



RELMAN COLFAX PLLC



NATIONAL FAIR  
HOUSING ALLIANCE

## **Special Purpose Credit Programs**

*How a Powerful Tool for Addressing Lending Disparities Fits Within the  
Antidiscrimination Law Ecosystem*

November 2020

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November 2020

## **ABOUT THE NATIONAL FAIR HOUSING ALLIANCE**

Founded in 1988 and headquartered in Washington, D.C., the National Fair Housing Alliance (NFHA) is the only national organization dedicated solely to ending discrimination in housing. NFHA is the voice of fair housing and works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, community development initiatives, advocacy, and enforcement. NFHA is a consortium of more than 220 private, nonprofit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. NFHA recognizes the importance of home as a component of the American Dream and aids in the creation of diverse, barrier-free communities throughout the nation.

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Page | 2

### **Authors**

Stephen Hayes is a Partner at Relman Colfax PLLC. Relman Colfax is a national civil rights law firm dedicated to protecting civil rights and enforcing our nation's civil rights laws. Stephen originally joined the firm in 2011 and returned in 2018 after several years at the Consumer Financial Protection Bureau (CFPB). His work focuses on designing best-in-class practices on a range of civil rights and consumer protection issues. Stephen has also represented individuals and organizations in numerous fair lending suits.



November 2020

## Executive Summary

There is an increasing consensus that creditors must do more to address lending disparities for people of color. Director Kraninger of the Consumer Financial Protection Bureau (CFPB) has promised steps to “help create real and sustainable changes in our financial system so that African Americans and other minorities have equal opportunities to build wealth and close the economic divide.”<sup>1</sup> Other agencies have announced similar priorities.<sup>2</sup>

Page | 3

The Equal Credit Opportunity Act (ECOA) offers creditors a powerful tool for addressing these disparities: Special Purpose Credit Programs (SPCPs). SPCPs provide a targeted means for creditors to meet special social needs and benefit economically disadvantaged groups, including groups that share a common characteristic such as race, national origin, or sex. Properly designed SPCPs can play an essential role in promoting inclusion, building equity, and removing barriers that have contributed to financial inequities and residential segregation. SPCPs can also fill gaps left by other affordable credit programs that leave racial and national origin disparities unaddressed, particularly in areas that are experiencing gentrification. Accordingly, shortly after Director Kraninger announced the importance of financial inclusion, the CFPB promoted the use of SPCPs, reminding creditors of the availability of these opportunities.<sup>3</sup>

The text of ECOA and Regulation B explicitly recognize that SPCPs are permissible. Lending programs designed to benefit applicants on the basis of a protected class such as race or national origin—in compliance with ECOA and Regulation B—also would not violate other federal antidiscrimination statutes, such as the Fair Housing Act (FHA) and sections 1981 and 1982 of the Civil Rights Act of 1866, despite the absence of corresponding SPCP language in those statutes.

This conclusion is supported by the fundamental canon of statutory construction that general prohibitions must be construed to co-exist with specific provisions; courts must give effect to both absent clear congressional intent otherwise. In addition, this conclusion best harmonizes ECOA with other antidiscrimination statutes, including the FHA’s purpose of furthering integration as well as case law confirming that

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<sup>1</sup> Kathleen Kraninger, CFPB, “The Bureau is taking action to build a more inclusive financial system” (July 28, 2020), <https://www.consumerfinance.gov/about-us/blog/bureau-taking-action-build-more-inclusive-financial-system/>.

<sup>2</sup> See, e.g., OCC, “OCC Announces Project REACH to Promote Greater Access to Capital and Credit for Underserved Populations” (July 10, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-89.html>.

<sup>3</sup> Susan M. Bernard and Patrice Alexander Ficklin, CFPB, “Expanding access to credit to underserved communities” (July 31, 2020), <https://www.consumerfinance.gov/about-us/blog/expanding-access-credit-underserved-communities/>.



November 2020

appropriately-cabined protected-class conscious programs are permissible across antidiscrimination laws. Official agency materials support this interpretation, including a direction in Regulation B that creditors can review Home Mortgage Disclosure Act data in designing SPCPs for low-income borrowers of color, indicating that the Federal Reserve Board (Board)—and now the CFPB—would not view such a program as a violation of the FHA. Moreover, legislative history accompanying ECOA’s SPCP provisions reveal that Congress understood these programs to be lawful, and it meant to encourage them by delegating rulemaking authority to the Board (now CFPB) to determine appropriate guardrails for the credit context.

Page | 4

No case law or agency materials support a contrary conclusion. A 1994 Office of the Comptroller of the Currency (OCC) staff interpretive letter confirming the permissibility of a minority-business SPCP, notes the FHA does not have a SPCP provision similar to ECOA’s.<sup>4</sup> But the letter does not express a view or provide any analysis on this issue. In contrast, public regulatory materials contemplate SPCPs designed to benefit mortgagors who are people of color, and the CFPB has recently expressed enthusiasm for SPCPs—including in the mortgage context—without reference to risks under other federal antidiscrimination laws.

Finally, the practical risk of a regulator finding an FHA violation for an ECOA-compliant SPCP should be low. Agency action prioritizing FHA enforcement of ECOA-compliant SPCPs would not only be premised on an incorrect legal theory, it would also run contrary to agencies’ own FHA obligations to affirmatively further fair housing. Mortgage SPCPs play an essential role in reducing discrimination and furthering residential integration, two primary goals of the FHA. Agency obligations to affirmatively further fair housing require promoting such programs, not discouraging them. A prudent regulator is likely to conclude, for fair notice and good governance reasons, that agency enforcement or supervisory measures are unwarranted—especially given recent agency enthusiasm for these programs and the significant existing regulatory materials on the issue, none of which caution lenders against this risk.

SPCPs can play an important role in bridging the financial gap for people of color. Creditors should not be dissuaded from deploying this tool to build a more inclusive financial system.

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<sup>4</sup> OCC Interpretive Letter, 1994 WL 763814, at \*1, n.1 (June 13, 1994).



November 2020

## **A. Background**

ECOA and its implementing regulation, Regulation B, prohibit discrimination on a prohibited basis in credit transactions.<sup>5</sup> They confirm, however, that it is not discriminatory for a creditor to provide SPCPs to extend credit to meet special social needs and benefit economically disadvantaged groups so long as certain conditions are met and procedures are followed.<sup>6</sup> These programs may require that participants “share one or more common characteristics (for example, race, national origin, or sex).”<sup>7</sup> Other federal antidiscrimination statutes overlap with ECOA’s prohibitions, including the prohibition against race and national origin discrimination. The FHA prohibits, among other things, race, national origin, and sex discrimination in residential real estate transactions, and sections 1981 and 1982 of the Civil Rights Act of 1866 prohibit race and national origin discrimination in contracting and property transactions, respectively. Although these latter three statutes do not include explicit textual permissions for SPCPs, a creditor would not violate them by implementing a SPCP designed in compliance with ECOA.

Page | 5

### **1. ECOA and Regulation B**

ECOA and Regulation B have authorized protected-class conscious SPCPs for decades. ECOA was amended in 1976 to authorize SPCPs at the same time that the statute was amended to expand the categories of protected classes beyond marital status and sex, to include race, color, religion, national origin, age, source of income, and exercise of rights under the Consumer Credit Protection Act.<sup>8</sup> Subsection 1691(c)—which authorizes SPCPs—is largely unchanged from its original version and now reads:

#### **(c) Additional activities not constituting discrimination**

It is not a violation of this section [15 U.S.C. § 1691] for a creditor to refuse to extend credit offered pursuant to—

...

(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.<sup>9</sup>

<sup>5</sup> 15 U.S.C. § 1691(a); 12 C.F.R. § 1002.4(a).

<sup>6</sup> 12 C.F.R. § 1002.8.

<sup>7</sup> 12 C.F.R. § 1002.8(b)(2).

<sup>8</sup> See Pub. L. 94-239, 90 Stat. 251 (March 23, 1976).

<sup>9</sup> 15 U.S.C. § 1691(c).



November 2020

Shortly thereafter, in 1977, the Board amended Regulation B to implement the statutory authorization for SPCPs.<sup>10</sup> Regulation B now provides that ECOA and Regulation B “permit a creditor to extend special purpose credit to applicants who meet eligibility requirements.” Not-for-profits can offer SPCPs to benefit their members or “an economically disadvantaged class of persons.” For-profit organizations can offer or participate in SPCPs “to meet special social needs,” if, among other things, the programs are “established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, 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.”<sup>11</sup>

Page | 6

Regulation B contains other specific guardrails for SPCPs. For example, the official staff commentary to Regulation B states that a written plan establishing a for-profit SPCP must “contain information that supports the need for the particular program,” and it must “either state a specific period of time for which the program will last, or contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it.”<sup>12</sup>

Regulation B further specifies that a SPCP cannot be established or administered so as to “discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.”<sup>13</sup>

## 2. The Fair Housing Act

Among other things, the FHA prohibits any person or other entity that engages in “residential real estate-related transactions,” from discriminating “against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>14</sup> Residential real estate-related transactions include making or purchasing loans or

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<sup>10</sup> See Final Rule, 42 FR 1242 (Jan. 6, 1977).

<sup>11</sup> 12 C.F.R. § 1002.8(a).

<sup>12</sup> 12 C.F.R. part 1002, Supp. I, .8(a)-6.

<sup>13</sup> 12 C.F.R. § 1002.8(b)(2). For example, “participants in a program may be required to meet the initial characteristic of minority race; however, once a participant qualifies for the program, the creditor may not discriminate within the program by favoring one gender of minority applicant over the other.” OCC Interpretive Letter, 1994 WL 763814, at \*2 (June 13, 1994) (citing *United States v. American Future Systems, Inc.*, 743 F.2d 169, 177 (3d Cir. 1984)).

<sup>14</sup> 42 U.S.C. § 3605(a).



November 2020

“providing other financial assistance,” that are secured by residential real estate or that are for purchasing or improving a dwelling.<sup>15</sup> Because some real estate-related transactions are also credit transactions (for example, home mortgages), certain transactions are covered by both the FHA and ECOA.

The substance of the FHA’s prohibition on discrimination was included when the FHA was first enacted in 1968,<sup>16</sup> although the language as it exists now was added by amendments in 1988.<sup>17</sup>

Page | 7

### 3. Sections 1981 and 1982 of the Civil Rights Act

Section 1981 of the Civil Rights Act of 1866 guarantees to all persons within the jurisdiction of the United States the same right as white citizens to make and enforce contracts.<sup>18</sup> Section 1981 prohibits intentional discrimination on the basis of race, alienage, ethnicity, ancestry, certain religions, and color.<sup>19</sup> Section 1982 has a similar scope, and prohibits intentional discrimination regarding real and personal property transactions.<sup>20</sup> Both statutes apply to credit and other financial arrangements.<sup>21</sup>

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<sup>15</sup> 42 U.S.C. § 3605(b).

<sup>16</sup> Pub. L. 90-284, 82 Stat. 73 (Apr. 11, 1968). The 1968 version made it unlawful for, “any bank . . . to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him.” The provision was also amended in August 1974 to add “sex” as a prohibited basis. Pub. L. 93-383, 88 Stat. 633 (Aug. 22, 1974).

<sup>17</sup> Pub. L. 100-430, 102 Stat. 1619 (Sept. 13, 1988).

<sup>18</sup> 42 U.S.C. § 1981 (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

<sup>19</sup> *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (noting that § 1981 was enacted to protect persons of “every race and color”); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that § 1981 was “intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics”).

<sup>20</sup> 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

<sup>21</sup> See, e.g., *Daniels v. Winn Dixie Montgomery, Inc.*, No. CV 08-AR-0063-S, 2008 WL 11377627, at \*2 (N.D. Ala. May 8, 2008); *Dobson v. Cent. Carolina Bank & Tr. Co.*, 240 F. Supp. 2d 516, 524 (M.D.N.C. 2003); *Evans v. First Fed. Sav. Bank of Ind.*, 669 F. Supp. 915, 918 (N.D. Ind. 1987); see also *Nwachukwu v. Liberty Bank*, 257 F. Supp. 3d 280, 307 (D. Conn. 2017).



November 2020

## **B. Analysis**

A SPCP designed and implemented in compliance with ECOA and Regulation B would not violate the FHA or sections 1981 and 1982, even though those statutes do not include explicit textual permissions for SPCPs. This conclusion is supported by established canons of statutory construction; it best reconciles these complementary statutes; it is consistent with case law confirming that appropriately-cabined protected-class programs are permissible across antidiscrimination laws, even absent explicit statutory permissions; and it is consistent with regulatory materials. For these reasons, a SPCP permitted under ECOA would not violate the FHA or sections 1981 or 1982 if it relates to mortgage lending and includes consideration a protected class, like race or national origin. Outside of the mortgage context, an ECOA-compliant SPCP that included race or national origin would not run afoul of sections 1981 or 1982. A contrary position would make it illegal to design any SPCP (mortgage or non-mortgage) that requires applicants to share a race or national origin, nullifying Regulation B's explicit approval of such programs.

Page | 8

### 1. Statutory interpretation principles

- a. *General antidiscrimination provisions must be interpreted harmoniously with ECOA's specific SPCP provisions.*

ECOA's SPCP provisions are more specific than the general antidiscrimination prohibitions in the FHA and in sections 1981 and 1982. Because it is "a commonplace of statutory construction that the specific governs the general,"<sup>22</sup> the specific SPCP provisions are best understood as clarifying conditions under which such programs are permissible under all overlapping general antidiscrimination laws.

For example, in *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court held that employment preferences for Native Americans in the Bureau of Indian Affairs (BIA)—specifically authorized by a 1934 statute—were not unlawful under Title VII, which prohibits employment discrimination because of race or national origin. The Court explained that the statute providing employment preferences for Native Americans was a "specific provision applying to a very specific situation," whereas Title VII is of general application. The Court then applied the following rule: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."<sup>23</sup> The Court also reasoned that the

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<sup>22</sup> *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal citation omitted); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) ("It is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974))).

<sup>23</sup> *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (citations omitted).





November 2020

two statutes were not irreconcilable, explaining that a “provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race.”<sup>24</sup>

Page | 9

The same analysis applies here. ECOA’s SPCP provisions address a narrow set of circumstances—namely, the extension of credit to benefit an economically disadvantaged class of persons or to meet special social needs, under specific standards prescribed in regulations by the Board (now CFPB).<sup>25</sup> Compare that narrow reach with the broad scope of the FHA, the most relevant provision of which prohibits all race and national origin discrimination in credit, selling, brokering, or appraising related to residential real property. The antidiscrimination prohibitions in sections 1981 and 1982 are similarly broad, covering all contracting and real and personal property transactions. Accordingly, ECOA’s narrow SPCP provisions should not be nullified in the mortgage context by the FHA or sections 1981 and 1982, or in all other credit contexts by sections 1981 and 1982. Because *Morton* clarifies that this canon applies “regardless of the priority of enactment,” this interpretation follows regardless whether one considers the original 1968 FHA provision or the re-enacted 1988 version.

Just as in *Morton*, this interpretation harmonizes ECOA with the FHA and sections 1981 and 1982. The SPCP provisions were intended to increase access to the credit market and avoid discouraging “ongoing special programs which prefer applicants in certain categories.”<sup>26</sup> A contrary interpretation would mean that, because of sections 1981 and 1982, no SPCP could consider race or ethnicity, a position belied by Regulation B and legislative history. The better interpretation is that Congress, through the SPCP provisions and an explicit rulemaking delegation to the Board (now CFPB), determined the circumstances under which programs that prefer certain classes of applicants do not constitute discrimination. The ECOA SPCP provisions represent a congressional directive approving such actions as nondiscriminatory in the credit space.

This interpretation aligns with authorities balancing the twin FHA goals of nondiscrimination and furthering integration.<sup>27</sup> The latter goal, in particular, can be

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<sup>24</sup> *Id.* at 550.

<sup>25</sup> 15 U.S.C. § 1691(c)(3).

<sup>26</sup> *United States v. Am. Future Sys. Inc.*, 743 F.2d 169, 175 (3d Cir. 1984) (quoting S. Rep. No. 589, U.S.C.C.A.N. 403, 407).

<sup>27</sup> *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988) (describing twin FHA goals of nondiscrimination and integration); *South-Suburban Hous. Center v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 882 (7th Cir. 1991) (similar); *United States v. Charlottesville Redevelopment & Hous. Auth.*, 718 F. Supp. 461, 466 (W.D. Va. 1989) (“[I]ntegration—in housing as well as in other aspects of life—is a prominent and significant policy goal of the [FHA].”); see also Schwemm, *Hous. Discrimination Law & Litigation*, § 2:3 (describing FHA goal of fostering racial integration).



November 2020

pursued under the FHA through properly-cabined race- and national origin-conscious housing programs. The appropriate guardrails are described in *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988). The court there disapproved of a private development's racial quota tenant-selection system, which limited Black and Hispanic applicants to avoid "white flight" that could result from too many minority residents. In doing so, the court described *permissible* race-conscious integrative programs as ones that are: (1) limited in duration; (2) designed to remedy some prior racial discrimination or imbalance; and (3) aimed at increasing minority participation, rather than limiting minority opportunities.<sup>28</sup>

Pursuant to its statutory delegation, the Board promulgated Regulation B such that ECOA-compliant SPCPs reflect principles similar to those FHA criteria—criteria that are generally applicable across antidiscrimination law.<sup>29</sup> A SPCP offered by a for-profit organization must "state a specific period of time for which the program will last, or contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it."<sup>30</sup> It must also be designed to extend credit to a class of persons who probably would not receive such credit or would receive it on less favorable terms, mirroring measures to remedy an imbalance and increase minority participation.<sup>31</sup>

In other words, the Board—via an explicit delegation reflecting a congressional directive that these programs are permissible and should be encouraged in the credit context—implemented the ECOA SPCP provisions such that a compliant SPCP would also be compliant with principles governing permissible race- and national origin-conscious programs across antidiscrimination laws. That Congress delegated to the Board, as an expert agency, the authority to promulgate standards specific to the credit context is consistent with judicial recognition that criteria governing race- and national-origin-conscious actions are not rigid and must be "modified to fit the context of [the] case."<sup>32</sup>

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<sup>28</sup> *Starrett City*, 840 F.2d at 1101-02.

<sup>29</sup> See, e.g., *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 645 (1987) (approving race-conscious program under Title VII and explaining, "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." (internal quotations and citations omitted)); see also *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 841 (9th Cir. 2006) (holding school preference policy for students of Native Hawaiian ancestry did not violate § 1981).

<sup>30</sup> 12 C.F.R. part 1002, Supp. I, .8(a)-6.

<sup>31</sup> 12 C.F.R. § 1002.8(a)(3)(ii).

<sup>32</sup> *Kamehameha Schs*, 470 F.3d at 841. For example, where a program is designed to address *external* disparities, as opposed to *internal* diversity concerns—such as furthering proportional workplace representation—the relevant population for assessing need is the "community as a whole." *Id.* at 842.



November 2020

b. *ECOA's SPCP provisions repealed by implication application of other antidiscrimination prohibitions.*

As explained, the ECOA SPCP provisions comfortably coexist with the general antidiscrimination provisions in the FHA and sections 1981 and 1982. However, to the extent a court is concerned that there may be an inconsistency, ECOA's SPCP provisions repealed by implication application of those general prohibitions in these circumstances. Under the "repeal by implication" canon, a later-enacted statute can "operate to amend or even repeal an earlier statutory provision."<sup>33</sup> Implied repeals are appropriate if necessary to give effect to the latter statute.<sup>34</sup>

Page | 11

ECOA's SPCP provisions were enacted in 1976, well after Congress enacted the FHA and sections 1981 and 1982. As noted, interpreting the FHA or sections 1981 or 1982 as inconsistent with ECOA's SPCP provision would nullify that SPCP provision with respect to protected classes such as race and national origin, a result the legislative history demonstrates Congress specifically meant to avoid (as described below). Accordingly, an implied repeal would be necessary to give the SPCPs their intended effect.

The Board has taken a similar interpretive position in the preemption context, explaining that broad antidiscrimination state law provisions are inconsistent with ECOA's SPCP provisions. Namely, ECOA includes a provision explaining that it preempts inconsistent state laws.<sup>35</sup> The Board has declared that state laws that bar—without exception—discrimination on the basis of race or national origin, are inconsistent with ECOA and therefore preempted to the extent such laws would prohibit SPCPs.<sup>36</sup> For example, New York's general prohibition against credit discrimination was "inconsistent" with ECOA's SPCP provisions, and therefore "the state of New York is barred from prohibiting special-purpose credit programs and related inquiries that are permissible under federal law."<sup>37</sup> In that state-federal context, the SPCP provision is given effect via preemption, whereas in the federal-federal context it is given effect through the repeal-by-implication canon. But the reasoning is aligned: if the SPCP provisions are viewed as inconsistent with other antidiscrimination provisions, the

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Programs promoting credit and housing, for example, would be designed to address external disparities and so showing need at a community level would be appropriate, consistent with the directive in Regulation B that SPCPs can be established based on "data from outside sources, including governmental reports and studies." 12 C.F.R. part 1002, Supp. I, .8(a)-5.

<sup>33</sup> *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662–63 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

<sup>34</sup> *Id.* (internal citations and quotations omitted).

<sup>35</sup> 15 U.S.C. § 1691d(f).

<sup>36</sup> 12 C.F.R. part 1002, Supp. I, 1002.11(a)-1; Federal Reserve Board, *Preemption Determination Under Regulation B*, 1989 WL 263475 (Jan. 1989).

<sup>37</sup> Federal Reserve Board, *Preemption Determination Under Regulation B*, 1989 WL 263475 (Jan. 1989).



November 2020

general statutes must yield to give effect to ECOA. Under that approach, ECOA's subsequent and more specific SPCP provisions implicitly repealed application of these provisions of the FHA and sections 1981 and 1982 in these circumstances.

While both of the canons of statutory construction discussed here (*i.e.*, the specific-controls-the-general and repeal-by-implication) are applicable, they are separate. Either is sufficient to reconcile ECOA's SPCP provisions with the FHA and sections 1981 and 1982.

Page | 12

## 2. Regulatory materials

Materials from the agencies charged with interpreting and enforcing ECOA and the FHA support the conclusion that ECOA SPCPs would not violate the FHA or other federal antidiscrimination laws.

First, the Official Interpretations to Regulation B provide that in designing a SPCP, a creditor can "review Home Mortgage Disclosure Act data along with demographic data for its assessment area and conclude that there is a need for a special purpose credit program for low-income minority borrowers."<sup>38</sup> This direction to rely on home mortgage data in designing a SPCP for *minority* borrowers acknowledges that it is permissible in the mortgage context for SPCPs to include race or national origin as eligibility criteria. The Board (now CFPB) likely understands these programs also to not violate the FHA or other antidiscrimination laws; otherwise, it would not have promulgated this Comment, particularly because the Board is responsible for evaluating compliance by its supervised entities with the FHA. The Regulation B comment was codified in the Code of Federal Regulations after notice-and-comment rulemaking, indicating it has the force and effect of law and is worthy of *Chevron* deference.<sup>39</sup> The necessary presupposition that such a program would not violate the FHA or other federal antidiscrimination laws is also worthy of deference, because that is the only plausible explanation of the comment.<sup>40</sup> A contrary interpretation would assume an unreasonable bait-and-switch and raise serious fair notice concerns.

Second, Department of Justice (DOJ) settlement agreements support this interpretation. For example, in settling FHA and ECOA mortgage claims with KleinBank

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<sup>38</sup> 12 C.F.R. part 1002, Supp. I, .8(a)-5.

<sup>39</sup> See generally *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); Proposed Rule, 59 FR 67235 (Dec. 29, 1994); Final Rule, 60 FR 29965 (June 7, 1995).

<sup>40</sup> *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) (deferring to agency interpretation because, while not express, that interpretation was the only reasonable reading and plausible explanation of the agency's decision).



November 2020

in 2018, DOJ included in the agreement relief directed at residents of majority-minority census tracts.<sup>41</sup> DOJ styled these programs as SPCPs, explaining that “[s]pecial purpose credit programs, as set forth in 12 C.F.R. § 1002.8, permit a creditor to extend special purpose credit under the terms of a written plan such as this Agreement.”<sup>42</sup> Accordingly, DOJ understands that conduct in compliance with the SPCP provisions does not violate either ECOA or the FHA. Otherwise, KleinBank would violate the FHA by implementing the remedial plan, which could not have been DOJ’s intent. If DOJ assumed another theory for why implementation of the programs would not violate ECOA and the FHA, it would have been unnecessary to cite the Regulation B SPCP provisions.

Third, in Supervisory Highlights, the CFPB favorably highlighted SPCPs, including a “small business lending program providing credit to minority-owned businesses,” and a “mortgage lending program with special rates and terms for individuals with income below certain thresholds or buying property in areas where the median income was below certain thresholds.”<sup>43</sup> Presumably, if the CFPB believed these programs raised risks under the FHA or other federal antidiscrimination law, it would have cautioned lenders just as it cautioned them about other risks raised by SPCPs.

Fourth, the Interagency Fair Lending Examination Procedures—issued by the OCC, FDIC, Federal Reserve Board, NCUA, and adopted by the CFPB—situate SPCPs favorably among other credit programs designed to meet the needs of underserved markets, particularly with respect to mortgage programs. The procedures provide interpretation and instruction for the agencies’ examiners on how to determine lenders’ compliance with fair lending laws, including the FHA and ECOA. They instruct examiners to consider home mortgage SPCPs, along with other housing loan programs designed to assist underserved populations.<sup>44</sup> And they caution examiners to identify home loan programs “that contain[] only borrowers from a prohibited basis group, or [that have] significant differences in the percentages of prohibited basis groups, *especially in the absence of a Special Purpose Credit Program under ECOA.*”<sup>45</sup> Again, there is no suggestion that an ECOA-compliant SPCP would violate other antidiscrimination laws.

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<sup>41</sup> Settlement Agreement Between the United States of Am. and Kleinbank, ¶¶ 15-16 (May 8, 2018), available at <https://www.justice.gov/opa/press-release/file/1060996/download>.

<sup>42</sup> *Id.* ¶ 9, n.5; see also Consent Order, United States v. Union Savings Bank & Guardian Savings Bank, No. 1:16-cv-1172, ¶ 34 (Dec. 28, 2016), available at <https://www.justice.gov/opa/file/921241/download>.

<sup>43</sup> CFPB Supervisory Highlights, Issue 12, Summer 2016, at sec. 2.5.2 (June 2016), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory\\_Highlights\\_Issue\\_12.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf).

<sup>44</sup> FFIEC Interagency Fair Lending Examination Procedures at 7 (Aug. 2009), available at <https://www.ffiec.gov/PDF/fairlend.pdf>; see also CFPB, Fair Lending Report, 84 FR 32420, 32426 (July 8, 2019) (explaining that CFPB has adopted Interagency Fair Lending Examination Procedures).

<sup>45</sup> FFIEC Interagency Fair Lending Examination Procedures at 9 (emphasis added).



November 2020

The only regulatory guidance that explicitly identifies the interaction between SPCPs and the FHA provides no guidance; it simply identifies the issue, without taking a position or providing analysis. In noting that a minority business loan program would be permissible under ECOA and Regulation B, an OCC staff interpretive letter notes the FHA does not have a SPCP provision similar to ECOA's.<sup>46</sup> The letter does not express any view on the issue because the program under consideration was for minority business lending. It also does not address the implications under sections 1981 or 1982 for the SPCP at issue if one were to incorrectly interpret ECOA's SPCP provisions to be in conflict with other general antidiscrimination provisions. The result under that incorrect interpretation, as described, would be that the very program the letter explains is permissible under ECOA would likely be prohibited by those sections of the Civil Rights Act.

### 3. Legislative and statutory history

#### a. *ECOA*

ECOA's legislative history makes clear that Congress understood that credit programs that preferred members of economically disadvantaged classes—including economically disadvantaged racial or ethnic groups—were lawful and should be encouraged. The ECOA SPCP provisions were added to codify the legality of these programs, not to suggest that they would now be illegal under pre-existing statutory schemes like the FHA or sections 1981 or 1982.

The Senate Report explained that, “[c]ertain credit programs are specifically designed to prefer members of economically disadvantaged classes, and the Committee does not intend to undermine these programs.”<sup>47</sup> According to the Conference Report, the SPCP provisions, “specifically permit[] the continuance of affirmative action type programs,” noting that the “[c]onferees were aware that there are a number of such ongoing programs.”<sup>48</sup> In the words of the OCC Interpretive Letter discussed above, “[w]hen debating enactment of the ECOA, Congress was concerned that the Act may inhibit experimental and affirmative programs that help to meet special credit needs of persons who, without such programs, would not receive credit. To

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<sup>46</sup> OCC Interpretive Letter, 1994 WL 763814, at \*1, n.1 (June 13, 1994). The letter addresses the issue in three sentences: “The Special Purpose Credit Program provision applies only to the ECOA. The Fair Housing Act does not contain a similar provision. It is, therefore, unclear whether such programs would be allowable in the context of real-estate related transactions.” *Id.*

<sup>47</sup> S. Rep. No. 94-589, at 409 (Jan. 21, 1976), 1976 U.S.C.C.A.N. 403, 409; see also *United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 175 (3d Cir. 1984) (summarizing legislative history).

<sup>48</sup> H.R. Conf. Rep. 94-873, at 8 (Mar. 4, 1976), 1976 U.S.C.C.A.N. 426, 428.



November 2020

ensure such programs would not be foreclosed by ECOA, Congress enacted the provision allowing ‘Special Purpose Credit Programs.’<sup>49</sup>

As identified by the court in *United States v. American Future Systems, Inc.*, 743 F.2d 169 (3d Cir. 1984), the Chairperson of the House Subcommittee responsible for drafting section 1691(c)(3) provided examples of these existing programs:

Page | 15

[w]hen we wrote 701(c)(3) in the Subcommittee last year, we definitely had in mind programs offered by banks and other profitmaking organizations to extend credit to *young* people, or to *old* people, or to *minority* groups, but we did want firm standards to be set.<sup>50</sup>

In floor debates on the SPCP amendments, the House specifically approved of “laws which provide specific benefits for loans to minority enterprises.”<sup>51</sup> That same member explained that “we do not want to prohibit discrimination in the granting of credit to a particular ethnic group,” noting favorably an existing program where lending institutions were encouraged to loan money to “a black-oriented group.”<sup>52</sup> In short, the SPCP language confirms “that an affirmative discrimination of that kind is not unlawful and is not a violation of this act.”<sup>53</sup>

To be sure, Congress was also concerned with inadvertently discouraging practices that increase credit access to ECOA-specific protected classes, such as age,<sup>54</sup> which would not implicate the FHA or sections 1981 or 1982. But the examples above illustrate that Congress understood—and intended to confirm—that affirmative action programs directed at any of ECOA’s protected classes were lawful, a position codified in

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<sup>49</sup> OCC Interpretive Letter, 1994 WL 763814, at \*1 (June 13, 1994) (citing legislative history).

<sup>50</sup> *Am. Future Sys., Inc.* 743 F.2d at 175 (quoting 121 Cong. Rec. 27, 138 (1975) (emphasis in original)).

<sup>51</sup> 121 Cong. Rec. 16,237, 16,743 (June 3, 1975) (Rep. Wylie) (“The city of Columbus has been an outstanding and shining example of a community which has made credit money available to minority enterprises under arrangements which encourage the loaning [to] minority businessmen and we want to be sure that such lending practice would not be discouraged . . . the loan of money to minority enterprises by businessmen to a community is not unlawful per se and can, in effect, be made the basis of affirmative discrimination.”), available at: <https://www.govinfo.gov/app/details/GPO-CRECB-1975-pt13/>.

<sup>52</sup> *Id.*

<sup>53</sup> In another example, Senators Garn (Utah) and Biden (Delaware) agreed that if a “creditor is located in a part of the country where there is a substantial ethnic minority which uses a language other than English,” the creditor should be permitted to “advertise for loans or other credit using the national language of that minority” without concern. 122 Cong. Rec. 1235, 1913 (Feb. 2, 1976) (Sen. Garn), available at: [https://www.govinfo.gov/app/collection/crecb/\\_crecb/Volume%20122%20\(1976\)](https://www.govinfo.gov/app/collection/crecb/_crecb/Volume%20122%20(1976)).

<sup>54</sup> *Id.* (Sen. Garn) (providing example of free checking with overdraft to depositors over a certain age); 121 Cong. Rec. 16,743 (June 3, 1975) (Rep. Wylie) (providing example of lender with high percentage of loans to persons 65 or older).



November 2020

Regulation B. Reading other antidiscrimination laws to prohibit these programs would be inconsistent with that congressional intent.

b. *1988 Amendments to the FHA*

The 1988 amendments to the FHA were enacted a few months after *Starrett City* summarized the conditions under which the FHA permits race-conscious integrative housing policies, suggesting congressional approval for that judicial approach. (By then, that approach was also already reflected in Regulation B's SPCP provisions.) In debating the 1988 amendments, Congress considered whether the FHA should account for race-conscious, pro-integrative housing policies.<sup>55</sup> Ultimately, Congress added no new language addressing such programs, indicating approval of the existing judicial landscape.<sup>56</sup> In fact, Congress rejected a proposed amendment that would have forbid the use of any race-based preference regardless of the motives involved,<sup>57</sup> further indicating ratification of the existing legal landscape that properly drawn race-based preferences are permissible.

Page | 16

In its Final Rule implementing the FHA 1988 amendments, HUD expressed a similar reading of this statutory history. After noting that Congress debated this issue—and explaining that “[n]othing in the amendments to the [FHA] or their legislative history would support a conclusion that Congress sought to make choice-broadening activities . . . unlawful discriminatory housing practices”—HUD removed from its Rule illustrations of purportedly illegal conduct to avoid suggesting that pro-integration activities were unlawful under the FHA.<sup>58</sup>

In short, the 1988 amendments demonstrate congressional ratification of the principle that the FHA permits properly drawn race-conscious housing programs. The requirements for a properly drawn race-conscious housing program generally track the requirements for a SPCP under Regulation B, further indicating that an ECOA-compliant SPCP would not violate the FHA in its application to housing-related credit.

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<sup>55</sup> See 134 Cong. Rec. 16,309, 16,481 (June 29, 1988), *available at*:

[https://www.govinfo.gov/app/collection/crecb/\\_crecb/Volume%20134%20\(1988\)](https://www.govinfo.gov/app/collection/crecb/_crecb/Volume%20134%20(1988)).

<sup>56</sup> See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”); see also *Tex. Dep’t of Hous. & Comm. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 537-38 (2015) (reasoning that 1988 statutory amendments to the FHA signaled congressional ratification of existing judicial landscape).

<sup>57</sup> The proposed “Hyde amendment” would have provided that “[n]othing in this Act requires, permits, or authorizes any preference in the provision of any dwelling based on race, color, religion, gender or national origin.” 134 Cong. Rec. at 16,481 (June 29, 1988).

<sup>58</sup> Final Rule, 54 FR 3232, 3235 (Jan. 23, 1989).





November 2020

#### 4. The obligation to affirmatively further fair housing

Regulators should empower and facilitate the design of effective SPCPs, particularly in the mortgage context. Regulatory action discouraging such programs—including supervisory or enforcement action—based on the theory that ECOA-compliant SPCPs may violate the FHA would be both legally incorrect and run counter to agencies' own FHA obligations to affirmatively further fair housing (AFFH).

Page | 17

The FHA requires agencies, including those with “regulatory or supervisory authority over financial institutions,” to administer programs and activities related to housing in ways that affirmatively further fair housing.<sup>59</sup> This obligation requires agencies to use their authorities to “assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>60</sup> The AFFH provision requires agency action “to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”<sup>61</sup>

SPCPs related to housing can play an essential role in reducing discrimination and promoting residential integration. Other affordable credit programs, such as those targeted at low- and moderate-income populations, do not always further integration, reduce loan origination disparities, or help close persistent credit and homeownership gaps, particularly for people of color or in areas that are experiencing gentrification. As noted, lenders can use SPCPs as targeted tools to address those disparities, thereby fostering the FHA’s twin goals of eliminating discrimination and promoting integration. Agencies should promote and facilitate such programs in the mortgage context. Discouraging them by prioritizing or pursuing an incorrect theory that they would violate the FHA would run counter to agencies’ AFFH obligations and undermine the FHA’s goals of eliminating discrimination and furthering residential integration.

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<sup>59</sup> 42 U.S.C. § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the FHA] and shall cooperate with the [U.S. Department of Housing and Urban Development] to further such purposes.”); see also Executive Order 12892 (Jan. 17, 1994) (establishing Fair Housing Council to ensure programs and activities affirmatively further fair housing, consisting of, among others, the Chair of the Federal Reserve, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Chair of the Federal Deposit Insurance Corporation).

<sup>60</sup> *NAACP v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987); see also *Shannon v. HUD*, 436 F. 2d 809, 820 (3d Cir. 1970) (holding that HUD cannot “remain blind to the very real effect that racial concentration has had in the development of urban blight” and must assess impact of funding decision on housing choice).

<sup>61</sup> *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 25 (D.D.C. Aug. 17, 2018) (quoting *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)).



November 2020

### Conclusion

SPCPs are an important tool in the ongoing effort to bridge lending gaps for people of color. ECOA confirms the importance, and permissibility, of such programs. Through an explicit congressional delegation the Board (now the CFPB) codified in Regulation B the circumstances and guardrails necessary to design and implement these programs in the lending context. A SPCP that complies with those regulatory provisions would not violate other antidiscrimination laws that generally prohibit lending discrimination, including the FHA and sections 1981 and 1982. That conclusion follows from established canons of statutory construction, ensures these statutes are harmonized (not nullified), is consistent with case law approving protected-class conscious programs across antidiscrimination laws, and is supported by regulatory materials, legislative history, and agencies' own AFFH obligations.



RELMAN COLFAX PLLC  
1225 19<sup>th</sup> Street, N.W., Suite 600  
Washington, D.C. 20036  
202.728.1888  
[www.relmanlaw.com](http://www.relmanlaw.com)



NATIONAL FAIR HOUSING ALLIANCE  
1331 Pennsylvania Ave., NW, Suite 650  
Washington, D.C. 20004  
202.898.1661  
[www.nationalfairhousing.org](http://www.nationalfairhousing.org)