. v. Fifth Third Mortgage, No. 5:14-cv-00292-MTT (M.D. Ga. Aug. 11, 2014); Complaint, U.S. & N.C. v. Auto Fare, Inc., No. 3:14-cv-00008-RJC-DSC (W.D.N.C. Jan. 13, 2014); Complaint, U.S. v. Nat'l City Bank, No. 2:13-cv-01817-CB (W.D. PA Dec. 23, 2013); Complaint, U.S. v. Chevy Chase Bank, F.S.B., No. 1:13-cv-01214-AJT-JFA (E.D. Va. Sep. 30, 2013); Complaint, U.S. v. Southport Bank, No. 13-C-1086 (E.D. Wis. Sep. 26, 2013); Complaint, U.S. v. Plaza Home Mortgage, Inc., No. 3:13-cv-02327-H-RBB (S.D. Cal Sep. 26, 2013); Complaint, U.S. v. Community State Bank, No. 2:13-cv-10142-TLL-CEB (E.D. Mich. Jan. 15, 2013); Complaint, U.S. v. Luther Burbank Sav. No. 2:12-cv-07809-JAK-FMO, (C.D. Cal Sep. 12, 2012); Complaint, U.S. v. Wells Fargo Bank, No. 1:12-cv-01150 (D.D.C. July 12. 2012); Complaint, U.S. v. SunTrust Mortgage, Inc. (E.D. Va. May 31, 2012); U.S. v. GFI Mortgage Bankers, Inc. No. 1:12-cv-02502-KBF (S.D.N.Y. Apr. 2, 2012); Complaint, U.S. v. Countrywide Fin. Corporation, No. 2:11-CV-10540-PSG-AJW (C.D. Cal Dec. 21, 2011); Complaint, U.S. v. Midwest BankCentre, No. 4:11-cv-01086 (E.D. Mo. June 16, 2011); Complaint, U.S. v. Citizens Republic Bancorp, Inc. & Citizens Bank, No. 2:11-cv-11976-LPZ -LJM (E.D. Mich. May 5, 2011); Complaint, U.S. v. Ally Fin. Inc. & Ally Bank, No. 2:13-cv-15180-AJT-MAR (E.D. Mich. Apr. 1, 2011); Complaint, U.S. v. Complaint, U.S. v. AIG Fed. Sav. Bank & Wilmington Fin., Inc., No. 1:10-cv-00178-JJF (D. Del. Mar. 22, 2010); Amended Complaint, U.S. v. Nara Bank & Union Auto Sales, No. 2:09-cv-07124-RGK-JC (C.D. Cal. Mar. 18, 2010); Complaint, U.S. v. First United Sec. Bank, No. 1:09-cv-00644 (S.D. Ala. Sep. 30, 2009); Complaint, U.S. v. First Lowndes, No. 2:08-cv-00798-WKW-CSC, (M.D. Ala. Sep. 29, 2008); Complaint, U.S. v. Compass Bank, No. 07-H-0102-S (N.D.

Ala. Jan. 12, 2007); Complaint, U.S. v. Centier Bank, No. 2:06-CV-344 (N.D. Ind. Oct. 13. 2006); Complaint, U.S. v. First Nat'l Bank of Pontotoc, No. 3:06CV061-M-D (N.D. Miss. Apr. 27, 2006); Complaint, U.S. v. First Am. Bank, No. 04C 4585, (N.D. Ill July 19, 2004); Complaint, U.S. v. Old Kent Fin. Corporation & Old Kent Bank, No. 04-71879 (E.D. Mich. May 19, 2004); Complaint, U.S. v. Fidelity Fed. Bank, No. 1:02-cv-03906 (E.D.N.Y. July 8, 2002); Complaint, U.S. v. Delta Funding Corporation, No. CV-00-1872 (E.D.N.Y. Mar. 31, 2000); Complaint, U.S. v. Deposit Guaranty Nat'l Bank, No. 3:99-cv-00670 (N.D. Miss Sep. 29, 1999); Complaint, U.S. v. Associates Nat'l Bank, No. 1:99-cv-00196 (D. Del Mar. 29, 1999.); Complaint, U.S. v. Albank, No. 97-CV-1206 (N.D.N.Y Aug. 13, 1997); Complaint, U.S. v. First Nat'l Bank of Doña Ana County, No. 2:97-cv-00096 (D. N.M. Jan. 28, 1997); Complaint, U.S. v. Long Beach Mortgage Company, No. CV-96-6159 (C.D. Cal. Sep. 5, 1996); Complaint, U.S. v. Fleet Mortgage Company, No. 1:96-cv-02279 (E.D.N.Y. May 6, 1996); Complaint, U.S. v. First Nat'l Bank of Gordon, No. 96-5035 (D. S.D. Apr. 15, 1996); Complaint, U.S. v. Huntington Mortgage Co. No. 1:95-cv-02211 (N.D. Ohio Oct. 1995); Complaint, U.S. v. N. Trust Company, No. 1:95-cv-03239 (N.D. Ill. June 1, 1995); Complaint, U.S. v. Chevy Chase Bank, No. 1:94-cv-01829 (D.D.C. Aug. 22, 1994); Complaint; U.S. v. First Nat'l Bank of Vicksburg, No. 5:94-cv-00006 (S.D. Miss. Jan. 21, 1994); Complaint, U.S. v. Shawmut Mortgage Company, No. 3:93-cv-02453 (D. Conn. Dec. 13, 1993); Complaint, U.S. v. Decatur Fed. Sav. & Loan, No. 1 92-CV-2198-CAM (N.D. Ga. Sep. 17, 1992).

Denial Rate Studies

- In 2025, a Federal Reserve Banks survey data showed Black-owned businesses face disproportionately higher denial rates when seeking credit. According to a survey, 39% of Black-owned businesses are denied financing, in contrast to just 18% of white-owned businesses, 24% of Asian-owned businesses, and 29% of Hispanic-owned businesses. Black-owned businesses were disproportionately classified as high credit risks, with 27% facing this designation compared to just 5% of white-owned businesses, 4% of Asian-owned businesses, and 17% of Hispanic-owned businesses.[260]
- In 2022, Federal Reserve researchers found Black applicants are 2.9 percentage points more likely than White applicants to be denied a mortgage, controlling for risk characteristics such as credit score, loan-to-value and debt-to-income ratios.[261]

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[260] Fed. Rsrv. Banks, *Small Business Credit Survey, 2025 Firms in Focus: Chartbook on Firms by Race and Ethnicity of Ownership*, *available at* https://www.fedsmallbusiness.org/reports/survey/2025/2025-small-business-data-chartbooks.
[261] Kim-Eng Ky & Katherine Lim, *The Role of Race in Mortgage Application Denials*, Fed. Rsrv. Bank of Minn. (May 2022), *available at* https://www.minneapolisfed.org/-/media/assets/papers/community-development-working-papers/2023/the-role-of-race-in-mortgage-application-denials.pdf.

- In 2020, a study found that more than 90 percent of businesses owned by Black, Latino, Asians, and Native people were shut out of the first round of the Paycheck Protection Program's initial $349 billion based on the program's design.[262]

- In 2019, a Federal Reserve Bank of Atlanta study found that on average, Black-owned firm applicants received approval for smaller shares of the financing they sought compared to white-owned small businesses that applied for financing. The same report noted that 38% of Black-owned firm applicants did not receive *any* of the financing they applied for, as compared to 20% of white-owned business applicants.[263]

- In 2014, a study found that minority-owned firms generally are disproportionately denied when they need and apply for additional credit. Denial disparities persist even after controlling for variables that influence loan decisions, including owners' characteristics (such as personal wealth and education), firm attributes (such as credit rating/scores and firm financials/revenues), and firm-lender relationship characteristics. The study also found that female-owned firms and minority-owned firms sought credit less often because they were discouraged from applying, fearing rejection.[264]

- In 2012, a study concluded that Black-owned and Hispanic-owned businesses faced discrimination in obtaining loan renewals in 2003. Regarding the cost of credit, the same study found that Hispanic-owned firms faced discrimination for the credit they did receive, even when controlling for creditworthiness and other risk factors.[265]

- In 2010, a Minority Business Development Agency report found that among small businesses with gross receipts under $500,000, loan denial rates for minority-owned firms were about three times higher than non-owned-firms, and for high sales firms, the rate of loan denial was almost twice as high for minority-owned firms as for non-minority-owned firms. In addition, minority-owned firms paid higher rates interest than non-minority owned firms.[266]

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[262] Testimony of Ashley C. Harrington before the United States House Committee on Small Business, *Paycheck Protection Program: Loan Forgiveness and Other Challenges,*" Center for Responsible Lending (June 17, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-testimony-harrington-house-smallbusiness-17jun2020.pdf.
[263] Fed. Rsrv. Bank of Atlanta, *Report of Minority-Owned Firms, Small Business Credit Survey* (Dec. 2019), *available at* https://www.atlantafed.org/community-development/publications/partners-update/2020/01/200108-report-on-minority-owned-small-businesses.
[264] Rebel Cole, *Credit Scores and Credit Market Outcomes: Evidence from the Small Business Finances and the Kauffman Firm Survey* (2014), available at https://www.mbda.gov/sites/default/files/migrated/files-attachments/rs419tot.pdf.
[265] Elizabeth Asiedu et al., *Access to Credit by Small Businesses: How Relevant Are Race, Ethnicity, and Gender?*, 102 Am. Econ. Rev. 532 (2012).
[266] Robert W. Fairlie & Alicia M. Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, Minority Business Development Agency*

Fair Lending Testing

- In 2024, a CFPB report on matched pair fair lending tests conducted with DOJ found that Black testers received less favorable treatment—that is, they experienced less encouragement and more discouragement—than white testers when seeking credit.[267]

- In 2023, National Community Reinvestment Coalition matched pair tests found that bank employees encouraged white customers to apply for small business loans more often than Black ones, to a statistically significant degree.[268]

- In 2020, National Community Reinvestment Coalition testing found that Black female and Hispanic male testers were treated less favorably than white testers even though the Black female and Hispanic male testers had stronger financial profiles. The testing revealed financial institutions discouraging members of protected classes from applying for credit.[269]

Other Studies

- In 2025, the Federal Reserve Banks published their Small Business Credit Survey demonstrating that Black-owned businesses face significant barriers to accessing financing, with a significantly higher likelihood of being discouraged from applying for credit compared to their white-owned business counterparts.[270]

- In 2024, field studies found that lender employees provide Black customers with inferior products and services as compared to white customers.[271]

- The 2022 Small Business Credit Survey found that, among low-credit-risk applicants, 43 percent of white-owned firms received all the financing they sought, compared to 27

(Jan. 2010), *available at* https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf.

[267] Consumer Fin. Prot. Bureau, *Matched-Pair Testing in Small Business Lending Markets* (Nov. 2024), https://files.consumerfinance.gov/f/documents/cfpb_matched-pair-testing-report_2024-11.pdf.

[268] Nat. Cmty. Reinvestment Coal., *Missed Opportunities: Financial Institutions In New York City Discourage Prospective Small Business Applicants* (Aug. 2023).

[269] Nat. Cmty. Reinvestment Coal., *Lending Discrimination During Covid-19: Black and Hispanic* (Nov. 10, 2020), *available at* https://ncrc.org/lending-discrimination-during-covid-19-black-and-hispanic-women-owned-businesses/#:~:text=16%20out%20of%2030%20(53,female%20testers%20received%20worse%20treatment.

[270] Fed. Rsrv. Banks, *Small Business Credit Survey, 2025 Firms in Focus: Chartbook on Firms by Race and Ethnicity of Ownership*, *available at* https://www.fedsmallbusiness.org/reports/survey/2025/2025-small-business-data-chartbooks.

[271] Maura L. Scott et al., *Revealing and Mitigating Racial Bias and Discrimination in Financial Services*, 6 J. of Marketing Res. 598 (2024), *available at* https://journals.sagepub.com/doi/abs/10.1177/00222437231176470.

percent of Black-owned firms, 24 percent of Hispanic-owned firms, and only 19 percent of Asian-owned firms.[272]

- In 2015, a study of credit data from new startups found that white-owned startups were more favorably treated in credit score determinations than Black-owned startups with the same firm characteristics and owner characteristics.[273]

Disproportionate Banking Rates

- In 2021, a study found that majority-Black census tracts were less likely to have a bank branch than non-majority-Black neighborhoods, limiting their access to financial services.[274]

Farm Lending Disparities

- In 2022, the CFPB found that "[t]he share of minority representation in farming, particularly that of Black farmers, has declined sharply over the last 100 years. . . . Based on the disposition of numerous lawsuits alleging discrimination against minority farmers, the Bureau believed that credit discrimination may play a role in this decline. [275]

- In 2013, the Congressional Research Service summarized decades of well-documented allegations of unlawful discrimination against minority and women farmers in the management of USDA programs.[276]

Home Mortgage Lending Disparities

- Mortgage applicants in majority-Black and majority-Hispanic census tracts continue to be denied more often than applicants in majority-white census tracts. In 2024, the average

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[272] Fed. Rsrv. Banks, *Small Business Credit Survey: 2022 Report on Firms Owned by People of Color* at 15 (Jun. 29, 2022), https://www.fedsmallbusiness.org/reports/survey/2022/2022-report-on-firms-owned-by-people-of-color.

[273] Loren Henderson et al., Wh*ere Credit is Due?: Race, Gender, and Discrimination in the Credit Scores of Business Startups*, 42 Review of Black Political Economy 459 (Dec. 2015), *available at* https://journals.sagepub.com/doi/abs/10.1007/s12114-015-9215-4.

[274] Kristen Broady et al., An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services, Brookings (Nov. 2021), *available at* https://www.brookings.edu/articles/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/.

[275] 88 Fed. Reg. 35150, 35224 (May 31, 2023) (Oct. 8, 2021) (citing, *inter alia,* from 1910 to 2017 a decrease from 14 percent to 1.2 percent the proportion of Black farmers in the United States and Order and the litigation of Black farmer discrimination claims in *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle v. Veneman*, No. 99-CIV-03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001).

[276] Congressional Research Service, *Garcia v. Vilsack*: A Policy and Legal Analysis of a USDA Discrimination Case (Feb. 22, 2013), *available at* https://nationalaglawcenter.org/wp content/uploads/assets/crs/R40988.pdf.

denial rate nationally was 12.07% in majority-Black census tracts and 10.58% in majority-Hispanic census tracts, compared to 6.29% in majority-White census tracts.[277]

- As one example, 2022 industrywide denial rates in the Washington D.C. metro area were 10.55% in majority-Black tracts and 8.57% in majority-Hispanic tracts, compared to 5.11% in majority-white tracts.
- Loans to Black and Hispanic consumers are more likely to be higher-priced,[278] and median interest rates are likely to be higher than for non-Hispanic white consumers.[279] In 2022, Black and Hispanics "continued to pay higher median interest rates than all other racial/ethnic groups for home purchase loans."[280]
- Similarly, Black and Hispanic paid more in total loan costs than non-Hispanic whites.[281]

CFPB Activity

Congress's determination that discrimination remains a significant impediment to credit access in the credit markets is demonstrated by its 2010 decision to create a separate Office of Fair Lending and Equal Opportunity (OFLEO) within the newly formed CFPB,[282] endowing it with various responsibilities in today's credit markets as the first office of its kind among the federal banking regulators. Over the past 15 years, the CFPB has published numerous reports and studies regarding current credit discrimination and the Bureau's ongoing efforts to combat it. These include:

- Fair Lending Report of the Consumer Financial Protection Bureau (June 2024)[283]
- Fair Lending Report of the Consumer Financial Protection Bureau (June 2023)[284]
- Fair Lending Report of the Consumer Financial Protection Bureau (May 2022)[285]

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[277] CFPB, *Data Point: 2023 Mortgage Market Activity and Trends* at 24 (Dec. 13, 2024), https://files.consumerfinance.gov/f/documents/cfpb_2023-mortgage-market-activity-and-trends_2024-12.pdf (all home purchase applications).
[278] CFPB, *Data Point: 2019 Mortgage Market Activity and Trends* at 47 (June 2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf ("CFPB Data Point 2019").
[279] CFPB, *Data Point: 2020 Mortgage Market Activity and Trends* at 21-22 (Aug. 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-mortgage-market-activity-trends_report_2021-08.pdf.
[280] CFPB, *Data Point: 2022 Mortgage Market Activity and Trends* at 22 (Sept. 2023), https://www.consumerfinance.gov/data-research/research-reports/data-point-2022-mortgage-market-activity-trends/.
[281] *CFPB Data Point 2022*, *supra* note 280, at 24.
[282] 12 U.S.C. § 5493(c)
[283] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_fair-lending-report_fy-2023.pdf.
[284] *Available at* https://www.consumerfinance.gov/data-research/research-reports/the-cfpbs-2023-fair-lending-annual-report-to-congress/.
[285] *Available at* https://files.consumerfinance.gov/f/documents/cfpb_2021-fair-lending_report_2022-05.pdf.

- CFPB Pilot Study Finds Differential Treatment in Small Business Lending Markets (Nov. 13, 2024)[286]
- Protecting Consumers' Right to Challenge Discrimination, (Jun. 26, 2023)[287]
- Protecting People from Discriminatory Targeting (Apr. 14, 2023)[288]
- CFPB Seeks Input on Detecting Discrimination in Mortgage Lending (Nov. 16, 2022)[289]
- CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022)[290]
- Cracking Down on Discrimination in the Financial Sector (Mar. 16, 2022)[291]
- Consumer Financial Protection Bureau Outlines Options To Prevent Algorithmic Bias In Home Valuations (Feb. 23, 2022)[292]
- Report: Asian American and Pacific Islanders in the Mortgage Market (Jul. 2021)[293]
- Consumer Financial Protection Bureau Requests Information on Ways to Prevent Credit Discrimination and Build a More Inclusive Financial System (Jul. 28, 2020)[294]
- The Importance of Fair and Equitable Access to Credit for Minority and Women-Owned Businesses (Apr. 27, 2020)[295]

The proposed rule does not address, or demonstrate awareness of, this information—much of it generated by the CFPB itself—in concluding that SPCPs "no longer serve the particular social needs envisioned in the 1976 Act." Indeed, the CFPB fails to provide any factual basis for its conclusion.

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[286] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-pilot-study-finds-differential-treatment-in-small-business-lending-markets/.
[287] *Available at* https://www.consumerfinance.gov/about-us/blog/protecting-consumers-right-to-challenge-discrimination/.
[288] *Available at* https://www.consumerfinance.gov/about-us/blog/protecting-people-from-discriminatory-targeting/.
[289] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-seeks-input-on-detecting-discrimination-in-mortgage-lending/.
[290] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/.
[291] *Available at* https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/.
[292] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-options-to-prevent-algorithmic-bias-in-home-valuations/.
[293] *Available at* https://www.consumerfinance.gov/data-research/research-reports/asian-american-and-pacific-islanders-in-the-mortgage-market/.
[294] *Available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-rfi-prevent-credit-discrimination-build-more-inclusive-financial-system/.
[295] *Available at* https://www.consumerfinance.gov/about-us/blog/fair-equitable-access-credit-minority-women-owned-businesses/.

G. *SPCPs Do Not Raise Constitutional Concerns*

In its proposal, the CFPB expresses concern that current SPCPs may not be constitutional based on "[t]he constitutional guarantee of equal protection [that] generally prohibits the government from discriminatory treatment on the bases of race, color, national origin, or sex."[296] SPCPs under the proposed rule, however, concern *private* conduct and not government action. As long established, constitutional equal protection "erects no shield against merely private conduct."[297]

Specifically, the Bureau's proposal disallows the use of race, color, national origin, and sex in an SPCP "offered by a for-profit organization, or in which such organization participates."[298] For these private entities, the statute establishes the *absence* of ECOA's otherwise applicable non-discrimination restrictions rather than any requirement or legal obligation.[299] In that way, the statute signals only that SPCPs operate free of some of the restrictions Congress applies to other credit transactions. Regulation B is careful to simply "permit" and not *require* "a creditor to extend special purpose credit to applicants"[300] and forbids any Bureau involvement in creditor SPCP decisions by mandating that "[t]he Bureau does not determine whether individual programs qualify for special purpose credit status, or whether a particular program benefits an 'economically disadvantaged class of persons.'"[301]

ECOA and Regulation B, moreover, merely specify the circumstances in which creditors can consider protected class status without running afoul of ECOA. Both the statute and the regulation are race-neutral; they do not identify any particular racial group that should be benefited by non-government programs.[302] Rather, they provide the authority for a lender to consider, for example, creating special programs designed to benefit people on the basis of ECOA protected classes that are not afforded special constitutional protections, such as the receipt of government assistance. Thus, even if permitting SPCPs could raise a constitutional question in some circumstances—and it does not—there is no basis for disallowing SPCPs as broadly as the Bureau proposes, extending far beyond the constitutional concern the Bureau itself

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[296] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50909.
[297] *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948).
[298] 12 C.F.R. § 10028(a)(3).
[299] 15 U.S.C. § 1691(c) ("It is *not a violation of this section* for a creditor to refuse to extend credit offered pursuant to . . . any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau . . . if such refusal is required by or made pursuant to such program.") (emphasis added).
[300] 12 C.F.R. § 1002.8(a).
[301] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50922, Comment 8(a)-1.
[302] *See Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 62 (D.C. Cir. 2016) ("Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. That makes it different from other statutes that either expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible.").

raises. The Bureau does not explain why its constitutional concerns lead it to eviscerate SPCPs far beyond what might be necessary to address any possible concern.

In proposing its changes, the Bureau states it is "mindful of recent Supreme Court decisions,"[303] but the decision it cites relates to government, rather than private, action in applying constitutional equal protection.[304] The Bureau also cites *Ames v. Ohio Department of Youth Services*, a case that interpreted VII, not the Constitution, as not exempting discrimination against majority groups,[305] but for ECOA there is no dispute that the statute *does* exempt SPCPs from some of its prohibitions.[306]

H. *Neither the Bureau's Adjustment and Exception Authority Nor Its Ability to Prescribe SPCP Standards Allow It to Alter Fundamental Statutory Provisions or Put An End to For-Profit SPCPs*

In proposing its SPCP changes, the CFPB references its "'adjustment and exception' authority."[307] The Bureau presumably refers to this authority to justify SPCP restrictions that are contrary to the plain text of the statute.

Congress granted the CFPB authority to "provide for such adjustments and exceptions for any class of transactions" as "necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith."[308] This authority is not limitless and is not properly invoked or explained here.

In particular, "adjustment and exception" authority does not support the effective elimination of for-profit organization SPCPs. Eliminating an important aspect of the Act's remedial scheme cannot "effectuate the purposes of [the Act]" and, for the same reason, the Bureau's proposed changes do not "prevent or circumvent evasion" of ECOA, or "facilitate or substantiate compliance" with the statute. To the contrary, it is the proposed nullification of for-profit organizations' SPCPs created by the statute that would "evade" ECOA as Congress wrote it. Again, the Bureau offers no explanation or evidence to the contrary.

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303 Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50909.
304 *Id.* n.61 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 205 (2023) (addressing "discrimination by the General Government, or by the States, against any citizen because of his race") (internal quotation marks omitted). The lower court cases cited by the Bureau are no different. *Id.* (citing *Nuziard v. Minority Bus. Dev. Agency,* 721 F. Supp. 3d 431, 465 (N.D. Tex. 2024) (constitutional challenge to *government action* by the Minority Business Development Agency in considering demographics in providing financial assistance grants); *Strickland v. United States Dep't of Agric.,* 736 F. Supp. 3d 469, 480 (N.D. Tex. 2024) (constitutional challenge to *government action* by the United States Department of Agriculture in considering demographics in providing disaster relief money)).
305 605 U.S. § 303 (2025).
306 *See* 15 U.S.C. § 1691(c)
307 Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50910.
308 15 U.S.C. § 1604(a).

In any event, neither term—"adjustment" nor "exception"—would justify the action taken here because the plain meaning of neither term would allow the Bureau to alter fundamental features of the statute. *See, e.g.*, *MCI v. ATT*, 512 U.S. 218 (1994) (holding that FCC's ability to "modify" statutory requirement did not allow it to make "fundamental changes," considering in part that the plain meaning of modify is "moderate change").

Thus, the Bureau has failed to provide any justification for use of "adjustment" or "exception" authority to make changes that contravene the plain text of the statute. In interpreting a parallel provision in the Truth in Lending Act, the D.C. Circuit expressed skepticism as to the "scope of [the Federal Reserve Board's] authority" as it sought to "contravene directly the terms of the authorizing statute."[309] "[G]iven the seriousness of interpreting a statutory provision that is asserted [by the Board] to give the Board authority to override the clear language of other provisions," the Court demanded that the Board explain: "How does the Board interpret the phrase 'adjustments and exceptions for any class of transactions'? Does that language authorize the Board to override statutory provisions that would otherwise apply to all lenders? If so, for what specific purposes?"[310]

The CFPB's proposal provides no indication of how it can satisfy this burden. Much less has the CFPB established how its changes "effectuate the purpose of the [Act]," help to "prevent circumvention or evasion" of ECOA's purposes, or "facilitate compliance"[311] with the statute.

ECOA also provides the CFPB the separate authority to "prescribe[]" "standards" for profit-making organization SPCPs.[312] This authority, however, does not include license to eliminate these programs by imposing standards that no profit-making organization could meet. Any standard-setting authority presumes that CFPB's standards will allow for the continued viability of the programs, understanding that only Congress has the power to eliminate for-profit SPCPs entirely.

Finally, while the CFPB's proposal points to its general rulemaking authority,[313] its standard-prescribing authority,[314] and its adjustments and exceptions authority,[315] the Bureau does not explain which authority the Bureau relies on for each of its proposed changes, thus not allowing commenters to examine its reasoning.

[309] *Consumers Union of U.S., Inc. v. Fed. Rsrv. Bd*., 938 F.2d 266, 273 (D.C. Cir. 1991).
[310] *Id.*
[311] 15 U.S.C. § 1604(a).
[312] 15 U.S.C. § 1691(c)(3).
[313] 15 U.S.C. § 5512(b)(1).
[314] 15 U.S.C. § 1691(c)(3).
[315] 15 U.S.C. § 1691b(a).

IV. OTHER SIGNIFICANT DEFICIENCES AND LEGAL VIOLATIONS

A. The Bureau Did Not Perform Its Required Cost Benefit Analysis and Fails to Recognize the Harm the Proposal Will Cause to Consumers, Small Businesses, and the Credit Markets

The Bureau assumes the effect of its proposed SPCP changes will be "small" due to its belief that "the prevalence of SPCPs is quite low and, at a market level, the total number of consumers receiving benefits under SPCPs likely represents a small portion of total credit."[316]

The CFPB does not account, however, for the trend in SPCPs creation. In February 2022, federal supervisory and enforcement agencies provided additional guidance that facilitated more widespread adoption of SPCPs.[317] That same year, industry trade associations provided strong support for SPCPs,[318] again contributing to greater adoption. Consumer groups and researchers also provided resources to aid in establishing SPCPs.[319] Through 2023, growth accelerated.[320] The 15,000 SPCP mortgages cited by the Bureau as purchased by the GSEs in 2023 represents only a portion of the market in the first full year of growth and does not take into account, for example, loans held in portfolio or non-mortgage SPCPs, like those designed to benefit small-business applicants. Moreover, the FHFA recently revised upward its estimates, stating that the

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[316] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50918.

[317] *See, e.g.,* Bd. of Governors of the Fed. Res. Sys. et al., *Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B* (Feb. 22, 2022), https://www.occ.gov/news-issuances/bulletins/2022/bulletin-2022-3a.pdf; Fed. Rsrv.. Banks, *Consumer Compliance Outlook* (2022) (noting HUD "issued guidance to clarify that a compliant SPCP generally does not violate the FHA"), https://www.consumercomplianceoutlook.org/2022/fourth-issue/overview-of-special-purpose-credit-programs; Bureau of Consumer Fin. Protection, *Equal Credit Opportunity (Regulation B; Special Purpose Credit Programs)*, 86 Fed. Reg. 3762 (Jan. 15, 2021).

[318] *See. e.g.,* Am. Bankers Assoc., N*ew Opportunities for Lenders and Borrowers Under Special Purpose Credit Programs* (Aug. 16, 2023) ("Special-purpose credit programs ("SPCPs") make loan qualification easier for underserved populations, filling the gaps in affordability and access to housing.") *available at* https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-august/new-opportunities-for-lenders/; Mortgage Bankers Assoc., *MBA, NFHA Launch Online Toolkit for Special Purpose Credit Programs in Underserved Communities* (June 28, 2022) (MBA President stating "MBA is committed to bringing the mortgage industry together to develop effective policy and resources to help to close the racial homeownership gap. We have been at the forefront of encouraging regulators, the GSEs, lenders, and other industry stakeholders to enable the creation of SPCPs to increase mortgage credit availability to underserved communities,"), *available at* https://newslink.mba.org/servicing-newslink/2022/june/mba-servicing-newslink-tuesday-june-28-2022/mba-nfha-launch-online-toolkit-for-special-purpose-credit-programs-in-underserved-communities/.

[319] *See,e.g., NFHA and MBA Launch Online Tookit to Help Lenders Develop Special Purpose Credit Programs for Underserved Communities* (June 21, 2022) (announced a new online toolkit for mortgage lenders interested in developing SPCPs), *available at* https://nationalfairhousing.org/resource/nfha-and-mba-launch-online-toolkit-to-help-lenders-develop-special-purpose-credit-programs-for-underserved-communities/; Urban Inst., *The Special Purpose Credit Program Data Tooklit* (offering market-specific data; interactive Excel file based on market-specific data, and documentation supporting the written plan), *available at* https://www.urban.org/projects/special-purpose-credit-program-data-toolkit.

[320] Trusted Mortgage Capital, *Challenges Aside, Mortgage Lenders See Benefits in Offering SPCPs* (2023) https://www.trustedmortgagecapital.com/challenges-aside-mortgage-leaders-see-benefits-in-offeringspcps/.

GSEs "purchased approximately 57,282 SPCP loans . . . under their 2022-2024 Plans."[321] Thus, a market unconstrained by the limitations the CFPB proposes would likely be able to grow more rapidly than the Bureau assumes in its analysis.

A lack of factual basis pervades the CFPB's entire 1022 analysis. The analysis consists mostly of unsubstantiated statements such as, with respect to benefits to covered persons:

> [T]he Bureau believes that the proposed provisions are deregulatory in nature and hence would benefit covered persons in the long run by reducing compliance burden. The Bureau anticipates these cost savings to vary with the covered person's size and the complexity of operations. However, the Bureau is unaware of any data that would enable reliable quantitative estimation of these benefits.[322]

Or, similarly, for costs to consumers, the Bureau states, for example:

> According to economic theory, in a perfectly competitive market where covered persons are profit maximizers, reductions in the marginal cost of operation would be passed on to consumers, and firms would absorb one-time fixed costs of compliance. However, covered persons' response likely varies with supply, demand, and competitive conditions. Moreover, in addition to any costs that covered persons may pass onto consumers, the proposed provisions concerning disparate impact and discouragement may potentially limit legal protections for consumers and affect consumers' access to credit.[323]

These assessments indicate that the Bureau has not adequately considered the potential benefits and costs of its proposed Regulation B changes to consumers and covered persons as required by section 1022(b)(2)(A) of the Dodd-Frank Act.

B. The Bureau Failed to Provide Sufficient Time to Comment

Without adequate explanation, the Bureau has provided just 30 days to comment on a profoundly important and complex rule—one that overhauls longstanding ECOA regulations in three separate ways. Under any circumstances, 30 days would be an insufficient amount of time for interested parties to digest and respond to a proposed rule of this magnitude.

The Administrative Procedure Act provides that agencies must afford a meaningful opportunity for public participation through submission of written data, views, or arguments.[324] Where a proposed rule concerns substantial changes and/or complex regulations, a 30-day

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[321] Fed. Hous. Fin. Agency, Fair Lending, Fair Housing, and Equitable Housing Finance Plans, 90 Fed. Reg. 35475, 35481 (proposed July 28, 2025).
[322] Equal Credit Opportunity Act (Regulation B), 90 Fed. Reg. at 50915.
[323] *Id.* at 50916.
[324] 5 U.S.C. § 553(c).

comment period has been held insufficient to allow for meaningful public participation.[325] That conclusion is consistent with longstanding executive orders on regulatory review, which likewise provide that agencies should "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days."[326]

Making matters worse, on the same day this proposed rule was published, the CFPB released another significant Regulation B rulemaking proposal, which would make major changes to the regulation implementing Section 1071 of the Dodd-Frank Act, with the same 30-day deadline. Many of the same organizations and experts have needed to comment on both rules. Having two complex proposals on related topics with the same short timeframe makes it even harder for stakeholders to provide appropriate and meaningful feedback on either one. Finally, the 30-day comment period was made even more unreasonable by having it run over the Thanksgiving holiday.

There is no obvious reason why, at a minimum, stakeholders should be deprived of the customary 60-day comment period here, given the substantial changes being proposed to decades-old regulations. Multiple parties asked the Bureau to extend the unreasonable and unexplained 30-day comment deadline. The Bureau simply ignored those requests, without providing any rationale.

C. *Antideficiency Act*

It may be that the Bureau's insistence on such a short comment period is related to the position it has taken elsewhere that it is undergoing a lapse in funding, such that continued Bureau operations are unlawful. But the Bureau has not explained why, if that is true, this rulemaking is a proper use of government funds. Under the Bureau's own reasoning, it is not properly engaging in this rulemaking, which is not excepted activity.

On November 10, 2025, the CFPB informed the U.S. District Court of the District of Columbia in pending litigation that the CFPB will run out of funds early in 2026 and will not request additional funding from the Federal Reserve.[327] That filing attaches a memo from the Office of Legal Counsel ("OLC"), which explains that Acting Director Vought interprets the Dodd-Frank Act as prohibiting the CFPB from drawing funding from the Federal Reserve unless the Federal Reserve is profitable. OLC, in turn, provided a memo supporting the CFPB's authority, having taken that position, to decline to request funding from the Federal Reserve. The CFPB's argues that, because the Federal Reserve's costs have exceeded its revenue in every year since 2022, it has been improper for the CFPB to request funding from the Federal Reserve

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[325] See, e.g., Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 501 F. Supp. 3d 792, 819 (N.D. Cal. 2020) (concluding that 30-day comment period was insufficient); Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021) (same).
[326] Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821–22 (Jan. 18, 2011); see also Exec. Order 12866, 58 Fed. Reg. 51735 § 6(a)(1) (Oct. 4, 1993).
[327] See Notice by CFPB, *NTEU v. Vought*, 1:25-cv-00381-ABJ (D.D.C. Nov. 10, 2025), ECF 145.

during that time. Without a further funding draw, it will run out of funds soon, the CFPB states, and continuation of the Bureau's operations during such a lapse violates the Antideficiency Act.[328]

The OLC memo describes litigation in which entities subject to CFPB enforcement actions have moved to dismiss those actions on the ground that the CFPB was unlawfully funded. It notes that, while the CFPB disagreed with their position in defending those actions, it and the OLC now agree with the challengers.

This position has immense implications for this rulemaking. The Bureau should explain why it believes it can lawfully propose or finalize changes to Regulation B given its apparent position that current Bureau funding and operations are unlawful. It cannot have it both ways.

D. Appointments Clause

The Bureau has failed to explain why it believes it can lawfully propose or finalize changes to Regulation B given that Acting Director Vought was not confirmed and currently is not lawfully appointed.

The Constitution mandates that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States."[329] The Director of the CFPB is a principal officer of the United States requiring Senate confirmation. Acting Director Vought, however, was neither nominated to serve as the Director nor confirmed by the Senate. His appointment is lawful, then, only if Congress gave authority to the President to install Acting Director Vought outside the ordinary advice-and-consent process (and only if that grant is itself constitutional).

President Trump purported to appoint Mr. Vought as an Acting Director under the authority of the Federal Vacancies Reform Act. That Act allows the President to temporarily fill a role for which Senate confirmation is required when the prior office holder "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[330] That assignment is temporary, lasting as long as 210 days.[331]

The Vacancies Reform Act, however, does not apply here. The last Senate-confirmed Director of the CFPB, Rohit Chopra, did not die or resign. And he was not "unable to perform the functions and duties of the office."[332] Instead, President Trump fired him. The Act gives the President no authority to appoint a temporary head in this circumstance—where the vacancy is of the President's own making rather than outside the President's control. *See United States v.*

[328] Id. ECF 145-1.
[329] U.S. Const. art. II, § 2, cl. 2.
[330] 5 U.S.C. § 3345(a).
[331] Id. § 3346.
[332] Id. § 3345(a).

Valencia, 2018 WL 6182755, at *4 (W.D. Tex. Nov. 27, 2018) ("Had [former Attorney General Jeff] Sessions chosen to refuse to resign the President could have exercised his authority to fire him, which would make the statute inapplicable.").

That the Vacancies Act does not apply here makes sense, as the authority the President claimed would allow an end-run around the Constitution's advice-and-consent requirement. A president could simply fire an agency head and then appoint a series of temporary replacements and thus evade the Senate. The facts here appear to reflect exactly that sort of evasion. Rather than make a timely nomination and work to get that person confirmed, the President appointed without any statutory authority a person who is simultaneously the confirmed leader of another federal agency and who has repeatedly expressed an intention to shut down the CFPB. Moreover, although President Trump nominated Stuart Levenbach as the next director of the CFPB in early November, there has been no movement on that nomination. It has been reported that this nomination is simply "a legal maneuver to keep his budget director Russell Vought as acting Director of the bureau while the Trump administration continues on its plan to shut down the consumer financial protection agency."[333] Levenbach has no experience in consumer financial markets, and according to an administration official, his "nomination is not meant to go through to confirmation."[334]

The CFPB should explain the basis for its authority and rationale for proposing the most significant overhaul of Regulation B since it was first promulgated at a time when it does not have a lawfully appointed director and is engaged in practices designed to circumvent the Senate's advice-and-consent responsibilities.

E. *Regulatory Flexibility Act*

The Bureau has violated the Regulatory Flexibility Act ("RFA") because the Bureau failed to conduct an "initial regulatory flexibility analysis" ("IRFA") or convene a small business advocacy review panel. The Bureau should withdraw its proposed rule and comply with these regulatory requirements.

The RFA requires the Bureau to consider the potential impact of its regulations on small entities, including small businesses, small government units, and small not-for-profit organizations. The RFA requires the Bureau to conduct an IRFA and a final regulatory flexibility analysis ("FRFA") of any rule subject to notice-and-comment rulemaking requirement, unless the Bureau certifies that the rule will not have a "significant economic impact on a substantial number of small entities."[335] When an IRFA s required, section 609(b) requires the Bureau to

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[333] Ken Sweet, *Trump Nominates New CFPB director, though White House says agency is still closing*, PBS News (Nov. 19, 2025), https://www.pbs.org/newshour/politics/trump-nominates-new-cfpb-director-though-white-house-says-agency-is-still-closing.
[334] *Id*.
[335] 5 U.S.C. §§ 603–05.

convene a small business advocacy review panel for the purpose of obtaining advice and recommendations about the potential impact of the proposed rule.[336]

The Bureau asserts an IRFA is not required here because the proposal, if adopted, "would not have a significant economic impact on a substantial number of small entities." The Bureau asserts that "any effects, including one-time costs, would be expected to be small for each entity" because "the size of SPCPs as a share of a lender's overall portfolio is expected to be small based on existing evidence," and the "prevalence of SPCPs is low."

The Bureau has not provided "the factual basis for such certification," as is required by the RFA.[337] Almost immediately after the proposed rule was issued, an entity provided a comment explaining why the Bureau's certification lacks an adequate factual basis and noting that its analysis omits key elements.[338] The undersigned incorporate the arguments made in that comment by reference. At a minimum, the obligations such as changes to underwriting and compliance controls will affect thousands of small entities. The commenter provided estimates of entity numbers and explained that, "[e]ven modest per-entity compliance costs, multiplied across this population, readily exceed nine figures in aggregate." The proposal omits specificity on the number and categories of small entities affected, itemized compliance tasks, or significant alternatives to minimize burden.

The Bureau has also ignored entire classes of small entities that will be affected by the proposed rule. The Bureau focuses only on assertions—without any factual basis—about the effects of the SPCP portion of the proposal. As discussed elsewhere, those assertions do not take into account that the number of SPCPs has grown significantly in recent years, due in part to guidance by the Bureau and other agencies clarifying legal responsibilities and facilitating development of such programs. The Bureau has made no effort to ascertain the number of entities that offer such programs, or the economic impact on those entities of its proposal to effectively eliminate such programs.

Moreover, the economic impact resulting from the SPCP changes should take into account not only the entities that offer such programs, who will no longer be able to do so, but also the small entities that will no longer be able to benefit from such programs. These entities include women- and minority-owned small businesses that will no longer have access to small business SPCPs. The RFA certification ignores these costs.

The Bureau's RFA certification also ignores the costs of the other significant portions of the proposal—namely, the proposed interpretation that disparate impact claims are not cognizable and the proposal to severely restrict Regulation B's application to discouraging pre-

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[336] *Id*. § 609(b).
[337] 5 U.S.C. § 605(b).
[338] Citizens Rulemaking Alliance, Comment Letter on Proposed Equal Credit Opportunity Act (Regulation B) (November 14, 2025), https://www.regulations.gov/comment/CFPB-2025-0039-0006.

application conduct. Small entities will be required to change their compliance systems, training programs, recordkeeping, and other systems to comply with the new rule and to navigate how to comply with the legal and regulatory inconsistencies the proposal would introduce given that Regulation B would no longer align with other significant laws like the Fair Housing Act and state law.

The Bureau's certification also ignores costs on other entities, such as minority- and women-owned small businesses, which are more likely to experience discrimination that will manifest in less access to credit, more expensive credit, and credit provided on worse terms. This letter has identified volumes of evidence of discrimination in these markets. The Bureau itself—as the primary regulator with responsibility for monitoring and preventing discrimination in small business lending—has been responsible for producing and compiling much of this evidence. Yet the Bureau makes no effort to engage with any of this evidence. Nor did the Bureau try to procure or review data that could form the basis of a section 605(b) certification. In addition to these groups most likely to experience additional costs of discrimination in the form of less available credit and worse pricing and terms, the Bureau has ignored costs to small entities that work towards ensuring access to credit, particularly for underserved populations, such as credit counseling and repair organizations. Finally, service providers that help ensure creditors' products and services are offered in a fair, responsible, and nondiscriminatory manner will be affected by the proposal. The Bureau makes no attempt to identify costs to any of these types of entities, let alone assess the likely economic impact of the rule on them.

Because an IRFA was required, the Bureau was also required to convene a small business advocacy review panel, which it failed to do. A small business advocacy review panel would have assisted the Bureau in identifying and understanding the costs on small entities that the Bureau has made no serious attempt to do in the proposal.

*F. Failure to Consult Under Section 1022(b)(2)***(B)**

The Bureau is required to "consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies." 12 U.S.C. § 5512(b)(2)(B). Although the Bureau said that it "offered to consult" with the appropriate agencies, the Bureau has not stated that it did in fact consult with these agencies, which it is required to do. The fact that this rulemaking was issued on an unprecedented timeline could suggest that such consultation may not have occurred. The Bureau should state whether it did in fact consult "prior to proposing [the] rule" as well as "during the comment process," and it should explain any comments, data, or analysis received during that consultation.

G. The Bureau Should Explain Its Use of AI in the Rulemaking

The Bureau should disclose whether and how it uses AI in this rulemaking process and, to the extent such use is significant, provide an additional opportunity for public comment.

There have been public reports that the CFPB is using AI tools to analyze and "write" regulations.[339] That reporting states that a government PowerPoint describing an AI tool represents that "[t]he tool will save 93 percent of the human labor involved by reviewing up to 500,000 comments submitted by the public in response to proposed rule changes. By the end of the deregulation exercise, humans will have spent just a few hours to cancel each of the 100,000 regulations."[340]

The APA requires agencies to disclose the "critical factual material" underlying proposed rules.[341] That requirement includes revealing the "technical basis for a proposed rule in time to allow for meaningful commentary so that a genuine interchange occurs."[342] This disclosure extends to the use of models: "[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model."[343] Such disclosures are the "safety valves in the use of . . . sophisticated methodology."[344] Disclosure of AI usage allows the public to confirm the Bureau is applying technical expertise to improve its use of technology, and to assess whether these critical Regulation B proposals may be influenced by biased or otherwise faulty methods or products. The use of AI technologies to compile and analyze critical factual information, to review and respond to public comments, and to influence connections between that information and choices made has dramatic implications for understanding whether a final rule is based on the agency's own reasoned decision making.

This issue is particularly concerning with respect to this rulemaking, since the CFPB purports to draw on its expertise as a regulator in conclusory fashion without demonstrating that expertise concretely. In order to understand how much credence to give this supposed expertise, it is critical to know to what extent AI rather than agency experts fashioned the notice of proposed rulemaking. To that end, the Bureau should explain:

- Whether AI was used in the rulemaking and, if so, how;
- What AI product(s) the agency used and how it was selected;
- Whether the product was fine-tuned for a particular purpose or use;

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[339] Hannah Natanson, Jeff Stein, Dan Diamond, *DOGE builds AI tool to cut 50 percent of federal regulations*, Washington Post (July 26, 2025), https://www.washingtonpost.com/business/2025/07/26/doge-ai-tool-cut-regulations-trump/?pwapi_token=eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9.eyJyZWFzb24iOiJnaWZ0IiwibmJmIjoxNzY0ODI0NDAwLCJpc3MiOiJzdWJzY3JpcHRpb25zIiwiZXhwIjoxNzY2MjA2Nzk5LCJpYXQiOjE3NjQ4MjQ0MDAsImp0aSI6IjhmZmRkMjI1LTMxMmMtNDJkZS1iZWI4LTgyNDc5NDVjN2EzZSIsInVybCI6Imh0dHBzOi8vd3d3Lndhc2hpbmd0b25wb3N0LmNvbS9idXNpbmVzcy8yMDI1LzA3LzI2L2RvZ2UtYWktdG9vbC1jdXQtcmVndWxhdGlvbnMtdHJ1bXAvIn0.d-MMnnAxL21S7mAQq-BoPSNsYWq7u_OGKA9xnIlZBjY.
[340] *Id*.
[341] *Am. Radio Relay League, Inc. v. FCC,* 524 F.3d 227, 236 (D.C. Cir. 2008) (quotation omitted).
[342] *Id*. at 236–37 (quotations omitted).
[343] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (quotations omitted).
[344] *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

- What categories or sets of data the product(s) was trained on;
- What prompts or inputs the agency used to elicit responses or outputs;
- What outputs the AI product produced;
- How agency staff used those outputs;
- What quality control and validation agency staff performed on the outputs;
- What measures the agency took to ensure that its usage of AI complied with applicable data security and privacy requirements; and
- Whether and to what extent persons and entities not employed by the agency developed, modified, provided access to, or used AI as part of the rulemaking.

Thank you for considering our views.

Sincerely,

National Organizations

National Fair Housing Alliance

American Association of University Women

American Atheists

Americans for Financial Reform Education Fund

The Asian Real Estate Association of American (AREAA)

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Electronic Privacy Information Center (EPIC)

Global Black Economic Forum

The Greenlining Institute

JustLeadershipUSA

The Leadership Conference on Civil and Human Rights

League of United Latin American Citizens (LULAC)

Mobility Works

NAACP

National Association of Consumer Advocates

National Association of Hispanic Real Estate Professionals (NAHREP)

National Association of Real Estate Brokers, Inc.

National Association of Social Workers

National Community Reinvestment Coalition

National Consumer Law Center, on behalf of its low-income clients

National Low Income Housing Coalition

National Urban League

The National Coalition for Asian Pacific American Community Development (National CAPACD)

Poverty & Race Research Action Council

Popular Democracy in Act

Southern Poverty Law Center

UnidosUS

<u>Local Organizations</u>

Access Living of Metropolitan Chicago

CNY Fair Housing

Connecticut Fair Housing Center

CSA San Diego County

Equal Rights Center

Equality California

Fair Housing Advocates Association

Fair Housing Advocates of Northern California

The Fair Housing Center

Fair Housing Center for Rights & Research

Fair Housing Center of Central Indiana

Fair Housing Center of the Greater Palm Beaches

Fair Housing Center of Washington

Fair Housing Center of West Michigan

Fair Housing Council of Central California

Fair Housing Council of Orange County

Fair Housing Council of South Texas

Fair Housing Justice Center Inc.

Fair Housing Rights Center in Southern PA

Hampton Roads Community Action Program

High Plains Fair Housing Center

HOPE Fair Housing Center

Housing Action Illinois

Housing Education and Economic Development (HEED)

Housing Opportunities Made Equal of Greater Cincinnati

Housing Opportunities Made Equal, Inc.

Housing Opportunities Made Equal of Virginia

Housing Opportunities Project for Excellence, Inc. (HOPE, Inc.)

Intermountain Fair Housing Council, Inc.

Jacksonville Area Legal Aid, Inc.

LaFHAC

Long Island Housing Services, Inc.

Metro Fair Housing Services, Inc.

Metropolitan Milwaukee Fair Housing Council

Miami Valley Fair Housing Center

Montana Fair Housing

Neighborhood Housing Services of Chicago

NHS Brooklyn CDC Inc.

North Carolina Justice Center

Northwest Fair Housing Alliance

Open Communities

Project Sentinel, Inc.

Rise Economy

Savannah-Chatham County Fair Housing Council

Silver State Equality

Silver State Fair Housing Council

South Suburban Housing Center

Southwest Fair Housing Council

Westchester Residential Opportunities, Inc.