December 1, 2020

Director Kathleen Kraninger
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Submitted electronically at http://www.regulations.gov

Re: Docket No. CFPB-2020-0026
Request for Information on the Equal Credit Opportunity Act and Regulation B

Dear Director Kraninger,

Thank you for the opportunity to submit comments in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) on the Equal Credit Opportunity Act (ECOA) and Regulation B.

Founded in 1988, the National Fair Housing Alliance (NFHA) is a consortium of more than 200 private, non-profit fair housing organizations, and state and local civil rights agencies, from throughout the United States. Headquartered in Washington DC, NFHA's comprehensive education, advocacy, community development, member services, consulting services, research, and enforcement programs help provide and ensure fair access to housing and financial services. NFHA's track record demonstrates that fair housing and fair lending laws have made a tremendous difference in the lives of millions of people throughout the country.

Over the past 32 years, NFHA has brought and resolved precedent-setting lawsuits and otherwise worked to eliminate lending and insurance redlining and discriminatory practices in order to reduce substantially barriers to the fair provision of mortgage loan products and homeowners insurance. NFHA has also assisted hundreds of thousands of victims of discrimination, aided hundreds of first-time homebuyers in purchasing affordable homes, worked with financial services providers to expand credit opportunities for millions of consumers, educated more than 100 million people about their fair housing rights and responsibilities, assisted homeowners in avoiding foreclosure, developed financial literacy materials and trainings for thousands of people, and much more.

The CFPB's RFI on ECOA and Regulation B is extremely important and happens at a time when the COVID-19 pandemic has revealed huge fissures in our housing and financial systems rooted in structural racism and inequality. These were created by policies and practices put in place by federal entities, state and local governments, and industry players. Because of these policies, neighborhoods are more racially segregated today than 100 years ago; the dual credit market disproportionately and adversely impacts consumers of color; the Black/White homeownership

gap—at over 30 percentage points—is back to where it was in 1890;[1][2] and the racial wealth gap remains stubbornly persistent with Blacks and Latinos, respectively, having one tenth and one eighth of the wealth of Whites.

Because of historic and current discriminatory practices, Blacks and Latinos 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-concentrated in predominantly White communities.[3] In fact, today banks are closing their branches in high-income, affluent Black neighborhoods at higher rates than they are closing branches in low-income non-Black areas.[4] Moreover, consumers of color are disproportionately credit invisible and have deflated credit scores. They are also disproportionately denied mortgage loans and are underserved by the GSEs.

While very little has been done to eliminate the systems that drive inequality in our financial markets, laws have been passed that hold great promise for expanding fair credit opportunities. The Equal Credit Opportunity Act is one such law, as it provides mechanisms for addressing both individual and systemic discriminatory practices. Additionally, ECOA, by allowing the creation of Special Purpose Credit Programs, is designed to counteract centuries of discriminatory policies that have resulted in underserved communities being disproportionately excluded from the financial mainstream.

Similarly, disparate impact can help expand fair credit opportunities. It is imperative that we use this critical tool to fight discrimination and ensure underserved groups can better access safe, affordable financial products.

Much work has yet to be done to make credit markets fair and equitable for everyone, and the CFPB's role in ensuring markets are safe and free from discrimination is central. NFHA believes the responses below will help inform the CFPB's work and positions.

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[1] LISA RICE, THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (1st ed. 2017). For a detailed explanation of how federal race-based housing and credit policies promoted inequality, *see* Chapter 6, entitled "The Fair Housing Act: A Tool for Expanding Access to Quality Credit."

[2] Adam Levitin, *How to Start Closing the Racial Wealth Gap*, THE AM. PROSPECT (June 17, 2020), https://prospect.org/economy/how-to-start-closing-the-racial-wealth-gap/.

[3] Cheryl Young & Felipe Chacon, *50 Years After the Fair Housing Act – Inequality Lingers*, TRULIA (April 19, 2018), https://www.trulia.com/research/50-years-fair-housing/.

[4] 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/latest-news-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925.

NFHA NATIONAL FAIR HOUSING ALLIANCE

1. Disparate Impact

CFPB Question 1: "*Should the Bureau provide additional clarity regarding its approach to disparate impact analysis under ECOA and/or Regulation B? If so, in what way(s)*"?

Yes. The CFPB need not formally amend Regulation B; the principles-based standards contained therein reflect decades of case law and have proven flexible, workable, and effective. However, as explained in more detail below, the CFPB should encourage entities to look to the Department of Housing and Urban Development's (HUD) 2013 disparate impact Rule for guidance on its application in credit contexts. Also, the CFPB should ensure that regulated entities search for and adopt less discriminatory alternatives with respect to credit-related policies and procedures.

ECOA prohibits practices that have an unjustified disparate impact on protected classes. As promulgated in the Official Interpretations to Regulation B, a creditor's policy or practice violates ECOA if it "has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact."[5] That position is consistent with decades of case law and longstanding regulatory positions on ECOA.

ECOA embodies our shared interest in ensuring that credit opportunities are equally available to everyone, regardless of their personal characteristics. Enforceable disparate impact law is critically important for fulfilling this shared interest and making equal credit opportunity a reality. As NFHA and others have previously documented, credit markets are rife with systemic barriers restricting fair access to credit, including:

- Discriminatory mark-ups in auto lending;
- Low balance loan policies;
- Age-of-housing restrictions;
- Maternity leave policies; and
- Loan-level pricing adjustments.[6]

Indeed, disparate impact is particularly important in the credit context, where credit decisions are increasingly based on statistical models that appear facially neutral (as opposed to intentionally discriminatory). Despite their air of objectivity, these credit-related models can—and often do—have disproportionate negative effects on protected classes because of pre-existing disparities that have their genesis in race-based policies and practices of the past. There is ample evidence that these systems have a disparate impact on people and communities of color: they are rooted in and reflect the dual credit market that resulted from our country's long history of

[5] 12 C.F.R. § 1002, Supp. I, ¶ .6(a)-2.
[6] *See, e.g.*, NFHA Comment in Response to CFPB Request for Information Regarding the CFPB's Inherited Regulations and Inherited Rulemaking Authorities, Dkt. No. CFPB-2018-0012, at 8-12 (June 25, 2018).

discrimination. Many of these systems also include factors "that do not just assess the risk characteristics of the borrower; they also reflect the riskiness of the environment in which a consumer is utilizing credit, as well as the riskiness of the types of products a consumer uses."[7]

For example, it is commonly understood that, because of residential segregation patterns, policies that incorporate localized geography will likely cause negative disparate impacts based on race and national origin. The CFPB's ECOA Examination Procedures, for example, caution examiners to ask whether underwriting or pricing guidelines contain criteria that could have a negative disparate impact, such as "models that use ZIP code."[8] This phenomenon is just as true when localized geography is embedded within variables. Take, for example, an underwriting model that assesses creditworthiness in part based on the median household value in the census tract where the applicant lives. Because of the history of residential segregation and redlining in the U.S., Black people tend to live in census tracts with lower home values than Whites. As a result, a model incorporating this variable is likely to have a disproportionately negative effect on historically disadvantaged protected classes. Eliminating this variable from the model—or substituting a different one that more closely measures creditworthiness—could reduce or eliminate the disparate impact while still achieving the creditor's goals.

These unintended negative effects are pervasive in the lending market and are just as damaging as intentional discrimination. As one court put it, "a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[9] Disparate impact law is an essential tool for addressing policies like these that could unnecessarily perpetuate discrimination and hold people back from reaching their full potential. Disparate impact helps smoke out and combat what is otherwise subtle but invidious discrimination. The prospect of disparate impact liability also incentivizes creditors to examine whether policies that have a disparate impact on protected classes are actually necessary to achieve their legitimate business interests. If an alternative would meet the creditor's legitimate goals while having a less discriminatory impact on a protected class, disparate impact law requires the creditor to adopt it.

Disparate impact liability thus ensures that subtle barriers do not unnecessarily block equal access to credit. Because credit is the key that opens the door to opportunities like homeownership, higher education, and starting a small business—all opportunities that make achievement of the "American dream" possible—robust disparate impact law is imperative. And with the growing role of complex machine-learning models and artificial intelligence in credit underwriting (and in all aspects of everyday life), disparate impact law is as important now as it has ever been, as discussed more below.

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[7] *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).

[8] CFPB, DFPB ECOA EXAMINATION PROCEDURES AT PROCEDURES 2 (Oct. 2015), https://files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf.

[9] *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 430 (4th Cir. 2018) (analyzing disparate impact under the Fair Housing Act) (quoting *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 383-84 (3d Cir. 2011)).

The principles-based standards reflected in the CDPB's Official Interpretations, along with decades of guidance and case law interpreting these standards under ECOA and sister-antidiscrimination statutes like the Fair Housing Act (FHAct), have proven workable and effective, and are flexible enough to map onto evolving credit policies and markets. The CFPB's Official Interpretations set forth the basic obligation to adopt policy alternatives that reduce disparate impact, so long as the alternative satisfies the creditor's legitimate business needs. The 1994 Joint Policy Statement on Discrimination in Lending—signed by the Federal Reserve System, HUD, the Department of Justice, and eight other federal regulatory and enforcement agencies—contains additional guidance on disparate impact standards under ECOA and the FHAct.

For decades, these regulatory materials have put creditors on notice that credit policies and models with an unnecessary disparate impact on protected classes violate ECOA. Still, some creditors do not critically evaluate their policies for disparate impact or actively search for less discriminatory alternatives, notwithstanding existing regulatory guidance to the contrary. Accordingly, NFHA provides three recommendations.

Disparate Impact Recommendation 1: The CFPB should encourage entities to look to HUD's 2013 disparate impact Rule (2013 Rule) for guidance on its application in credit contexts.

In 2013, HUD finalized a rule formalizing the longstanding disparate impact doctrine under ECOA's sister-statute, the FHAct.[10] HUD's 2013 Rule correctly codified the disparate impact doctrine as it had been applied in the FHAct context for decades.[11] Much of this precedent overlaps with ECOA, as both statutes apply in the mortgage context.

For example, HUD's 2013 Rule codifies the same basic "effects test" reflected in the CFPB's Official Interpretation of Regulation B: that a neutral policy or practice violates ECOA if it has a discriminatory effect on a protected class, unless the policy or practice meets a nondiscriminatory interest that could not be served by an alternative with a less discriminatory effect.[12] In addition to this core standard, the 2013 Rule provides that the nondiscriminatory interest must be "substantial," supported by evidence, and may not be "hypothetical or speculative."[13] In particular, once the plaintiff proves that the challenged practice causes "or predictably will cause" a discriminatory effect, the defendant must prove that the challenged practice is "necessary" to achieve its "substantial, legitimate, nondiscriminatory interest."[14] If the defendant satisfies that burden, then the plaintiff may still prevail upon proving that the interest "could be served by another practice that has a less discriminatory effect."[15]

[10] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. No. 32 11460-01 (Feb. 15, 2013).) (Codified at 24 C.F.R. § 100.500).
[11] *Id.* at 11462 ("[T]his final rule embodies law that has been in place for almost four decades and that has consistently been applied, with minor variations, by HUD, the Justice Department and nine other federal agencies, and federal courts.").
[12] *Id.* at 11482.
[13] *Id.*
[14] *Id.*
[15] *Id.*

In 2015, the Supreme Court affirmed in *Inclusive Communities* that the FHAct bars practices with unnecessary discriminatory impact.[16] It repeatedly referenced HUD's 2013 Rule, as well as cases decided under the doctrine that the 2013 Rule codified.[17]

The standards codified in HUD's 2013 Rule have worked. They have fostered more inclusive lending markets, housing markets, and more, by providing entities with the incentive to search for less discriminatory alternatives to practices that have a discriminatory impact based on race or other protected classes and are not necessary to achieve a legitimate purpose. The 2013 Rule has been straightforward to apply and has struck the proper balance between competing interests. Although HUD recently attempted to gut the 2013 Rule, its 2020 rule is unlawful and unworkable. At least three lawsuits have been filed challenging HUD's 2020 Rule—including one in which NFHA is a plaintiff—and a court preliminarily enjoined the Rule before it went into effect, concluding that it was likely unlawful.[18]

Thus, for individuals and entities looking for detailed guidance on the standards governing disparate impact claims, HUD's 2013 Rule provides a useful reference point. NFHA therefore recommends that the CFPB encourage entities to look to HUD's 2013 Rule for additional guidance on how disparate impact applies in the credit context. The CFPB could do so, for example, by clarifying through guidance that these standards reflect disparate impact case law and precedent and that the CFPB employs these substantive standards in its own supervisory and enforcement activities.

Disparate Impact Recommendation 2: The CFPB should ensure that regulated entities search for and adopt less discriminatory alternatives.

The touchstone of disparate impact law has always been that an entity must adopt an available alternative to a policy or practice that has a discriminatory effect, so long as the alternative can satisfy the entity's legitimate needs with less discriminatory effect. The utility of disparate

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[16] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 576 U.S. 519, 539 (2015).

[17] *See, e.g.*, *id.* at 527 (describing prima facie case and burden-shifting in the 2013 rule), 539-40 (describing cases involving practices that "reside at the heartland of disparate-impact liability").

[18] *See Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, No. CV 20-11765-MGM, 2020 WL 6390143, at *1 (D. Mass. Oct. 25, 2020) (order granting preliminary injunction because of a substantial likelihood that the 2020 rule would be found arbitrary and capricious in violation of the Administrative Procedure Act). HUD's 2020 rule has been challenged in at least two other cases. *See also Nat'l Fair Hous. All. v. Carson*, Case No. 3:20-cv-07388 (N.D. Cal.); *Open Cmtys. All. v. U.S. Dep't of Hous. & Urban Dev.*, Case No. 3:20-cv-01587 (D. Conn.). HUD's attempted changes to the 2013 Rule were roundly opposed and criticized when proposed, including by regulated businesses. For example, Bank of America, Quicken Loans, Wells Fargo, Citibank, and J.P. Morgan Chase sent a number of letters to HUD stating that the Proposed 2020 Rule was inappropriate in light of the national movement towards addressing the impact of discrimination, in particular structural racism, on Black Americans. *See* Emily Flitter, *Big Banks' 'Revolutionary' Request: Please Don't Weaken This Rule*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/business/banks-housing-racial-discrimination.html; Andrew Ackerman, *Lenders Oppose Federal Effort to Weaken Housing-Discrimination Rule*, WALL ST. J. (July 13, 2020), https://www.wsj.com/articles/lenders-oppose-federal-effort-to-weaken-housing-discrimination-rule-11594667932. Similarly, the National Association of Realtors urged HUD to abandon the Proposed Rule, stating: "There is broad consensus across the country that now is not the time to issue a regulation that could hinder further progress toward addressing ongoing systemic racism." *See* Ackerman, *Lenders Oppose Federal Effort to Weaken Housing-Discrimination Rule*.

impact as a tool for ensuring equal access to credit lies not only in enforcement against existing or past violations, but in shaping the ongoing processes by which lenders create and maintain the policies and statistical models they use for credit underwriting.

Given the prospect of disparate impact liability, responsible lenders and financial institutions now have systems in place to identify and implement the least discriminatory policies consistent with their business needs. Indeed, many major financial institutions have adopted compliance systems designed to ensure that their marketing, underwriting, pricing, servicing, and other policies and statistical models remain fair and ECOA-compliant. For example, these institutions routinely evaluate their credit-related models for disparate impact risk and, to the extent models have a discriminatory effect, they actively search for alternatives that maintain performance while minimizing impact. Institutions frequently have found that such alternatives cost them little if any profits and may help them find new customers and be more precise about the lines they draw so as not to exclude people unnecessarily. This is the promise that disparate impact offers—causing lenders to critically and continuously evaluate their policies to ensure they are as inclusive as possible while meeting legitimate business objectives.

While some lenders have institutionalized disparate impact fair lending protocols, many lenders have not. In the absence of a robust fair lending compliance framework, these entities will perpetuate discrimination and structural inequality. Borrowers rarely know if they have been subjected to a policy with a disproportionately adverse effect on a protected class, so private enforcement can be difficult. Accordingly, the CFPB should use its regulatory and supervisory tools to ensure that entities' compliance management systems include routinely testing policies and models for disparate impact and actively searching for, and adopting, less discriminatory alternatives where they are available.

To this end, the CFPB should incorporate into its own analyses of whether credit-related policies are likely to cause disparate impact and whether less discriminatory alternatives exist, and the CFPB should revise its examination procedures to provide examiners with guidance on these analyses. The CFPB could explain in detail its own methodologies, similar to how it explained its own use of the Bayesian Improved Surname Geocoding proxy method for fair lending testing.[19] The CFPB should also confirm that entities' self-assessment of compliance with federal consumer financial law includes disparate impact and alternatives analyses. Entities should self-report to the CFPB likely violations, and remediate the harm resulting from these violations. The CFPB should make clear that, consistent with the CFPB's Bulletin on Responsible Business Conduct,[20] the existence and robustness of these analyses may be considered, along with other relevant factors, in addressing violations of federal consumer financial law in supervisory and enforcement matters.

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[19] CFPB, Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.

[20] CFPB Bulletin 2020-01, Responsible Business Conduct: Self-Assessing, Self-Reporting, Remediating, and Cooperating (March 6, 2020), https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2020-01_responsible-business-conduct.pdf.

Disparate Impact Recommendation 3: The CFPB should emphasize the continued need for full enforcement of Regulation B, including disparate impact claims.

The lending discrimination that ECOA is designed to eradicate has substantial effects on the lives of marginalized communities. Disparate impact is an important tool for combating this injustice and providing relief for people who have been adversely impacted by discriminatory policies and practices.

For example, studies show that much work remains to be done in eliminating credit discrimination on the basis of sex. A 2006 report from the Consumer Federation of America showed that women are disproportionately represented in the high-cost, subprime mortgage market at the national level.[21] Similarly, a 2013 report by the Woodstock Institute also confirmed that disparities between men and women exist in particular markets (in that case Chicago).[22] Likewise, a 2010 report from Work Life Law, a product of UC Hastings College of the Law, found that discrimination against women in the lending market on the basis of pregnancy or maternity leave was widespread.[23] The case of *Williams v. Countrywide Home Loans, Inc.*, in which a pregnant woman alleged that Countrywide had refused to grant her a loan because her income would be reduced for several years while she raised her child, was the first to address disparate impact against women on these bases.[24]

The lending market also contains deeply entrenched disparities between White and non-White borrowers. A 2014 study in the Journal of Real Estate Finance and Economics analyzed discrepancies in mortgage interest rates between particular groups and found that the typical Black male receives an interest rate that is 8.9 basis points higher than his White male counterpart, while the typical Black woman pays 26.5 basis points more than her White female counterparts.[25] An extensive analysis of 31 million records conducted by Reveal from The Center for Investigative Reporting found that modern-day redlining, in the form of racial discrimination in lending, persisted in 61 metro areas, even when controlling for applicants' income, loan amount, and neighborhood.[26] In Chicago, for example, 68.1 percent of loaned dollars for housing purchases went to majority-White neighborhoods, whereas only 8.1 percent and 8.7 percent went to majority-Black and majority-Latino neighborhoods respectively.[27]

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[21] Allen Fishbein & Patrick Woodall, *Women are Prime Targets for Subprime Lending: Women are Disproportionately Represented in High-Cost Mortgage Market*, CONSUMER FED'N OF AM. (2006), https://consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf.

[22] *Unequal Opportunity: Disparate Mortgage Origination Patterns for Women in the Chicago Area*, WOODSTOCK INST. (2013), https://woodstockinst.org/wp-content/uploads/2013/05/unequalopportunity_factsheet_march2013_0.pdf.

[23] *Discrimination in Mortgage Lending on the Basis of Pregnancy and Maternity Leave*, WORK LIFE LAW, U.C. HASTINGS COLL. OF THE LAW (2010), http://worklifelaw.org/publications/WLLMortgageDiscriminationBrief.pdf.

[24] *Williams v. Countrywide Home Loans, Inc.*, No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002).

[25] Ping Cheng, Zhenguo Lin, & Yingchun Liu, *Racial Discrepancy in Mortgage Interest Rates*, 51 J. OF REAL ESTATE FIN. & ECON. 101, 117-118 (2014), http://link.springer.com/article/10.1007/s11146-014-9473-0.

[26] Aaron Glantz & Emmanuel Martinez, *For people of color, banks are shutting the door to homeownership*, REVEAL NEWS (Feb. 15, 2018), https://revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/.

[27] Linda Lutton, Andrew Fan, & Alden Loury, *Where Banks Don't Lend*, WBEZ 91.5 CHICAGO (June 3, 2020), https://interactive.wbez.org/2020/banking/disparity/.

The American Bar Association has also noted similar discrepancies in a variety of other contexts within the lending market, including the marketing of subprime mortgages disproportionately to Black borrowers.[28]

Disparate impact litigation under ECOA is central to closing these gaps and providing relief to borrowers impacted by unnecessarily discriminatory credit policies and practices. Such litigation has been widely successful after the landmark decision in *Hargraves v. Capital City Mortgage Corp.*, in which Black plaintiffs established a prima facie showing of disparate impact in their claims under ECOA.[29] Borrowers in *Hargraves* provided documentation regarding their area's historically segregated housing market and statistical evidence that Capital City Mortgage made a greater percentage of its loans in majority Black census tracts than other subprime lenders. Other lenders have settled disparate impact claims brought against them, providing important relief to affected borrowers.[30]

The evidence is clear: discrepancies continue to exist within the lending space, most notably affecting women and non-White borrowers. Disparate impact liability under ECOA is an important tool to address these pervasive injustices. For this reason, the CFPB should emphasize the continued need for full enforcement of Regulation B, including disparate impact claims.

2. Limited English Proficiency

CFPB Question 2: *Should the Bureau provide additional clarity under ECOA and/or Regulation B to further encourage creditors to provide assistance, products, and services in languages other than English to consumers with limited English proficiency? If so, in what way(s)?*

The LEP population in the U.S. is large and potentially vulnerable in the financial services marketplace.

Given its mission, its responsibilities under the Equal Credit Opportunity Act and its obligations under the Fair Housing Act to affirmatively further fair housing, it is appropriate for the CFPB to focus attention on the considerable number of people in the U.S. whose English proficiency is limited. The US Census Bureau defines an LEP individual as anyone over the age of 5 who speaks English less than very well. The U.S. Department of Justice and HUD define an LEP individual as someone with limited ability to read, write, or understand English. According to a 2016 analysis by the HUD, "[o]ver twenty-five million persons in the United States, approximately nine percent of the United States population, are LEP. Among LEP persons in the

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[28] Nikitra Bailey, *Predatory Lending: The New Face of Economic Injustice*, AM. BAR ASS'N HUMAN RIGHTS MAGAZINE (2005), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/.

[29] *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000).

[30] *See, e.g.*, *United States v. GFI Mortg. Bankers, Inc.*, Case No. 1:12-CV-02502 (S.D.N.Y. 2012); *United States v. Luther Burbank Sav.*, Case No. 2:12-CV-07809 (C.D. Cal. 2012); *Smith v. DaimlerChrysler Servs. N. Am. LLC*, 2005 WL 2739213 (D.N.J. 2005).

United States, approximately 16,350,000 speak Spanish (65%), 1,660,000 speak Chinese (7%), 850,000 speak Vietnamese (3%), 620,000 speak Korean (2%), 530,000 speak Tagalog (2%), 410,000 speak Russian (2%), and fewer speak dozens of other languages."[31]

For consumers who are not proficient in English, entering into a financial transaction such as a mortgage can be a risky proposition. These transactions are inherently complex and involve technical terms that are not commonly understood in any language, let alone a language in which one has only limited proficiency. It is not uncommon that marketing for mortgages and other financial products is conducted in-language, but it is less common for the actual transaction to be conducted in any language other than English. Providing mortgage documents and related disclosures to LEP borrowers in English only places them at a considerable disadvantage. They may not be able to compare the terms and conditions they were promised with those that are actually provided. They may not fully understand the terms and conditions of the mortgage they are actually receiving, which may lead them to accept mortgages that they do not want or cannot afford.

Once a loan is originated, unless the mortgage servicer offers assistance in-language, LEP borrowers may be unable to obtain the help they need from their loan servicer in a timely fashion, or in some cases at all. It can be difficult for LEP borrowers to navigate loss mitigation systems in which there are multiple barriers to getting both critical documents and verbal assistance in a language they understand. Although lenders may make special efforts to market products to LEP consumers, failure to address these barriers at the point of sale and afterwards may lead to confusion, misunderstandings, inadvisable decisions, and financial hardship.

Past experience demonstrates that LEP Borrowers have been subject to abusive and discriminatory practices.

The problems outlined above are not mere hypotheticals. In the wake of the foreclosure crisis of the 2000s and the ensuing financial crisis, housing counselors and legal services attorneys who worked with LEP borrowers in financial distress documented numerous cases in which those borrowers encountered tremendous barriers to obtaining loss mitigation. Some of these borrowers became delinquent when the payments rose to unaffordable levels on loans that they had been told would be 30 year, fixed rate mortgages but were in fact adjustable rate and/or interest only mortgages. These borrowers were the victims of bait and switch tactics. They had been sold one product with marketing conducted in their preferred language, but unbeknownst to them, received a very different product at closing. They were unable to detect this bait and switch because none of the relevant documents were in a language they could understand.

Even LEP borrowers who were not subjected to such abusive and fraudulent practices during the mortgage origination stage frequently found themselves at a disadvantage during the loss mitigation process. Most servicers do not collect and track borrowers' language preferences. As a result, LEP borrowers would find that each and every time they contacted their servicer by

[31] U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON FAIR HOUSING ACT PROTECTIONS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY (Sept. 15, 2016), https://www.hud.gov/sites/documents/LEPMEMO091516.PDF.

phone, they would have to re-establish their language preference and go through what could be a lengthy and frustrating process to be connected to someone who could speak their language, either someone on the servicer's staff or through a third-party language line. If servicers used a language line to provide oral interpretation in a particular language, those LEP borrowers might need to make an appointment in advance, adding to the time needed to conduct even the most basic interaction. Important documents outlining the loss mitigation options available to the borrower, the documentation required to obtain those options, and the timelines and deadlines associated with the loss mitigation process were provided only in English. In some cases, borrowers were unable to obtain the loan modifications for which they were eligible because they could not understand the offers provided to them in writing and did not realize what steps they needed to take or the applicable deadlines.[32] They lost their homes to foreclosures that should have been avoidable.

The CFPB itself has recognized many of these problems, particularly with respect to mortgage servicing. In considering changes to its mortgage servicing regulations in 2016, the CFPB acknowledged the significance of the comments it had received about the problems faced by LEP borrowers both at the mortgage origination stage and in mortgage servicing, saying, "The Bureau recognizes the challenges borrowers with limited English proficiency face in understanding the terms of their mortgage. The Bureau believes that servicers should communicate with borrowers clearly, including in the borrower's native language, where possible, and especially when lenders advertise in the borrower's native language."[33]

The CFPB has already provided considerable guidance to lenders about their treatment of LEP consumers.

The CFPB has already provided considerable guidance to lenders to help them address the needs of LEP consumers. For example, the CFPB's Fall 2016 Supervisory Highlights includes examples of practices it has observed lenders using with LEP borrowers that, "provide access to credit in languages other than English in a manner that is beneficial to consumers as well as the institution, while taking steps to ensure their actions are compliant with ECOA and other applicable laws."[34] These include:

- Marketing and servicing of loans in languages other than English;
- Collection of customer language information to facilitate communication with LEP consumers in a language other than English;
- Translation of certain financial institution documents sent to borrowers, including monthly statements and payment assistance forms, into languages other than English;

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[32] *Barriers to Language Access in the Housing Market*, AM. FOR FIN. REFORM (May 2016), https://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.
[33] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72163 (Oct. 19, 2016).
[34] *3.1 Provision of language services to limited English proficient (LEP) consumers*, 13 CFPB Supervisory Highlights 17-19 (June 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

- Use of bilingual and/or multilingual customer service agents, including single points of contact, and other forms of oral customer assistance in languages other than English; and
- Quality assurance testing and monitoring of customer assistance provided in languages other than English.[35]

Equally important, the same Supervisory Highlights describes practices the CFPB has observed that have exposed lenders to fair lending risk for their treatment of LEP consumers. One example is an institution that marketed certain credit card products to Spanish-speaking consumers while marketing additional credit card products to English-speaking consumers but failed to provide any documentation to explain the rationale for doing so.

Further, the 2016 Supervisory Highlights describe a number of enforcement actions taken in cases where the CFPB found lenders' practices with respect to LEP consumers to be in violation of Regulation B or other consumer financial law. Specifically, the CFPB noted, "examiners observed one or more institutions marketing only some of their available credit card products to Spanish speaking consumers, while marketing several additional credit card products to English speaking consumers. One or more such institutions also lacked documentation describing how they decided to exclude those products from Spanish language marketing, raising questions about the adequacy of their compliance management systems related to fair lending."[36] The Supervisory Highlights go on to describe the subsequent steps taken by these institutions to mitigate their fair lending risk.

Finally, the Supervisory Highlights detail the features of a strong Compliance Management System, tailored to a lender's size, complexity and scope, that will assist in mitigating any fair lending risk that might otherwise be associated with serving LEP consumers.

In November 2017, the CFPB published a summary of information that it had gleaned from interviews with a wide range of stakeholders, along with secondary research on best practices for serving LEP consumers. This "Spotlight on serving limited English proficiency consumers" discusses assessing consumers' language needs, centralized points of contact for LEP consumers, translation and interpretation systems, training for employees and interactions with consumers, among other topics, and points lenders to a variety of additional resources to assist them in serving these consumers.

Lenders can take additional guidance from the questions in the CFPB's examination procedures that pertain to their treatment of LEP borrowers. These procedures point lenders to the issues and information that examiners will consider in determining whether the institution's practices with respect to LEP consumers pose any fair lending concerns. The questions cover such topics as the

[35] *Id.*
[36] *Id.*

marketing and targeting of financial products, fair lending training for employees and service providers, servicing practices and resources, tracking of borrowers' language preferences, and the use of outside service providers to provide language assistance.[37]

Taken together, these resources constitute a substantial and useful set of guardrails for lenders and servicers seeking to ensure that they are serving the needs of LEP consumers fairly and effectively while also mitigating any potential fair lending risk.

Limited English Proficiency Recommendation 1: The CFPB should take additional steps to ensure that LEP consumers are treated fairly.

Nonetheless, there is more that the CFPB can do to ensure fair access to credit for LEP borrowers. Additional measures that NFHA recommends that the CFPB adopt include requiring lenders to:

- Collect information about the language preference of their customers, including loan applicants. A question was developed for this purpose for inclusion on the Uniform Residential Loan Application when it was being revised recently. The CFPB reviewed the wording of the question and determined that it was consistent with the provisions of ECOA. However, the Federal Housing Finance Agency, which oversaw the URLA revision process, made a unilateral decision to remove the language preference question from the final URLA. FHFA later announced that it would create a new Voluntary Consumer Information Form including the language preference question and several others for lenders to use if they so choose, but it has yet to release that form. Nonetheless, the question has been developed and vetted, and there is no reason lenders cannot move ahead on their own to collect language preference information using this question. The CFPB should encourage them to do so in order to better understand the language needs of their customers and position themselves to address those needs to the maximum extent possible. In addition to collecting this information, lenders must also track and transfer this information with the loan file, so that it is available to subsequent servicers of that loan.

- Use translated forms, disclosures, and other mortgage-related documents where available and as appropriate. In addition to glossaries of financial terms and other information that the CFPB makes available in multiple languages on its website, a number of mortgage origination-related documents and some mortgage servicing-related documents in Spanish, Chinese, Korean, Vietnamese and Tagalog are available at no cost on FHFA's Mortgage Translations clearinghouse.[38] Lenders serving LEP borrowers who speak these languages should be making use of these resources.

[37] CFPB, CFPB EXAMINATION PROCEDURES, ECOA BASELINE REVIEW MODULE 13, 20-21 (Oct. 2015), files.consumerfinance.gov/f/201510_cfpb_ecoa-baseline-review-modules.pdf.
[38] *Mortgage Translations*, FED. HOUS. FIN. AGENCY, https://www.fhfa.gov/MortgageTranslations.

- Translate the most important mortgage-related forms into any language spoken by 5 percent or more of the population of any of a lender's local markets. Further, lenders should be prepared to offer oral interpretation for such LEP borrowers. They may do so by hiring and training their own staff, contracting with interpreters, including those associated with HUD-approved housing counseling agencies, or using third party providers such as telephone-based language line services.

Limited English Proficiency Recommendation 2: Language Access Plans should play an important role in helping lenders serve the LEP market fairly, effectively, and efficiently.

To help lenders accomplish all of this in a comprehensive, systematic, and individually-tailored manner, the CFPB should require lenders to develop language access plans. The concept of a language access plan has been explained in detail in guidance[39] issued by the US Department of Justice for federal government agencies and other entities that receive federal financial assistance and are therefore subject to the provisions of Title VI of the Civil Rights Act of 1964 that prohibit discrimination on the basis of national origin and Executive Order 13166.[40] DOJ's guidance lays out a four-factor analysis to enable recipients to determine what language assistance services are appropriate for them to provide. That four-factor analysis balances:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
2. the frequency with which LEP individuals come in contact with the program;
3. the nature and importance of the program, activity, or service provided by the program to people's lives; and
4. the resources available to the grantee/recipient and costs.[41]

Based on the outcome of this analysis, which takes into consideration the recipient's size, the nature of the services offered, and the size of the relevant LEP population, DOJ then recommends that recipients develop written language access plans that detail the assistance they will provide to LEP persons to ensure that they have meaningful access to important government services.

HUD has adopted guidance on language access containing a similar four-factor analysis.[42] The HUD guidance also contains recommendations about the level of written translation assistance that should be provided depending on the size of the local LEP population. Based on the HUD

[39] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).
[40] Improving Access to Services for Persons with Limited English Proficiency, Exec. Order No. 13166, 65 Fed. Reg. 5011950122 (Aug. 11, 2000), https://www.justice.gov/crt/executive-order-13166.
[41] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41459 (June 18, 2002).
[42] U.S. Department of Housing and Urban Development [Docket No. FR–4878–N–02] Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007).

guidance, we recommend that lenders' language access plans spell out the services they will provide to members of any LEP group that constitutes 5 percent of the population of a local market area, or 1,000 persons, whichever is less.

With minor changes, this four-factor analysis would provide a useful framework with which mortgage lenders and servicers could assess the language access needs of the markets they serve. The resulting information could then be used to develop a written language access plan that would describe the steps lenders will take, with appropriate time frames for each, to ensure that LEP persons have meaningful access to the important financial services they provide. The CFPB could assist lenders by providing one or more templates for language access plans that would help assure lenders that their plans include the necessary components. Such templates would have to provide enough flexibility to allow lenders of different sizes, with different product mixes, and serving different populations to develop plans appropriate to their needs. The CFPB should review these plans in the course of its examinations, and lenders should review and update their plans annually.

Limited English Proficiency Recommendation 3: Any further guidance to lenders must be provided in a transparent, publicly available manner.

If the CFPB should determine that further guidance is warranted to assist lenders and servicers in providing meaningful access for LEP consumers, NFHA urges the CFPB to provide that guidance in a manner that is transparent and fully open to the public. The importance of these issues and the wide array of stakeholders—lenders, LEP consumers, organizations serving those consumers, and others—dictates the need for transparency in this area. It would be inappropriate and counterproductive to use the vehicles available through the CFPB's Office of Innovation, such as No Action Letters and the Compliance Assistance Sandbox, for this purpose.

Limited English Proficiency Recommendation 4: The CFPB must step up its current efforts to ensure fair treatment of LEP borrowers and avoid a massive wave of foreclosures resulting from the COVID-19 pandemic.

The CFPB was established in the aftermath of the foreclosure crisis a decade ago, in which more than 6 million households lost their homes to foreclosure,[43] communities experienced tremendous disruption, households of color, in particular, suffered enormous wealth losses,[44] and our economy nearly collapsed. A large part of the CFPB's mission is to ensure that the regulatory failures that created the conditions for such a crisis never occur again. Now, as the country faces another potential surge in foreclosures due to the impacts of the COVID-19 pandemic, the CFPB has a special role to play in preventing that outcome, one in which the last crisis showed us LEP homeowners are particularly vulnerable. The combination of the CFPB's

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[43] Brooke Niemeyer, *There have been 6.3 million foreclosures in the U.S. in the last decade*, MARKETWATCH (May 30, 2016), https://www.marketwatch.com/story/there-were-63-million-foreclosures-in-the-last-decade-2016-05-31.
[44] *Wealth Gaps Rise to Record Highs between Whites, Blacks, Hispanics*, PEW RESEARCH CTR., (July 26, 2011), https://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/.

regulatory authority, financial education tools, and bully pulpit, if used effectively, can help protect homeowners affected by the pandemic from losing their homes to foreclosure, LEP homeowners among them.

NFHA urges the CFPB to take several immediate steps to accomplish this goal.

1. The CFPB should require mortgage servicers to notify borrowers of the protections provided by the CARES Act for homeowners experiencing economic difficulties due to COVID-19 and the steps they must take to obtain those protections. It should develop a simple notice to this effect, translate that notice into the top eight languages spoken by people with limited English proficiency, and make those translated notices available to servicers. We commend the CFPB for the forbearance-related information it has already developed for consumers and for making that available on its website in multiple languages. However, many consumers will never find that helpful information because they will not know to look for it. Feedback from housing counselors, and the number of borrowers who are delinquent but not in the forbearances for which they are eligible, shows us this is the case. It is likely that a significant number of LEP borrowers are among that group, and the CFPB must take affirmative steps to help plug that information gap and ensure that borrowers are aware of these important protections.

2. The CFPB should spearhead an aggressive public media and outreach campaign to borrowers, including LEP borrowers, to make sure they are aware of the protections available under the CARES Act. We commend the CFPB for co-branding the "Not OK, That's OK" outreach materials that have been developed by industry and consumer advocates. But making those materials available is not the same thing as conducting a campaign, and as yet, those materials are not available in languages other than English. We are approaching critical dates with regard to consumers' ability to request forbearance, and the end of moratoria on foreclosures and evictions. We can anticipate a surge in the number of consumers exiting forbearance and requiring long-term solutions for sustaining homeownership. To avoid another massive wave of foreclosures, it is crucial to make sure that consumers are aware of the protections available and how to get help. That requires a comprehensive, coordinated, well-resourced campaign aimed at making sure the message reaches all borrowers, including those with limited English proficiency. For LEP consumers, it will be important to have in-language information disseminated through channels that will reach them, including ethnic media, foreign countries' consular offices, state and local government offices that interface with different ethnic and immigrant communities, and civic, religious, and community organizations that serve those communities, among others.

   The CFPB's mission to arm consumers with the information they need to make prudent financial decisions should encompass this kind of campaign. One of the failures that contributed to the previous foreclosure crisis was the passive approach taken by federal regulators. Even when shown evidence of an alarming rise in

foreclosures, many concentrated in communities of color, the federal regulatory agencies failed to take active steps to intervene. Action is needed now to avoid a repeat of this historic failure.

That action must be spearheaded by the federal government, which alone has the resources and reach to accomplish the job effectively. Feedback from the field suggests that many borrowers do not trust their servicers as reliable sources of this kind of information.[45] In addition, it may not be reasonable to expect servicers to undertake broad outreach that extends beyond their base of borrowers. Housing counseling agencies and other non-profits have an interest in reaching the broad public but lack the resources to do this is in a comprehensive and sustained manner. The CFPB has taken some initial steps in this direction, but much more is needed, and quickly. As information needs transition from forbearance protections to post-forbearance options, the focus of the campaign should shift accordingly.

3. The CFPB should begin now to evaluate servicers' capacity and readiness to respond to the coming demands for loss mitigation. We know that large numbers of forbearances will begin to expire in a few months, and millions of borrowers, including LEP borrowers, will need assistance obtaining long-term solutions for their mortgage arrearages. This was a stress point that failed abysmally during the last crisis, and it is important to take steps now to prevent a recurrence of those failures. Servicers need adequate staffing, training, management systems, and oversight to handle the coming wave of loss mitigation needs. The CFPB should evaluate servicers' systems and plans now, so that necessary changes can be made before a crisis develops, rather than after failures have occurred and homes have been lost. During the last crisis, language barriers presented LEP borrowers with additional, sometimes insurmountable, challenges to navigating servicers' loss mitigation systems, and language needs should be part of the CFPB's evaluation of servicers' readiness for the demands they will face in a few months.

4. The CFPB should identify and translate key mortgage servicing documents that will be necessary for the post-forbearance process and make those available for servicers to use with their LEP borrowers. That will help prevent LEP borrowers from losing out on the full array of loss mitigation options as they exit forbearance and need access to affordable solutions that will enable them to save their homes. The CFPB has done important work on creating materials that describe forbearance and explain what happens when it ends, and we commend the CFPB for its plans to translate this information into multiple languages. However, we are not aware that any significant number of servicers is linking to these pages on the CFPB's website or taking other steps to direct their LEP borrowers to these resources. Additional efforts are needed

[45] *Forbearance and Delinquency Summary of Housing Counselor Survey*, NAT'L HOUS. RES. CTR. (July 20, 2020), https://www.hsgcenter.org/wp-content/uploads/2020/07/Survey-results-Forbearance-and-Delinquency2.pdf.

to make sure LEP borrowers have the information they need at the time they need it, and providing relevant documents in-language is one important way to help accomplish this.

3. Special Purpose Credit Programs

CFPB Question 3: *Should the Bureau address any potential regulatory uncertainty and facilitate the use of SPCPs? If so, in what way(s)? For example, should the Bureau clarify any of the SPCP provisions in Regulation B?*

Yes. As explained below, the CFPB should provide more information on existing Special Purpose Credit Programs (SPCPs), and it should coordinate with sister agencies to codify that SPCPs further the purpose of, and would not violate, overlapping antidiscrimination laws like the FHAct. The CFPB should also take measures to facilitate the use of SPCPs.

ECOA and Regulation B SPCPs provide a tailored way to benefit economically disadvantaged groups, including groups that share a common characteristic such as race, national origin, or gender.[46] Properly designed, SPCPs can play a critical role in promoting equity and inclusion, building wealth, and removing stubborn barriers that have contributed to financial inequities, housing instability, and residential segregation.[47] NFHA applauds the CFPB for recently signaling steps to create real changes in our financial system so that people of color have equal opportunities to build wealth and close the economic divide,[48] including reminding entities of the availability of SPCPs.[49] While affordable mortgage programs will help expand opportunities for underserved groups and are an important tool for reducing the racial homeownership gap, they are not a panacea and, without more intentional action, may ultimately do little to advance racial equity.

Targeted programs are necessary to address disparities caused by decades of discrimination.

For decades, discriminatory policies in the U.S. created distinct advantages for White families, leading to massive wealth, homeownership, and credit gaps that persist today. The nation's largest affordable housing initiative was arguably the Federal Housing Administration (FHA) mortgage insurance program. It did very little to benefit people of color in the first decades of the effort, largely because the guidelines and policies adopted by the program were designed to

[46] 12 C.F.R. § 1002.8(b)(2).
[47] Lisa Rice, *Using Special Purpose Credit Programs to Expand Equality*, NFHA (Nov. 2020), https://nationalfairhousing.org/using-spcps-blog/.
[48] Kathleen Kraninger, *The Bureau is taking action to build a more inclusive financial system*, CFPB (July 28, 2020), https://www.consumerfinance.gov/about-us/blog/bureau-taking-action-build-more-inclusive-financial-system/.
[49] Susan M. Bernard & Patrice Alexander Ficklin, *Expanding access to credit to underserved communities*, CFPB (July 31, 2020), https://www.consumerfinance.gov/about-us/blog/expanding-access-credit-underserved-communities/.

restrict access for Black people and other underserved groups.[50] Many of these policies were explicitly racist,[51] including the utilization of the Home Owners' Loan Corporation's (HOLC) race-based redlining system, the requirement to use racially restrictive covenants, and more.

The graphic below is a portion of a Residential Security Survey form for a geographical area in Atlanta that illustrates the importance race played in establishing the redlining system put in place by the HOLC. Surveyors were required to indicate the percentage of Black people living in each geographical area. Indeed, there is a permanent place to indicate the percentage of Black population on the forms. No other racial category is highlighted in such a fashion. Areas with Black residents received the lowest grade of "D" and were labeled "hazardous." Such areas either received no lending at all or, in the rare case that they did, consumers receiving loans in those areas paid premium rates. This system and language included in the FHA's underwriting guidelines made a clear association between risk and race.

REPRODUCED AT THE NATIONAL ARCHIVES

AREA DESCRIPTION - SECURITY MAP OF Atlanta, Ga.

1. AREA CHARACTERISTICS:
   a. Description of Terrain. Mostly level.
   b. Favorable Influences. Close to occupants' source of employment. Street car transportation along East Ponce de Leon Avenue.
   c. Detrimental Influences. Lack of paved streets. Distance to negro schools. Proximity of cemetery.
   d. Percentage of land improved 70 %; e. Trend of desirability next 10-15 yrs. Static for negroes
2. INHABITANTS:
   a. Occupation Laborers & domestics; b. Estimated annual family income $ 400-700
   c. Foreign-born families 0 %; None predominating; d. Negro Yes ; 100 %
   e. Infiltration of None; f. Relief families Few
   g. Population is increasing Slowly; decreasing ; static

Source: ATLMaps Emory University, https://www.atlantastudies.org/2017/09/07/jason-rhodes-geographies-of-privilege-and-exclusion-the-1938-home-owners-loan-corporation-residential-security-map-of-atlanta/

The association between race and risk in our financial markets has not been eradicated. Again, while laws like the ECOA and FHAct address discriminatory practices, they have not been fully enforced. Moreover, discriminatory systems that perpetuate bias, like the dual credit market, the separate and unequal credit landscape, and residential segregation, have not been removed. In fact, because the association between race and risk is still prevalent, in many cases a person's credit score can serve as a proxy for race or racial composition of the neighborhood.[52]

[50] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (1st ed. 2017).
[51] RICE, *supra* note 1. For a detailed explanation of how federal race-based housing and credit policies promoted inequality, see Chapter 6, "The Fair Housing Act: A Tool for Expanding Access to Quality Credit."
[52] Rice, *supra* note 7.

Policies and practices in other federal programs also supported a separate and unequal housing market. For example, federal housing policies by the then-US Housing Authority mandated residential segregation in publicly funded multi-family rental housing developments. Even today, housing authorities continue to practice segregation, offering facilities located in well-resourced neighborhoods to White tenants while steering Black tenants to complexes located in under-resourced areas.[53] Blatant discrimination in the implementation of the GI bill,[54] Social Security program, National Highway Act, Urban Renewal program, and more contributed to the permanent installation of a dual credit and housing market that too often prohibits consumers of color from accessing quality, sustainable credit options.

These policies followed centuries of slavery, racial violence, and a race-based caste system that systematically robbed Black people and other people of color of the opportunities to own homes, pass down assets to their heirs, and build wealth.

The inequities built into our society from race-based policies and practices are seen today in persistent wealth and homeownership gaps. A seminal 2012 HUD report cautioned that "[c]reditworthy low-income and minority families face significant barriers to sustainable homeownership, a major vehicle for building wealth and economic opportunity."[55] Families of color were not benefitting from decreases in housing prices and interest rates, and "purchasing a home is out of reach for many [low-income and minority] families because they have insufficient cash for down payment and closing costs, cannot pay down debts, have low credit scores, and are subject to higher borrowing costs."[56] Recent Home Mortgage Disclosure Act (HMDA) data reflect these disparities. Among other metrics, the 2019 denial rate for conventional home-purchase loans was 16.0 percent for Black borrowers and 10.8 percent for Hispanic White borrowers. In contrast, the denial rate was only 6.1 percent for non-Hispanic White borrowers.[57] These homeownership disparities are the result, in part, of wealth disparities.[58] In 2019, White family wealth sat at $188,200 (median) and $983,400 (mean).[59] In contrast, Black families'

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[53] Raisa Habersham, *Atlanta-based management companies face housing discrimination suit*, ATLANTA J. CONST. (May 14, 2020), https://www.ajc.com/news/atlanta-based-management-companies-faces-housing-discrimination-suit/VzX5hVxIQ1QnLezhsw2klI/.

[54] Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, HISTORY (June 21, 2019), https://www.history.com/news/gi-bill-black-wwii-veterans-benefits.

[55] U.S. Department of Housing and Urban Development, *Paths to Homeownership for Low-Income and Minority Households*, EVIDENCE MATTERS 3 (2012) ("*HUD Paths to Homeownership*"), https://www.huduser.gov/portal/periodicals/em/fall12/highlight1.html.

[56] *Id*. at 1.

[57] CFPB, DATA POINT: 2019 MORTGAGE MARKET ACTIVITY AND TRENDS (June 2020), https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf.

[58] *HUD Paths to Homeownership*, at 6 ("Along with income, household wealth determines whether families can afford down payment and closing costs and can sustain homeownership after purchase."); Christopher Herbert, Shannon Rieger, & Jonathan Spader, *Expanding Access to Homeownership as a Means of Fostering Residential Integration and Inclusion* 3 (2017) (on file with A Shared Future) ("[A] lack of savings to meet downpayment requirements and pay closing costs is by far the most significant financial barrier to buying a home."), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_expanding_access_to_homeownership_fostering_inclusion.pdf.

[59] Neil Bhutta, Jesse Bricker, Andrew Chang, et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106(5) FED. RESERVE BULLETIN (Sept. 2020), https://www.federalreserve.gov/publications/files/scf20.pdf.

median and mean net worth were $24,100 and $142,500, respectively.[60] These wealth disparities, in turn, reflect intergenerational transfer disparities: 29.9 percent of White families have received an inheritance, compared with only 10.1 percent of Black families.[61]

These disparities are the result of race-based policies and practices that created systemic barriers that exclude borrowers of color from accessing the quality credit they deserve. Addressing these disparities requires intentional efforts by lenders and policymakers. The CFPB should focus on facilitating these efforts by providing support for SPCPs to expand opportunities to those who were unfairly locked out. Because of our innately unfair structures and inequitable systems—residential segregation, dual credit market, over-reliance on outdated credit scoring systems, policies that favor wealthy households—maintaining the status quo will only lead to more inequality. This observation is true even with respect to well-intentioned affordable housing programs for low- and moderate-income individuals and areas. Without deliberate tailoring, these programs can exacerbate racial gaps—particularly in gentrifying areas—and can perpetuate segregation if housing options are limited to certain geographic areas. We must implement race-sensitive policies and programs that directly address the racial wealth gap and are explicitly designed to bring opportunities to those the government and private players explicitly excluded.

SPCP Recommendation 1: The CFPB should provide more information on existing programs and issue templates to help lenders draft SPCP written plans.

In a 2016 issue of its Supervisory Highlights, the CFPB favorably highlighted examples of existing SPCPs.[62] The CFPB should continue to provide public information about existing SPCPs—including details regarding product type and program benefits, eligibility criteria, and populations served. The more information lenders have about existing programs, the easier it will be for them to design their own Regulation B-compliant SPCPs.

Information about existing programs will also illustrate that a wide range of features and benefits can be deployed to ensure that SPCPs will effectively meet the needs of groups and further the purposes of ECOA. For example, the CFPB identified a mortgage program that provided "special rates and terms,"[63] and the Official Interpretations in Regulation B provide examples of new products to reach consumers with "credit inexperience" or that rely on "credit sources that may not report to consumer reporting agencies."[64] Similarly, DOJ has approved SPCPs that include debt forgiveness and checking accounts designed to increase accountholders because such programs would "establish or remediate consumer credit."[65]

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[60] *Id.*
[61] Neil Bhutta, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, WASHINGTON: BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Sept. 2020), https://doi.org/10.17016/2380-7172.2797.
[62] *2.5.2 Equal Credit Opportunity Act special purpose credit programs*, 12 CFPB Supervisory Highlights 17-19 (June 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf.
[63] *Id*. at sec. 2.5.2.
[64] 12 C.F.R. part 1002, Supp. I, ¶ .8(a)-6.
[65] Settlement Agreement Between the United States of Am. and KleinBank, ¶ 15 (May 8, 2018) ("KleinBank Settlement"), *available at* https://www.justice.gov/opa/press-release/file/1060996/download.

SPCP Recommendation 2: The CFPB should provide additional information about how entities can construct SPCPs.

Since SPCPs have been underutilized, entities desiring to establish such programs will benefit from additional guidance from the CFPB about how to design and implement such programs. The CFPB should provide a template for lenders to use to help them develop SPCPs that will fulfill the requirements set forth in the ECOA. The template could provide an outline with critical steps that entities should undertake in order to provide the appropriate information that the CFPB and/or prudential regulators will need to consider to ensure the program meets the criteria established in the statute.

Additional guidance could also provide information about features that entities might wish to include in a SPCP. These features should be focused not just on increasing access to credit but on designing products that are affordable and facilitate equity and wealth creation. Some features might include:

- Robust down-payment and closing cost grants and assistance;
- Below market interest rates;
- No private mortgage insurance;
- Low down payment requirements (supplemented by down payment grants);
- Flexible but tailored underwriting criteria (*e.g.*, consideration of alternative data like rental and utility payments; waiving years-in-operation requirements for small business applicants; etc.);
- Financial and homebuyer counseling;
- Targeted marketing and outreach;
- Low loan minimum requirements;
- No fee loans and fee waivers during servicing; and
- Debt forgiveness and favorable loss mitigation support.

The CFPB could further facilitate SPCPs by issuing illustrative templates of written plans for hypothetical SPCPs. Use of the templates would be voluntary and could be modified to reflect the details and criteria of, and support for, actual plans. These templates would facilitate compliance by providing guidance to lenders on regulatory expectations regarding the appropriate amount of detail and support for drafting a SPCP written plan that would be compliant with Regulation B requirements.

The CFPB should also encourage lenders to use SPCPs to complement other efforts to serve LEP consumers. In the course of implementing a comprehensive language access plan, lenders may identify the need for targeted support for consumers of particular national origins in specific markets. The CFPB should clarify that, while lenders need not create SPCPs in the course of designing marketing, originating, and servicing policies and practices for LEP consumers, lenders should use information gleaned during these efforts to identify whether SPCPs could help address lending gaps to consumers of specific national origins.

SPCP Recommendation 3: The CFPB should coordinate with sister agencies to codify that SPCPs do not violate overlapping antidiscrimination laws.

SPCPs are consistent with and provide a targeted and effective way to further the purpose of civil rights laws that complement ECOA, including the Fair Housing Act's twin goals of overcoming discrimination and reducing segregation. NFHA has published a legal analysis explaining why 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 FHAct and sections 1981 and 1982 of the Civil Rights Act of 1866, despite the absence of corresponding SPCP language in those statutes.[66]

The CFPB should coordinate with sister agencies, such as the prudential regulators and HUD, to clarify that lending programs designed to benefit applicants on the basis of a protected class such as race, national origin, or sex—in compliance with ECOA and Regulation B—also would not violate other federal antidiscrimination 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.[67] In addition, this conclusion best harmonizes ECOA with other antidiscrimination statutes, including the FHAct's purpose of furthering integration as well as case law confirming that appropriately-cabined protected-class conscious programs are permissible across antidiscrimination laws.[68] Official agency materials support this interpretation, including a direction in Regulation B that creditors can review HMDA 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 FHAct.[69] Moreover, legislative history accompanying ECOA's SPCP provisions reveals 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.[70]

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[66] STEPHEN HAYES, SPECIAL PURPOSE CREDIT PROGRAMS: HOW A POWERFUL TOOL FOR ADDRESSING LENDING DISPARITIES FITS WITHIN THE ANTIDISCRIMINATION LAW ECOSYSTEM (2020), https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

[67] *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974).

[68] *See, e.g.*, *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988).

[69] *See* 12 C.F.R. part 1002, Supp. I, .8(a)-5.

[70] *See, e.g.*, H.R. Conf. Rep. 94-873, at 8 (Mar. 4, 1976), 1976 U.S.C.C.A.N. 426, 428 (noting the SPCP provisions, "specifically permit[] the continuance of affirmative action type programs," and that the "[c]onferees were aware that there are a number of such ongoing programs"); 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/.

Additionally, the FFIEC Interagency Fair Lending Examination Procedures[71]—issued by the OCC, FDIC, Federal Reserve Board, NCUA, and adopted by the CFPB—highlight SPCPs as favorably 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 lender compliance with fair lending laws, including the FHAct and ECOA. They instruct examiners to consider home mortgage SPCPs, along with other housing loan programs designed to assist underserved consumers. They also caution examiners to identify home loan programs "that contain[ed] 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."[72] The Interagency Fair Lending Examination Procedures suggest that an ECOA-compliant SPCP complements and advances the purposes of other fair housing and lending statutes and that the absence of such a program would raise fair lending concerns when a lender has disproportionately excluded underserved groups in its loan originations.

Finally, 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 FHAct would be both legally incorrect and run counter to agencies' own FHAct obligations to affirmatively further fair housing (AFFH).

4. Affirmative Advertising to Disadvantaged Groups

CFPB Question 4: *Should the Bureau provide clarity under ECOA and/or Regulation B to further encourage creditors to use such affirmative advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?*

Yes, the Bureau should provide clarity under ECOA and amend Regulation B to illuminate the ways in which lenders can better reach key demographic groups and provide quality, sustainable credit. The CFPB has the opportunity to support efforts to reach historically marginalized consumers in protected classes through the creation and public dissemination of additional resources that enable institutions to confidently pursue such marketing. Lenders, and ultimately consumers themselves, would benefit from the availability of standardized language they can use in their affirmative marketing, and the CFPB can do more to illustrate the ways in which marketing programs can be designed with full compliance in mind. In the housing context, for example, borrowers of color are driving the greatest increase in new household formation and will make up a greater proportion of first-time homebuyers in the decades to come. The CFPB can be of great service to lenders who want to expand their footprint *and* increase credit opportunities for borrowers of color and other historically marginalized consumers.

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[71] FFIEC, INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES 7 (Aug. 2009), 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).
[72] *Id.*

The Equal Credit Opportunity Act, like the Fair Housing Act, allows for affirmative marketing efforts to protected classes. By employing various strategies that market quality, sustainable, and affordable products to protected classes, lenders can broaden the diversity of its applicant pool while staying within the parameters of their responsibilities under ECOA. Such efforts can also extend credit opportunities to people of color, people with disabilities, and other groups who may otherwise not seek credit due to a long history of exclusion by the mainstream credit market.

Affirmative marketing is permissible if used to reach out to historically underrepresented populations and broaden the diversity of an entity's applicant pool. It should not be used to exclude groups based on protected class. Under ECOA, a creditor may "affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor."[73] Indeed, the CFPB and other agencies responsible for administering ECOA, including the Department of Justice, have previously clarified that such affirmative advertising is permissible under ECOA and the Fair Housing Act if it does "not involve application of different lending standards."[74] For example, "special outreach to a minority community would be permissible."

HUD program policy and case law on affirmative marketing under the FHAct can be helpful in contemplating ways to assist lenders. Courts have approved under the FHAct affirmative marketing plans used to engage historically underrepresented populations. The Court in *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors* (935 F.2d 868, 884 (7th Cir. 1991)) concluded that the "affirmative marketing plan [that] merely provided additional information to White home buyers concerning properties they might not ordinarily know about nor consider, and involved no lessening of efforts to attract Black home buyers to these same properties . . . was not in violation of [FHAct]"). Similarly, the Court in *Raso v. Lago* (958 F. Supp. 686, 704 (D. Mass. 1997), aff'd, 135 F.3d 11 (1st Cir. 1998)) rejected a FHAct challenge to an affirmative marketing plan where White people were not discouraged from applying for credit and where those White people who formerly lived in a complex were recruited. This analysis is similar to the Title VII context, where a covered entity's efforts to broaden a pool of applicants to include women and applicants of color, standing alone, does not constitute discrimination. Rather, "[a]n inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment."[75]

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[73] 12 C.F.R. § 1002, Supp. I, 1002.4(b)-2.

[74] *See* INTERAGENCY POLICY STATEMENT ON DISCRIMINATION IN LENDING (1994), https://www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm. The exception here applies to the operation of a Special Purpose Credit Program, which we comment on earlier in our comments. But as a general rule of thumb, if protected class criteria are used for eligibility determination, then a Special Purpose Credit Program must be established.

[75] *See Duffy v. Wolle*, 123 F.3d 1026, 1038–39 (8th Cir. 1997), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *see also Mlynczak v. Bodman*, 442 F.3d 1050, 1059 (7th Cir. 2006).

The CFPB may also draw from existing HUD program requirements. HUD has provided regulations for affirmative marketing plans that must be used in connection with Federal Housing Administration-funded housing.[76] It has also promulgated regulations that set forth requirements to ensure that marginalized groups are included to the maximum extent possible.[77]

Affirmative Marketing Recommendation 1: The CFPB should provide model language that entities may use in their public-facing affirmative marketing materials.

As noted above, a lender is perfectly within the bounds of ECOA if its affirmative marketing seeks to broaden the diversity of its applicant pool and it does not use protected-class criteria to determine eligibility. However, lenders may be overly cautious about what type of language, imagery, and other affinity-based information to use for fear of appearing exclusive. To address this, NFHA recommends that the CFPB provide standardized model language and imagery that lenders may draw from and use in their affirmative marketing efforts. This language and imagery should cover each protected class under ECOA, as well as carefully analyze and discuss the nuances that may reasonably or unreasonably be understood as exclusionary.

Affirmative Marketing Recommendation 2: The CFPB should provide lenders with scenario-based FAQs to assist in the design and targeting of affirmative marketing programs.

The nation's current reckoning with structural racism has lit a deep desire among lending institutions to take a stance against systemic racism and to address their own role in perpetuating lending discrimination and other historic injustices. Many lenders have an appetite to design programs that meet the lending needs of protected classes, and the CFPB can play a role in providing them the confidence they need to move forward with targeting approaches.

One way to do this is to create guidance that sets forth best practices in affirmative marketing and to simulate analysis through several likely scenarios. For example, lenders may want to increase their footprint in historically Black neighborhoods but may not feel equipped to design a marketing approach that both reaches their target audience and comports with ECOA. Similarly, a lender may be concerned about little engagement with their products among Spanish-speaking borrowers and may want to roll out a marketing campaign that is informed by an analysis of the barriers they or other Limited English Proficiency borrowers experience.

The design of a marketing campaign itself is essential to successfully reach protected classes. Guidance should also provide clarity about what a lender should analyze when designing an affirmative marketing strategy. Elements of this analysis should include:

- How to appropriately conduct geographic targeting, for both brand marketing in new or underserved areas, and for products and services for which a lender seeks further market penetration;
- Types of media used, such as radio, print, tv, online platforms, and other vehicles;

[76] *See, e.g.*, 24 C.F.R. § 200.600, *et seq.*
[77] *See* 24 C.F.R. § 92.351.

- Possible collaboration with community organizations that work with underserved communities;
- Content development, including language and imagery; and
- Focus group research to obtain feedback on suggested language and imagery.

It should also be made clear how this guidance relates to Limited English Proficiency concerns as well as Special Purpose Credit Programs. It is important not to discourage lenders or cause confusion about what is permissible in affirmative marketing efforts where protected class does not affect eligibility determinations and in other efforts where it does.

Affirmative Marketing Recommendation 3: The CFPB should coordinate with other federal agencies to align affirmative marketing requirements of federal program participants.

The CFPB should coordinate with other agencies, including HUD, as it pursues new affirmative marketing guidance.

5. Small Business Lending

CFPB Question 5*: In light of the Bureau's authority under ECOA/Regulation B, in what way(s) might it support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned?*

Small businesses, including those owned by women and people of color, are critical to our national economy and to local communities. They provide essential goods and services and contribute to the character and livability of the neighborhoods in which they are located. They provide jobs and help business owners create the wealth needed for financial security, not only for themselves but also for their children, when that wealth can be tapped to help finance an education and/or passed along to the owner's children through intergenerational transfers.

The ability of entrepreneurs to start, sustain, and grow a small business depends on access to capital. This access has too often been denied to small businesses owned by women and people of color. The CFPB highlighted the important role played by small businesses and their need for access to credit in its May 2017 white paper on small business lending, noting,

> "Small businesses play a key role in fostering community development and fueling economic growth both nationally and in their local communities. Women-owned and minority-owned small businesses in particular play an important role in supporting their local communities. To contribute meaningfully to the U.S. economy, small businesses – and especially women-owned and minority-owned small businesses – need access to credit to smooth business cash flows from current operations and to allow entrepreneurs to take advantage of opportunities for growth." [78]

[78] CFPB, KEY DIMENSIONS OF THE SMALL BUSINESS LENDING LANDSCAPE (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf.

The CFPB also noted the lack of comprehensive, consistent data on small business lending and the challenges this poses for policymakers seeking to understand and regulate the small business lending market.

Congress identified this information gap more than a decade ago. In §1071 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), which amended the Equal Credit Opportunity Act, Congress tasked the CFPB with promulgating a rule requiring lenders to collect and report information on their lending to small, women-owned, and minority-owned businesses. For the better part of a decade, the CFPB has failed to carry out this task. Its failure has hampered efforts to better understand this market and ensure that it operates free from discrimination. This has undermined the CFPB's responsibilities to enforce ECOA and has left policymakers without an important tool to ensure that these businesses, which are so important to the vitality of local communities, have access to the credit they need to thrive.

One impact of this lack of data, and the accountability it would help to provide, can be seen in the recent Paycheck Protection Program (PPP). PPP was established by Congress to enable small businesses, including those owned by women and minorities, to weather the economic disruption caused by the coronavirus pandemic. As its name implies, a key goal of the program was to provide a mechanism through which employers could keep employees on their payrolls, despite the cutbacks and closures needed to mitigate the public health emergency. Armed with PPP loans and their generous terms, businesses could maintain payroll and stay afloat, enabling their workers to weather the worst impacts of the pandemic and helping to keep the economy going.

An analysis of the PPP conducted by the Center for Responsible Lending raised a number of concerns about the ability of small businesses owned by women and minorities to get access to the program.[79] "Based on how the program is structured, we estimate that upwards of 90% of businesses owned by people of color have been, or will likely be, shut out of the Paycheck Protection Program," said Ashley Harrington, director of federal advocacy and senior council for the Center for Responsible Lending…"[80] She added, "[o]ne obstacle for minority business owners is that many banks participating in the low-interest, forgivable loan program are only issuing loans to existing clients to speed up the approval process that grants access to the money."[81]

Had the CFPB moved swiftly a decade ago to institute the data reporting regime envisioned by Congress in §1071 of Dodd-Frank, policymakers and regulators—including the CFPB itself—could have intervened in the small business lending market to ensure greater access for these small businesses, many of which may not survive the current pandemic.

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[79] *The Paycheck Protection Program Continues to be Disadvantageous to Smaller Businesses, Especially Businesses Owned by People of Color and the Self-Employed*, CTR. FOR RESPONSIBLE LENDING (April 6, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-apr2020.pdf?mod=article_inline.

[80] Megan Cerullo, *Up to 90% of minority and women owners shut out of Paycheck Protection Program, experts fear*, CBS NEWS (April 22, 2020), https://www.cbsnews.com/news/women-minority-business-owners-paycheck-protection-program-loans/.

[81] *Id.*

The fundamental need for capital that all businesses have, including small, women-, and minority-owned businesses, will last far beyond the end of the current pandemic. So, too, will the CFPB's mandate to ensure that these businesses do not face discrimination in their efforts to obtain that credit and the importance of comprehensive, reliable information about this market. Thus, one of the most important steps that the CFPB can take to support efforts to meet the credit needs of these businesses is to move swiftly to promulgate the rulemaking contemplated by Congress, and to collect and make public the data that lenders report.

In September 2020, the CFPB took the first, long overdue, step toward implementing §1071, issuing a summary of proposals under consideration for small business lending data collection rulemaking.[82] NFHA urges the CFPB to move ahead expeditiously to adopt and implement a regulation mandating that all lenders involved in small business lending report comprehensive data on their lending to minority- and women-owned small businesses. Further, NFHA urges the CFPB to make these data available to the public in a format that is easy to access and facilitates analysis. This will enable researchers and policymakers alike to better understand this market, identify obstacles faced by these businesses, and design interventions that will better support the flow of credit to these vital enterprises.

6. Sexual Orientation and Gender Identity Discrimination

CFPB Question 6: *Should the Supreme Court's decision in Bostock affect how the Bureau interprets ECOA's prohibition of discrimination on the basis of sex? If so, in what way(s)?*

Yes. *Bostock* confirms the Bureau's existing position that ECOA prohibits discrimination on the basis of sexual orientation and gender identity. Indeed, after *Bostock*, there is no question that ECOA's prohibition on sex discrimination—which tracks Title VII's same prohibition—encompasses sexual orientation discrimination and gender identity discrimination. The CFPB should amend Regulation B to formalize this conclusion.

In a letter dated August 30, 2016, to Services & Advocacy for GLBT Elders (SAGE), the CFPB directly addressed the question of "whether the [Bureau] views credit discrimination on the bases of gender identity and sexual orientation . . . as forms of sex discrimination prohibited under the Equal Credit Opportunity Act (ECOA)."[83] After carefully examining relevant authority, the CFPB answered as follows:

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[82] CFPB, HIGH-LEVEL SUMMARY OF OUTLINE OF PROPOSALS UNDER CONSIDERATION FOR SBREFA: SMALL BUSINESS LENDING DATA COLLECTION RULEMAKING (2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_high-level-summary-of-outline-of-proposals_2020-09.pdf.

[83] Letter from CFPB to SAGE re: Application of the Equal Credit Opportunity Act to Credit Discrimination on the Bases of Gender Identity and Sexual Orientation (Aug. 30, 2016), https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf.

> [T]he current state of the law supports arguments that the prohibition of sex discrimination in ECOA and Regulation B affords broad protection against credit discrimination on the bases of gender identity and sexual orientation, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes as well as discrimination based on one's associations.[84]

This conclusion was based in part on decisions by the Equal Employment Opportunity Commission ("EEOC"), finding that sexual orientation discrimination and gender identity discrimination were forms of sex discrimination under Title VII because they "necessarily involve[d] sex-based considerations."[85] The CFPB gave significant weight to the EEOC decisions, noting that "the EEOC's views on what constitutes discrimination on the basis of 'sex' under Title VII are highly relevant to the similar statutory analysis of what it means to discriminate based on 'sex' under ECOA."[86]

The Supreme Court's decision in *Bostock* confirmed that this analysis was exactly right. In *Bostock*, the Court considered whether Title VII's prohibition on sex discrimination also prohibits discrimination because of sexual orientation or gender identity. It answered that question in the affirmative, holding that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[87] As the Court put it, "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'"[88]

Like Title VII, ECOA makes it unlawful to "discriminate" on the basis of "sex." And as the CFPB correctly explained in its 2016 SAGE letter, "[t]here is no apparent reason why the same reasoning that the Supreme Court and courts of appeals have applied to discrimination on the basis of 'sex' under Title VII would not equally apply to discrimination on the basis of 'sex' under ECOA as well."[89] In fact, the Court's central observation in *Bostock*—that it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex"[90]—applies to *all* discrimination based on sexual orientation and gender identity, regardless of the relevant statute. Thus, *Bostock* is resounding confirmation of the CFPB's prior opinion on this issue: that discrimination based on sexual orientation and gender identity is discrimination based on sex in violation of ECOA.

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] 590 U.S. __, 140 S. Ct. 1731, 1737 (2020).
[88] *Id.* at 1743.
[89] *See also* S. Rep. No. 94-589, 94th Cong., 2d. Sess., 4-5 (1976) ("judicial constructions of anti-discrimination legislation in the employment field . . . are intended to serve as guides in the application of this Act"); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law").
[90] *Bostock*, 140 S. Ct. at 1741.

The holding in *Bostock* that sex discrimination includes sexual orientation and gender identity discrimination has already reverberated outside the Title VII context. In *Grimm v. Gloucester County School Board*, the Fourth Circuit cited to *Bostock* in holding that a policy prohibiting a transgender student from using the boys' bathroom was discrimination "on the basis of sex" under Title IX.[91] The Eleventh Circuit also used *Bostock* to invalidate a similar transgender bathroom ban under Title IX in *Adams v. School Board of St. Johns County*.[92] The reliance on *Bostock*'s holding outside of the Title VII context demonstrates the general applicability of *Bostock* across various anti-discrimination statutes.

Beyond the legal underpinnings, a recognition that sex discrimination in ECOA includes sexual orientation and gender identity discrimination would have important practical ramifications for the LGBT community. A study published in the Proceedings of the National Academy of Sciences found that between 1990 and 2015, mortgage data revealed persistent discrimination against same sex loan applicants in mortgage lending.[93] The mortgage approval rate for same sex applicants is 3 to 8 percent lower than similarly situated different sex loan applicants.[94] Lenders that approved mortgage loans for same sex applicants charged, on average, 0.02 to 0.2 percent higher interest rates than to similarly situated different sex applicants.[95] A 2018 survey from Freddie Mac also found that 14 percent of gender expansive (transgender, nonbinary, etc.) homeowners, 19 percent of lesbian homeowners, and 10 percent of both gay and bisexual homeowners experienced discrimination in the home purchase process.[96] ECOA's prohibition against sex discrimination can become a potent tool for combatting rampant sexual orientation and gender identity discrimination in credit.

7. Scope of Federal Preemption of State Law

CFPB Question 7: *What are examples of potential conflicts or intersections between state laws, state regulations, and ECOA and/or Regulation B, and should the Bureau address such potential conflicts or intersections? For example, should the Bureau provide further guidance to assist creditors evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B?*

Yes. There are two areas in which creditors would benefit from further guidance on preemption from the CFPB. First, the CFPB should clarify that state and local laws that prohibit discrimination based on immigration status are not preempted by ECOA. Second, the CFPB should expressly extend a prior preemption opinion regarding special purpose credit and New York state law (currently found in the Official Interpretations to Regulation B) to all other states with similar laws.

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[91] 972 F.3d 586, 616–617 (4th Cir. 2020).

[92] 968 F.3d 1286, 1296, 1303 (11th Cir. 2020).

[93] Hua Sun & Lei Gao, *Lending practices to same-sex borrowers*, 116(19) PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 9293, 9294 (2019).

[94] *Id.*

[95] *Id.*

[96] Freddie Mac, *The LGBT Community: Buying and Renting Homes* (2018), http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf.

NFHA NATIONAL FAIR HOUSING ALLIANCE

Preemption Recommendation 1: The CFPB should formally confirm that ECOA does not preempt state and local protections against discrimination on the basis of citizenship, immigration status, or related criteria.

Two states and at least one city now prohibit credit discrimination on the basis of citizenship or immigration status: California, Washington State, and New York City.[97] By contrast, citizenship and immigration status are not among the protected classes expressly enumerated in ECOA, and the CFPB's Official Interpretations of Regulation B explain that a denial of credit on the ground that an applicant is not a United States citizen "is not per se discrimination based on national origin."[98] Regulation B clarifies that a creditor "may consider the applicant's immigration status or status as a permanent resident," only if "necessary to ascertain the creditor's rights and remedies regarding repayment" or if necessary to comply with laws limiting dealings with certain countries.[99] These provisions make the narrow point that consideration of immigration status for these limited purposes does not necessarily constitute per se national origin discrimination.

Although ECOA itself does not explicitly enumerate citizenship and immigration status as protected classes, ECOA certainly does not preempt state and local laws that do provide these additional protections. ECOA expressly states that state law and ECOA are not inconsistent if the state law "gives greater protection to the applicant."[100] Laws prohibiting discrimination based on citizenship and immigration status provide "greater protection" to the applicant. They do not "[require] or [permit] a practice or act prohibited by" ECOA or Regulation B, or fall into any other circumstance that Regulation B enumerates as an inconsistency dictating preemption.[101] Accordingly, they are not preempted by ECOA. Given the CFPB's authority to determine preemption issues, the CFPB should clarify for creditors that state laws prohibiting discrimination based on citizenship or immigration status—including the specific laws cited above—are not preempted. This clarification could be added as an official interpretation of 12 C.F.R. § 1002.11(a) (Inconsistent state laws).

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[97] *See* CAL. CIV. CODE § 1747.80 (prohibiting discrimination in issuing credit cards based on protected categories in CAL. CIV. CODE § 51(b)); CAL. CIV. CODE § 51(b) (prohibiting discrimination by all business establishments and listing citizenship and immigration status as protected categories); WASH. REV. CODE § 49.60.175-176 (prohibiting discrimination based on "citizenship or immigration status" in any credit transaction); N.Y.C. ADMIN. CODE § 8-107(4) (prohibiting public accommodations from discriminating based on "immigration or citizenship status"); NYC Admin. Code § 8-107(5) (prohibiting discrimination based on "immigration or citizenship status" in lending for purpose of purchasing or repairing housing or commercial space).

[98] 12 C.F.R. § 1002, Supp. I, ¶ 6(b)(7).

[99] 12 C.F.R. § 1002.6(b)(7); *see also* 12 C.F.R. Pt. 1002, Supp. I, .2(z)-2 ("A creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant's immigration status into account. A creditor may also take into any applicable law, regulation, or executive order restricting dealings with citizens (or the government) of a particular country or imposing limitations regarding credit extended for their use.").

[100] 15 U.S.C. § 1691d(f); 12 C.F.R. § 1002.11(a).

[101] 12 C.F.R. § 1002.11(b)(1).

Preemption Recommendation 2: The CFPB should formally confirm that ECOA preempts all state and local laws that would otherwise prohibit SPCPs.

The CFPB should formalize the position that ECOA preempts state laws that would prohibit special purpose credit programs. This conclusion is evident from existing provisions in Regulation B; the CFPB should make some modest adjustments to remove any ambiguity. Regulation B is clear that ECOA preempts state laws that "[p]rohibit[ed] inquiries necessary to establish or administer a special purpose credit program."[102] Although that text, on its face, is limited to inquiries, the necessary implication is that state laws that prohibit consideration or evaluation of such information are also preempted. The Official Interpretation of 12 C.F.R. § 1002.11(a) takes that position in a preemption determination specific to New York state law. The determination states that New York's prohibition on credit discrimination on the basis of race, creed, color, national origin, age, sex, marital status, or disability "is preempted to the extent that it bars taking a prohibited basis into account when establishing eligibility for certain special-purpose credit programs."[103] The CFPB should clarify that its preemption determination regarding New York state law applies equally to other, similar state laws.

8. Public Assistance Income

CFPB Question 8: *Should the Bureau provide additional clarity under ECOA and/or Regulation B regarding when all or part of the applicant's income derives from any public assistance program? If so, in what way(s)? For example, should it provide guidance on how to address situations where creditors seek to ascertain the continuance of public assistance benefits in underwriting decisions?*

Yes. The CFPB should provide additional guidance under ECOA and/or Regulation B related to how creditors seek to ascertain the continuance of public assistance benefits in underwriting decisions. Although the CFPB has issued a bulletin directly addressing this issue, the CFPB's statement that stakeholders continue to have questions about these provisions demonstrates that Regulation B and the limited commentary are not sufficient.

The commentary in Regulation B requires a creditor to evaluate the income derived from public assistance on an individual basis and allows the creditor to consider the length of time an applicant will likely remain eligible to receive such income.[104] The issue of how creditors should confirm the continuance of public benefits was explained by the CFPB in its 2013 Qualified

[102] 12 C.F.R. § 1002.11(b)(1)(v).
[103] 12 C.F.R. § 1002, Supp. I, ¶ 11(a)(1).
[104] 12 C.F.R. § 1002.6, Supp. I, ¶ 6(b)(5)-(1); ¶ 6(b)(2)-6.

Mortgage Rule[105] and in Bulletin 2014-03,[106] discussed in more detail below. Despite this guidance provided by the CFPB in 2013 and 2014, the CFPB states that stakeholders continue to have questions about these provisions under ECOA and/or Regulation B.

Public Assistance Income Recommendation: Elevate the language in CFPB Bulletin 2014-03 to Regulation B commentary and amended Regulation B.

The language in CFPB Bulletin 2014-03 at p. 3, reiterating the 2013 Qualified Mortgage Rule, reads:

> On July 24, 2013, the CFPB published a final rule that, among other things, clarifies the verification requirements for Social Security income used in the debt-to-income ratio that determines whether a loan is a Qualified Mortgage under the Ability-to-Repay and Qualified Mortgage Standards Rule (Ability-to-Repay Rule). Specifically, Appendix Q of Regulation Z, 12 C.F.R. part 1026, was amended to provide for verification of Social Security income by means of "a Social Security Administration benefit verification letter (sometimes called a 'proof of income letter,' 'budget letter,' 'benefits letter,' or 'proof of award letter')." **The Appendix explains that "[i]f the Social Security Administration benefit verification letter does not indicate a defined expiration date within three years of loan origination, the creditor shall consider the income effective and likely to continue."** The Appendix further notes that "[p]ending or current re-evaluation of medical eligibility for benefit payments is not considered an indication that the benefit payments are not likely to continue." (emphasis supplied.)

Although NFHA submitted comments in 2019 advocating for the removal of Appendix Q,[107] NFHA supports the Appendix Q language in bold above to provide guidance regarding public assistance income.

CFPB Bulletin 2014-03 also cited the similar verification of income underwriting guidelines for loans insured by the Federal Housing Administration, guaranteed by the Department of Veterans Affairs and purchased by Fannie Mae and Freddie Mac.[108]

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[105] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 44,686, 44,719-20 (July 24, 2013) (codified at 12 C.F.R. pt. 1026, Appendix Q).
[106] CFPB Bulletin 2014-03, Social Security Disability Income Verification, (Nov. 18, 2014), https://files.consumerfinance.gov/f/201411_cfpb_bulletin_disability-income.pdf.
[107] NFHA, Comment Letter on Advance Notice of Proposed Rulemaking Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z), 12 CFR Part 1026; Docket No. CFPB-2019-0039 RIN 3170-AA98 (Sept. 16, 2019).
[108] *Id*. at 3-5.

The CFPB, through commentary and amendments to Regulation B, should expressly state:

- If the Social Security Administration or other applicable agency benefit verification letter does not indicate a defined expiration date within three years of loan origination, the creditor shall consider the income effective and likely to continue;
- Creditors may not ask applicants to provide documentation that does not exist, such as requesting a letter from the Social Security Administration that confirms disability income will last for at least three years;
- Pending or current re-evaluation of medical eligibility for benefit payments is not considered an indication that the benefit payments are not likely to continue; and
- Creditors may not inquire into or request documentation concerning the nature of the disability or the medical condition of the borrower in an attempt to determine whether the disability is permanent for the purposes of determining whether benefits are likely to continue.

9. Artificial Intelligence and Machine Learning

CFPB Question 9: *Should the Bureau provide more regulatory clarity under ECOA and/or Regulation B to help facilitate innovation in a way that increases access to credit for consumers and communities in the context of AI/ML without unlawful discrimination? If so, in what way(s)? Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML? If so, in what way(s)?*

Yes. While AI/ML models may offer some benefits, they have the potential to replicate, amplify, and exacerbate discriminatory lending practices. The CFPB should use its regulatory and supervisory tools to ensure that entities' sound compliance management systems include routine fair lending testing of models, including looking for and adopting less discriminatory alternatives to models that may cause disproportionate negative impacts on protected classes. The CFPB should insist on equivalent testing for credit-related models developed or implemented by third parties. Robust testing for disparate impact and less discriminatory alternatives will ensure that innovation increases access to credit without unlawful discrimination. The CFPB should also compel creditors to use debiasing techniques to increase the fairness of models. (Responses regarding notifications of action taken are provided in Question 10 below.)

AI/ML Recommendation 1: AI/ML Models Must be Closely Monitored to Ensure They Do Not Discriminate against Protected Classes**.**

Models and algorithms have been used for credit-related decisions for decades, the most obvious examples being credit underwriting and pricing. Today, models are ubiquitous in consumer markets and are constantly being applied in new ways. In addition to underwriting and pricing, lenders use models as part of their own internal marketing campaigns, to determine where and how to solicit new customers, and to determine offers to existing customers. Lenders also rely on

third-party vendors for marketing. Entities like Facebook—which play an important gatekeeping role in the housing and credit markets, just as brokers and agents always have—offer marketing and advertising services based on models, some of which have also been the focus of civil rights lawsuits.[109] Lenders also rely on data and tools, including models and modeled variables, provided by third parties like consumer reporting agencies (CRAs).

These systems often have a disparate impact on people and communities of color, particularly with respect to credit, because they reflect the dual credit market that resulted from our country's long history of discrimination. For example, in the housing context, screening algorithms offered by CRAs have had serious discriminatory effects.[110] Credit scoring systems have been found to discriminate against people of color.[111] Risk-based pricing systems can perpetuate bias as well. In a Berkeley study, researchers found that certain algorithmic-based pricing systems discriminate against Blacks and Latinos, overcharging them by more than $765 million per year.[112] In short, these systems can penalize people simply because of the communities in which they live and associate, and the types of risky credit historically targeted to those communities.[113]

In addition to new *uses* of models, there are new *types* of sophisticated models that process new kinds and greater quantities of data. In particular, entities are increasingly using artificial intelligence models to make decisions regarding creditworthiness, marketing, and other key issues. These models, as with non-AI algorithmic models, raise serious risks of discrimination. Machine learning models, for example, can be opaque and inscrutable. It can be difficult or impossible to understand how these models process variables to reach the conclusions they reach.[114] But, like any model, they can reflect and perpetuate bias and historical discrimination.[115] Scholars have pointed out that discrimination can be introduced, often unintentionally, during at least three stages of modeling: "defining the output variable and

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[109] *See* NFHA, *Facebook Settlement* (Mar. 19, 2019), https://nationalfairhousing.org/facebook-settlement/.
[110] *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Solutions, LLC*, ---F. Supp. 3d---, 2020 WL 4570110 (D. Conn. 2020) (denying motion for summary judgment to dismiss Fair Housing Act disparate impact and disparate treatment claims based on tenant screening algorithm).
[111] Sarah Ludwig, *Credit scores in America perpetuate racial injustice. Here's how*, THE GUARDIAN (Oct. 13, 2015), https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why .
[112] Robert Bartlett, Adair Morse, Richard Stanton, & Nancy Wallace, *Consumer-Lending Discrimination in the FinTech Era*, UC BERKELEY (2019), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.
[113] *See, e.g.*, Rice, *supra* note 7.
[114] *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).
[115] *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); 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_discrimination.pdf; Mark MacCarthy, *Standards of Fairness for Disparate Impact Assessment of Big Data Algorithms*, 48 CUMB. L. REV. 67, 75-76 (2018).

labeling its constituent classes, collecting and labeling the training data, and selecting the input variables."[116] For example, models are trained on historical data. If that data reflects existing discriminatory patterns or biases—which much of it will—the model will perpetuate those same problems.[117]

Thus, discrimination can be introduced into models in many ways, and examples of discriminatory models abound, particularly in the finance and housing space. For example, the financial industry has for centuries excluded people and communities from mainstream, affordable credit based on race and national origin.[118] There has never been a time when people of color have had full and fair access to mainstream financial services. This is in part due to the separate and unequal financial services landscape in which mainstream creditors are concentrated in predominantly White communities and non-traditional, higher-cost lenders, such as payday lenders, check cashers, and title money lenders, are hyper-concentrated in predominantly Black and Latino communities.[119]

Not only have communities of color thus been presented with unnecessarily limited choice in lending products, but many of the products that *have* been made available to these communities have been designed to fail, resulting in devastating defaults.[120] Borrowers of color with high credit scores have been steered into subprime mortgages, even when they qualified for prime credit.[121] Models trained on this historic data will reflect the discriminatory steering that led to disproportionate defaults by borrowers.[122]

Even worse, it is common for algorithmic models (AI-based or not) to consider the types of tradelines consumers have received in the past. That means models will penalize borrowers steered into risky products who did *not* default—*i.e.*, the borrowers who paid off their loans—simply because these borrowers were targeted for the riskier products to begin with.[123] Underwriting based on a history of *inquiries* into risky loan products is even worse; consumers make inquiries into these products often because that is what has historically been available to their communities. Penalizing consumers for shopping for products, regardless of their performance with respect to those products, epitomizes these systemic barriers. These problems are exacerbated by sophisticated models and data use. As reported by Trulia in 2018, scoring systems used for credit and other risk scores that can determine access to credit and housing, "artificially intelligent or not, are opaque; inaccurate, or arbitrary; and potentially discriminatory."[124]

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[116] 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 115, at 677-92).
[117] Evans, *supra* note 115; Barocas, *supra* note 115, at 674.
[118] Rice, *supra* note 7, at 940.
[119] Cheryl Young & Felipe Chacon, *50 Years After the Fair Housing Act – Inequality Lingers*, TRULIA (April 19, 2018), https://www.trulia.com/research/50-years-fair-housing/.
[120] *Id*. at 944.
[121] *Id*. at 944-45.
[122] *Id*. at 949.
[123] *Id.*
[124] Lehr, *supra* note 116, at 662-63.

AI systems can manifest bias in myriad ways. These include design flaws in systems that are constructed in a manner that encourages biased outcomes. NFHA's challenge against Facebook's advertising platform design is a great example of how design flaws can drive discriminatory outcomes. Systems can also be developed so they simply mirror bias in society; this can happen if systems are not carefully tested for disparate outcomes. The Berkeley analysis of risk-based pricing systems is a great example of how bias replete throughout our society can be reflected in algorithmic programs—both AI-based and non-AI based.

The use of unrepresentative, insufficient, or flawed training data will also result in unfair AI. AI systems can sometimes be built using data sets that are not robust or fully represent the universe of consumers that will ultimately be assessed by the utility. An example of this is when Amazon famously built a recruitment system that disadvantaged women because the training data set was overpopulated with White men. Another example is when facial recognition technology mis-reads women or certain racial/ethnic groups because the data used to train the system did not include enough examples of women and/or people of color.

Biased feedback loops can also drive unfair outcomes by amplifying discriminatory information within the AI system. For example, a consumer who lives in a segregated community that is also a credit desert might access credit from a payday lender because that is the only creditor in her community. However, even when the consumer pays off the debt on time, her positive payments will not be reported to a credit repository and she loses out on any boost she might have received from having a history of timely payments. With a lower credit score, she will become the target of finance lenders who peddle credit offers to her. When she accepts an offer from the finance lender, her credit score is further dinged because of the type of credit she accessed. Thus, living in a credit desert prompts accessing credit from one fringe lender that creates biased feedback that attracts more fringe lenders, resulting in a lowered credit score and further barriers to accessing credit in the financial mainstream.

A lack of diversity on teams developing technology can also generate bias. People with divergent backgrounds and experiences bring unique perspectives to understanding how data impact different segments of the market and can lend deeper and broader insights into what the data might be stating, or not stating.

In all these ways and more, models have been used for decades to make decisions in housing and credit markets that have a serious discriminatory impact based on race and other protected classes. That use is growing and becoming more complicated, increasing the risk of discriminatory impact.

AI/ML Recommendation 2: The CFPB should ensure entities conduct fair lending testing of models.

As noted above in the discussion of disparate impact, the CFPB should use its regulatory and supervisory tools to ensure that entities' compliance management systems include routine fair lending testing of all credit-related models. This testing should include disparate impact testing, which requires looking for and adopting less discriminatory alternatives to models that may cause disproportionate negative impacts on protected classes.

With limited explicit exceptions, it is a plain violation of the ECOA's prohibitions against overt, intentional discrimination to use a protected class as a factor in a credit scoring model related to housing.[125] This is equally true for variables that act as proxies for protected characteristics. For example, as HUD has recognized, often "lack of English proficiency is used as a proxy for national origin-discrimination."[126] Inclusion of lack of English proficiency in a model to price loans for otherwise eligible customers would, for example, constitute intentional discrimination on the basis of national origin. The Office of the Comptroller of the Currency (OCC) has made this point explicit with respect to model segmentations.

Segmenting the population by any other prohibited basis [other than age], regardless of whether the credit scoring system is validated, is illegal. Moreover, factors linked so closely to a prohibited basis that they may actually serve as proxies for that basis cannot be used to segment the population.[127]

Accordingly, entities must eliminate protected classes and proxies or substitutes for those classes from their models (and model policies, like segmentations, cutoffs, overrides, etc.) to avoid overtly, intentionally discriminating against consumers.

However, simply removing protected classes and proxies is insufficient, standing alone, to ensure compliance with ECOA. Models that do not contain substitutes or "close proxies" often have adverse effects on protected classes. This can happen for a number of reasons, including that a model is trained on unrepresentative data or simply because non-proxy data reflects

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[125] FFIEC, INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES 8 (Aug. 2009), https://www.ffiec.gov/pdf/fairlend.pdf (explaining that "overt discrimination" includes using "variables in a credit scoring system that constitute a basis or factor prohibited by Regulation B or, for residential loan scoring systems, the FHAct"); OCC Bull. 1997-24 App'x., Safety and Soundness and Compliance Issues on Credit Scoring Models (1997), https://www.occ.treas.gov/news-issuances/bulletins/1997/bulletin-1997-24a.pdf. (noting that "a creditor cannot use a credit scoring system that assigns various points based on the applicant's race, national origin, or any other prohibited basis," with an exception for age).

[126] HUD, OFFICE OF GENERAL COUNSEL GUIDANCE ON FAIR HOUSING ACT PROTECTIONS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY 3 (Sept. 15, 2016) (quoting *Aghazadeh v. Me. Med. Ctr.*, No. 98-421-P-C, 1999 U.S. Dist. LEXIS 23538, at *12 (D. Me. July 8, 1999)).

[127] OCC Bull. 97-24, Credit Scoring Models 10 (May 1997), https://ithandbook.ffiec.gov/media/resources/3672/occ-bl-97-24_credit_scor_models.pdf.

patterns of historic discrimination and segregation, as discussed above.[128] In other words, whether variables are proxies or close substitutes does not answer the question of whether a model causes impermissible disparate impacts.

Responsible lenders have established systems for assessing the adverse effects of models and for identifying and adopting less discriminatory alternative models. Various techniques are used, but as a general matter, entities evaluate whether their models cause adverse impacts. If such impacts exist, the entities assess whether protected-class-neutral-changes to the model—for example removal or substitution of certain variables—would result in less of a disparate effect.[129] The introduction of more complex models does not change this obligation: algorithmic discrimination can be mitigated and addressed for even the most sophisticated artificial intelligence models.[130] In fact, AI can be used to test for discriminatory outcomes in highly sophisticated systems.

Lenders have been on notice "at least since the issuance of the Joint Policy Statement nearly [25] years ago" of the application of disparate impact to their lending practices.[131] Lenders should regularly assess policies and practices related not just to variables used, but to segmentations, score thresholds, and overrides, all of which can raise discrimination risks.[132] The CFPB should use its regulatory and supervisory tools to ensure that entities' compliance management systems include routine fair lending testing of all credit-related models.

Importantly, disparate impact and alternative testing should rely on methodologies for assessing impact that focus on disparities in the rates of credit provided, pricing for that credit, or other measures of access across protected classes, without controls that would unnecessarily obviate the search for a less discriminatory alternative. These methodologies should also not rely on accuracy or performance metrics that could exacerbate disparities or artificially avoid the requirement to search for less discriminatory alternatives.

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[128] *See, e.g.*, Lehr, *supra* note 116, at 703-04 ("[O]utcome variables can be disadvantageously defined, data can be collected in a nonrepresentative manner, data can have baked into them preexisting human biases, and a particular set of input variables can be more predictive for one group than another. . . . [and] an overfitting algorithm could generate less accurate predictive rules for minority groups than for others.").
[129] *See* Nicholas Schmidt & Bryce Stephens, *An Introduction to Artificial Intelligence and Solutions to the Problems of Algorithmic Discrimination* 73(2) QUARTERLY REPORT 130, 141 (2019), https://arxiv.org/pdf/1911.05755.pdf; DAVID SKANDERSON & DUBRAVKA RITTER, FRB OF PHILADELPHIA – PAYMENT CARDS CENTER DISCUSSION PAPER NO. 14-2, FAIR LENDING ANALYSIS OF CREDIT CARDS 38-40 (2014).
[130] *See* Schmidt, *supra* note 129, at 142; Lehr, *supra* note 116, at 704-05.
[131] 2013 Rule, 78 Fed. Reg. at 11476.
[132] *See, e.g.*, OCC Bull. 97-24, Credit Scoring Models 10 (1997) (warning of ECOA risks related to overrides and segmentations), https://ithandbook.ffiec.gov/media/resources/3672/occ-bl-97-24_credit_scor_models.pdf; *United States v. Assocs. Nat'l Bank*, No. 1:99-cv-00196-SLR (D. Del. Mar. 29, 1999) (suit based on implementation of different score cut-offs for English-language and Spanish-language applicants); *United States v. Deposit Guar. Nat'l Bank*, No. 3:99-cv-67-OLN (S.D. Miss. 1999) (suit based on discretionary overrides of credit scored applicants).

AI/ML Recommendation 3: The CFPB should ensure vendor models undergo fair lending testing.

As noted, entities rely increasingly on models created or deployed by third parties. These include models for marketing, screening, underwriting, and pricing. The CFPB should ensure these third-party models undergo fair lending testing as well. That testing should include: (1) transparency for entities regarding the variables and model criteria, including segmentations, optimization, and the like; and (2) disparate impact and alternatives assessments.

The CFPB and OCC bulletins on third-party service provider liability emphasize that relationships with service providers do not absolve banks of responsibility for complying with consumer protection laws, including ECOA and Regulation B. Entities must insist on relationships that allow them to determine whether service providers are complying with applicable laws and regulations.[133] Particularly with respect to pricing and underwriting models developed by third parties, creditors should require vendors to provide developmental evidence explaining model components, design, limitations, and intended use, as well as testing and ongoing monitoring of results. In addition, creditors should validate their use of vendor models and investigate the relevance of vendor-provided input data and assumptions. In short, as the OCC recently explained with respect to artificial intelligence underwriting models: "[b]ank management should be able to explain and defend underwriting and modeling decisions."[134]

AI/ML Recommendation 4: The CFPB should require creditors to use de-biasing techniques.

Many tools and methodologies have been identified for debiasing technology, and the CFPB should compel creditors to utilize these mechanisms to make the marketplace fairer and ensure compliance with ECOA. Debiasing techniques include:

- Ensuring data scientists, engineers, and others developing technologies used by creditors receive extensive fair housing and fair lending training to develop a deep understanding about the ways systems can perpetuate discrimination and how to debias technology;
- Encouraging entities that develop technologies for use in financial services to increase diversity since it will lead to better outcomes for consumers. Research shows that diverse teams are more innovative and productive,[135] and can help develop fairer solutions;[136]

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[133] *See* CFPB, Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf; OCC Bull. 2013-29, Third-Party Relationships Risk Management Guidance (2013), https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html.

[134] OCC, SEMIANNUAL RISK PERSPECTIVE 23 (Spring 2019), https://www.occ.treas.gov/publications-and-resources/publications/semiannual-risk-perspective/files/semiannual-risk-perspective-spring-2019.html.

[135] John Rampton, *Why You Need Diversity on Your Team, and 8 Ways to Build It*, ENTREPRENEUR (Sept. 6, 2019), https://www.entrepreneur.com/article/338663.

[136] Kasey Matthews, *Improving This Algorithm Can Make Lending A Lot Less Racist*, ZESTAI (Aug. 2020), https://zest.ai/article/a-few-changes-in-one-algorithm-can-make-lending-a-lot-less-racist.

- Compelling creditors to increase transparency and explainability in the technologies they use since this will help identify where bias might be generating and create improved models. It will also help regulators better undertake their oversight responsibilities;
- Requiring robust fair lending testing (see the discussion above);
- Increasing oversight and governance to include responsible regulation. This entails the CFPB securing highly trained data scientists, ethicists, civil rights experts, and engineers, as well as developing effective in-house technologies to enable the CFPB to effectively monitor creditors' use of technology; and
- Using newly developed methodologies like Adversarial Debiasing, Generalized Location Models, Monotonic Constraints, and other methods that help debias AI and other algorithmic systems.

10. ECOA Adverse Action Notices

CFPB Question 10: *Under ECOA and Regulation B, a statement of reasons for adverse action must be specific and indicate the principal reason(s) for the adverse action. The Bureau understands from direct engagement and its supervisory work that stakeholders continue to have questions about this requirement. Should the Bureau provide any additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor, requiring a notification that includes a statement of specific reasons for the adverse action? If so, in what way(s)?*

Yes. The CFPB should provide additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor by requiring a notification that includes a statement of specific reasons for the adverse action. General categories of reasons currently permitted fail to provide sufficient information to enable a consumer to understand why actions were taken or how to improve their chances of receiving credit in the future.

ECOA (and complementary Fair Credit Reporting Act) adverse action notice requirements are intended to serve three purposes: (1) notify consumers about potential inaccuracies in the information used to take adverse action; (2) prevent and reveal discrimination; and (3) educate consumers about how they might improve their chance of being approved for credit in the future. The existing regulatory environment related to adverse action notices fails to achieve these goals. Accordingly, the CFPB should provide guidance addressing three overlapping risks related to adverse action. First, ensure adverse action notices are actually understandable and useful for consumers. Second, ensure creditors are providing accurate adverse action notices. Third, ensure creditors are complying with basic regulatory requirements and are not attempting to evade the letter and spirit of Regulation B's adverse action notice requirements. Additionally, the CFPB should enhance its oversight of lenders' compliance with Adverse Action Notice requirements as it relates to fair lending violations.

Adverse Action Recommendation 1: The CFPB should ensure adverse action notices are understandable and useful.

The CFPB, through guidance and amendments to Regulation B, should insist that creditors provide more understandable and consumer-friendly reasons in adverse action notices. A key purpose of the adverse action requirements is to provide transparency about the credit underwriting process so that consumers understand what information is being used to judge their applications. That knowledge should allow consumers to take steps to correct inaccuracies in the information used and improve their chances of being approved for credit in the future. Unfortunately, there is little emphasis in Regulation B on ensuring these notices are consumer-friendly. Creditors treat them as formalities, with little emphasis on designing them to actually assist consumers.

The CFPB's recent "tech sprint" on adverse action reasons is a good first step.[137] The CFPB should publicly share the results and learning gained during that event. And the CFPB should continue to convene focus groups and conduct consumer testing to learn what types of reasons are actually useful for consumers.

The CFPB should take three further steps. First, lenders should be required to provide directionality associated with principal reasons. The commentary to Regulation B currently provides that creditors "need not describe how or why a factor adversely affected an applicant. For example, the notice may say 'length of residence' rather than 'too short a period of residence.'"[138] This guidance does not facilitate the goals of adverse action reasons. In fact, because credit decisioning is often counter-intuitive, it is likely to result in notices that actively mislead consumers. For example, many consumers might assume that shopping around for credit products is prudent and would be viewed favorably in a credit decision: an educated consumer willing to do the work to understand her options is also likely to take the credit obligation seriously. But the result is the opposite in many credit decisions; inquiries are treated as a negative factor. For this reason, a notice informing a consumer that adverse action was taken because of the "number of recent inquiries on credit bureau report"—as the Regulation B model sample notification form suggests—may well mislead reasonable consumers. This concern is exacerbated as models and data become more complicated and interactions less intuitive.

Second, the CFPB should explore requiring lenders to provide notices containing counterfactuals; lenders should provide as much information as possible to consumers about what changes would be most significant in terms of improving their chances of receiving credit. For example, instead of returning Loan-to-Value ratio as an adverse action code, a lender could return: "If you reduce the proposed loan amount by 2% or increase your down payment by 2%, you're likely to be approved for this loan." Similarly, instead of "length of residence," a notice could state the minimum length of time that would have been acceptable. This type of information would allow consumers to focus on specific actions to improve their likelihood of receiving credit, and would increase their ability to identify potential inaccuracies in the

[137] *See Electronic disclosure of adverse action virtual tech sprint*, CFPB, https://www.consumerfinance.gov/policy-compliance/innovation/cfpb-tech-sprints/electronic-disclosures-tech-sprint/.
[138] 12 C.F.R. § 1002, Supp. I, ¶ 9(b)(2)-2.

information used. To the extent lenders using AI models might argue that it is not possible for them to provide directional information, as suggested above, because directionality of variables in their models is not monotonic, providing counterfactual information would allow an alternative means of compliance.

Third, the CFPB should require creditors to provide direct contact information for trained representatives who can explain the reason(s) for the adverse action and the credit decisioning process in more detail to the consumer. The complexity of credit decisioning has far outpaced any efforts by lenders to ensure their customers have a reasonable understanding of how their information is used in the process. CFPB complaints show that consumers have attempted to contact creditors to better understand exactly why they have received an adverse action, but have been unable to speak with anyone who could provide concrete and meaningful information. Experts could help consumers better understand the reasons provided by creditors.

Adverse Action Recommendation 2: The CFPB should ensure creditors are providing accurate adverse action notices.

The CFPB and other agencies have recognized that the increased use of AI/ML brings increased risks of inaccurate adverse action reasons. As noted above, these models can be difficult to explain. However, these complications do not relieve creditors of their obligations to provide reasons that "relate to and accurately describe the factors actually considered or scored by a creditor."[139] Accordingly, the CFPB should make clear that if creditors are using complicated AI/ML models, they must use explainability techniques for generating adverse action reasons that reliably produce accurate reasons. As the OCC has emphasized, addressing fair lending risks requires an effective explainability method: regardless of the model type used, "[b]ank management should be able to explain and defend underwriting and modeling decisions."[140]

The CFPB should develop its own in-house expertise to test and understand explainability methods, and then provide public guidance on the best-in-class practices the CFPB uses. At the same time, it should clarify that methods that do not reliably return accurate results do not comply with Regulation B and it should take action against lenders that do not invest in those techniques.

Adverse Action Recommendation 3: The CFPB should ensure compliance and monitor attempts to evade Regulation B.

The CFPB should ensure that lenders are not evading Regulation B's adverse action notice requirements by masking the actual reasons for denial.

Basic compliance with Regulation B requires providing reasons that accurately describe the factors actually considered or scored by the creditor. Often, credit models will consider dozens of variables (and increasingly more), many of which relate to similar core reasons. For example, a group of variables might all relate to late payments over different periods of time. Lenders often

[139] 12 C.F.R. part 1002, Supp. I, ¶ 9(b)(2)-2.
[140] OCC, SEMIANNUAL RISK PERSPECTIVE, *supra* note 134.

group these related variables into a single principal reason to provide to consumers. The CFPB should ensure that in this mapping process, lenders are not masking variables they do not want to disclose to consumers. For example, imagine a lender that uses a school "prestige" rating score in a model. That lender may not want to disclose that it is denying an applicant because she did not attend a school the lender has rated as "prestigious," and so instead the lender inaccurately tells the consumer she was denied because of "insufficient income," on the flawed theory that the education rating is used to predict future income. That practice would be unlawful, and the CFPB should examine institutions with an eye toward how they are mapping variables onto reasons provided to consumers.

Relatedly, some lenders provide insufficient detail in their notices when they are denying applicants for suspected likelihood of fraud or "abuse" of credit. In one recent example, a district court disapproved of a bank informing an applicant that he was denied due to his "[p]revious unsatisfactory relationship with this bank."[141] The bank argued that it had closed four of the customer's existing credit accounts due to a perceived risk of future fraud, and therefore this reason was sufficiently specific. The court disagreed, reasoning that the notice provided "no guidance as to what standard or policy the creditor considered, thereby leaving the applicant clueless as to why they were denied."[142] The CFPB should make clear that reasons provided to consumers must reflect not just the actual information used in a model, but also the actual underlying concerns driving adverse decisions, even if those reasons may be uncomfortable for lenders.

This specific guidance should be part of a broader push by the CFPB in supervision and enforcement to ensure that lenders are abiding by Regulation B's adverse action notice requirements. A search of the CFPB Consumer Complaint Database shows that consumers regularly experience issues related to adverse action notices. Complaints show that, among other problems, consumers do not always receive adverse action notices when legally required, even after requesting an adverse action notice from the creditor. In addition, complaints show that some creditors do not provide adverse action notices based on the mistaken belief that the transaction did not constitute credit under ECOA.

The CFPB's Supervisory Highlights also demonstrate the need for additional oversight of adverse action notices. For example, examiners have found that:

- Creditors have provided consumers with incorrect principal reasons for taking an adverse action (as recent as Winter 2020 Highlights);
- One or more entities failed to notify an applicant of action taken within 30 days after receiving the completed application;
- One or more entities failed to comply with the complementary Fair Credit Reporting Act requirement to provide adverse action notices to consumers that include the name, address, and telephone number of the CRA that provided the information relied upon when the adverse action was taken; and

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[141] *Chen v. Chase Bank USA, N.A.*, 393 F. Supp. 3d 850, 855 (N.D. Cal. 2019).
[142] *Id*. at 856.

- Some violations of Regulation B have been caused by weak oversight of automated compliance management systems (CMS), including inadequate testing of codes and failure to monitor for changes that would require updated disclosures to comply with applicable federal consumer financial laws.

The CFPB should also heighten its compliance efforts and provide additional guidance for errors in the issuance of adverse action notices in cases where lenders have violated a fair housing or lending statute. Thousands of consumers have been denied for credit or had their original terms and conditions altered based on a discriminatory reason, by intent or not; however, the adverse action notice provided to the consumer provided a false or alternate reason for the denial. NFHA and its members have seen cases in which a consumer was denied for a loan or provided unfavorable terms and conditions that were different from the applicant's original request because of race, gender, or another protected class basis. However, the adverse action notice might have erroneously indicated that the consumer was denied due to insufficient credit or some alternate reason. In these instances, the true cause of the denial or provision of less favorable terms and conditions was camouflaged to conceal discrimination. The CFPB must be vigilant in addressing these matters. It must appropriately sanction lenders who engage in such subterfuge and ensure lenders adequately remedy errors and fully compensate consumers who are harmed by these practices.

Based on issues identified in the Supervisory Highlights, as well as NFHA's review of complaints in the Consumer Complaint Database, NFHA urges the CFPB to provide additional oversight of creditors who must comply with the adverse action notice requirements in ECOA and Regulation B. Additional guidance on what transactions are considered applications for credit would also be useful. Further, the CFPB should ensure that CMS are subject to adequate oversight and comply with applicable legal requirements, including ensuring that notifications are sent to consumers with the appropriate content and within the allotted timeframe required under Regulation B. This additional supervision and guidance, along with the detailed recommendations above, are essential to meeting the purposes the adverse action notice requirement was designed to serve.

Conclusion

With appropriate amendments to Regulation B and strong enforcement of ECOA, it is possible to close the nation's worsening racial wealth and homeownership gaps. The questions the CFPB has posed to the public demonstrate an understanding of the ways in which quality, affordable, mainstream credit may be unavailable to persons in protected classes. They also reflect a thoughtful approach to addressing the fair lending challenges posed by the increasing use of artificial intelligence and machine learning systems. NFHA appreciates the opportunity to provide its comments to the Request for Information and looks forward to forthcoming rulemaking and other methods of engaging the CFPB on these important matters. For questions,

please reach out to the following staff of the National Fair Housing Alliance: Jorge Andres Soto at 310-686-3198 or JSoto@nationalfairhousing.org; Debby Goldberg at 202-898-1661 or DGoldberg@nationalfairhousing.org; or Morgan Williams at 202-898-1661 or MWilliams@nationalfairhousing.org.

Sincerely,

Lisa Rice
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