COMMENTS

to the
Consumer Financial Protection Bureau
on
The Equal Credit Opportunity Act and Regulation B
Proposed Rule; Request for Public Comment

90 Fed. Reg. 50901 (November 13, 2025)

Docket No. CFPB-2025-0039

By the
National Consumer Law Center
On behalf of its low-income clients

December 15, 2025

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The National Consumer Law Center[1] (NCLC) respectfully submits the following comments on behalf of its low-income clients in response to the *Proposed Rule; Request for Public Comment on the Equal Credit Opportunity Act and Regulation B*, issued by the Consumer Financial Protection Bureau (CFPB).[2] The Proposed Rule should be withdrawn in its entirety. The proposed changes to Regulation B are inconsistent with the Equal Credit Opportunity Act and a radical departure from its core mission to protect consumers from discrimination in the credit marketplace. The proposed changes undermine key fair lending protections, leave consumers at risk of discrimination, and increase the cost of credit in the midst of an affordability crisis.

I. The Bureau's Proposed Rule guts fair lending protections and leaves consumers unprotected from large scale discrimination in the credit market.

The Equal Credit Opportunity Act (ECOA) is a landmark law passed during the civil rights era to remedy systemic discrimination in access to credit for consumers and businesses.[3] Originally, the Act was focused on gender discrimination, to address the pervasive exclusion of women from accessing credit. Two years after its original enactment, Congress amended the ECOA specifically to address discrimination on the basis of race. The history of discrimination in the credit marketplace and its enduring legacy is extensive, and includes current forms of predatory and high-cost lending, redlining, reverse redlining and other racially exclusionary practices. These practices created credit deserts, cutting communities of color off from affordable credit while inundating these same communities with high-risk destructive credit.[4]

Credit discrimination takes many forms and includes a wide array of policies and practices. Creditors discriminate at every stage of a credit transaction. This includes whom they market to or solicit as customers, whom they grant credit, the price and other terms and conditions on which credit is extended, and how customers are treated in subsequent stages of the transaction, such as extension of credit to existing customers, fraud monitoring and closure of

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[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys, and provided extensive oral and written testimony to numerous Congressional committees on various topics. In addition, NCLC attorneys regularly provide comprehensive comments to federal agencies, including HUD, on the regulations under consumer laws that affect low-income consumers.

[2] 90 Fed. Reg. 50901 (November 13, 2025).

[3] *See* 15 U.S.C. § 1691 et seq.

[4] *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, 2017.

lines of credit, loan servicing, and debt collection. Discrimination persists in the credit market and creates barriers to economic advancement and financial inclusion. Moreover, the historical legacy of discrimination creates obstacles to financial participation across many different communities. ECOA was specifically enacted to reverse the historical exclusion of many people and communities from the consumer credit marketplace. The proposed rule would, in effect, override Congressional intent and exceed the CFPB's legal authority.

A. Discrimination is pervasive in the credit market and consumers protected by the ECOA bear the brunt of predatory and discriminatory credit practices.

ECOA prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, the receipt of public assistance benefits, and exercise of rights under the federal Consumer Protection Act.[5] In every category or class covered by ECOA consumers are effectively denied credit in a range of credit transactions due to ongoing structural barriers and the continuing effects of decades of government-sanctioned discrimination. Those ongoing effects include, of course, inherited views among creditors of who is and is not a good credit risk, resulting in further restrictions in the credit market.

The subsections that follow describe the current status in the credit marketplace of three protected classes, reflecting the ongoing need for disparate impact liability under ECOA, robust anti-discouragement rules, and special purpose credit programs. We then discuss the importance of ECOA protections for consumers who exercise their rights under the Consumer Credit Protection Act.

1. *Race and color*

Fifty years of legal prohibition on racial discrimination in credit has not significantly changed the fact that borrowers of color are effectively unable to access the credit marketplace at anything like level footing compared to white borrowers. From slavery on, the federal government has, in its policies and operations, enabled white families to enrich themselves while restricting access to the same support to many Black, Asian, Latino, and Native American families. To take one historic example, the national Freedman's Savings and Trust Company, set up after the civil war to help newly free people build wealth and financial stability, did not make loans but only held the accumulated wealth of families in trust–until funds were embezzled and the bank failed, leaving many families poorer than before.[6] To take another, relatively recent, example, the vast accumulation of wealth in white families, enabled by government actions from the 1930s to the 1960s that provided federally backed mortgages and development projects to white households, was not available to Black families. Instead, the government required the

[5] 15 U.S.C. § 1691.

[6] Justene Hill Edwards, *Savings and Trust: The Rise and Betrayal of the Freedman's Bank* (2024).

denial of credit to families of color and limited lending in neighborhoods of mixed racial composition, thus de facto imposing residential segregation in neighborhoods.[7]

This history, which has never been significantly remediated, means that credit applicants from communities of color start off with less generational wealth, fewer opportunities to build a credit record, and less experience with the mainstream consumer financial market compared to white families, on average. Denial rates for mortgages, car loans, and small business loans remain significantly higher for Black borrowers than for white borrowers into the present. From 2004 to 2024, for example, the denial rate for home mortgages has remained roughly double for Black applicants compared to the denial rate for white applicants.[8]

Over the decades after the passage of ECOA, as Black applicants continued to face significant barriers to obtaining prime rate mortgage loans, a growing market of subprime lenders intentionally targeted Black communities. These creditors seized on the opportunity presented by the Black community's relatively limited access to credit and relatively low accumulated non-home wealth to finance needed home repairs or improvements. Contractors went door to door selling a promise of repairs as well as the financing. Black homeowners who had been able to acquire a 30-year, fixed rate mortgage in the years immediately following passage of the Fair Housing Act (FHA) were then induced into predatory transactions involving interest-only periods, hybrid adjustable rates with an initial fixed teaser rate, lack of escrow for taxes and insurance, piggy back 80/20 loans – all to mask the unaffordability of higher balance and higher interest rate loans.

These predatory products were targeted at communities of color and were enabled by federal regulators. The widespread securitization of subprime mortgage pools fueled the growth of the subprime market. When that market collapsed, as it was bound to do, lacking any meaningful underwriting, a massive wave of foreclosures followed. The nation saw foreclosure rates many times higher than during the Great Depression and a loss of Black homeownership to below levels in the 1910s and 1920s. Black and Latino communities lost staggering amounts of wealth in the foreclosure crisis. Those families who lost their homes because of a toxic subprime mortgage were then further credit constrained in the future.

As of 2022, the Black-white homeownership gap stood at 30%, wider than it was in 1960 before the passage of the Fair Housing Act.[9] The homeownership gap contributes to the overall racial wealth gap. In addition, as of 2022 the typical white family had $285,000 in wealth compared to $44,900 for the typical Black family–about 15 percent of the wealth of the typical white family. The typical Hispanic family held only about 20 percent of the wealth of the typical

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[7] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).
[8] *See* Figure 1, Appendix C (analysis of HMDA denial rates by race).
[9] Caitlin Young, Micheal Neal, and Janneke Ratcliffe, A Landscape Scan of Homeownership for Households of Color, Urban Institute (Nov. 9, 2022), https://www.urban.org/research/publication/landscape-scan-homeownership-households-color.

white family (about $61,600). The remaining families, a diverse group that includes those identifying as American Indian, Alaska Native, Native Hawaiian, Pacific Islander, or other race, and those of more than one racial identification, had median wealth similar to the typical Black or Hispanic family.[10] Black applicants also face an ongoing employment and income gaps relative to white households, which makes it much more difficult to obtain a mortgage or other forms of credit.[11] As a result of all the historical inequities and present disparities, Black and Hispanic lack the wealth and savings enjoyed by most white families. For example, the likelihood of having $400 of emergency savings varies significantly based on race and ethnicity. That likelihood as of 2024 was 71% for white adults, 47% for Hispanic adults, and 43% for Black adults. That gap has remained relatively constant over the past decade.[12]

Our nation's consumer credit scoring system cements historical inequities and imbalances through an over-reliance on historical payment data.[13] Backwards-looking payment history data skews negative for households without significant accumulated wealth, because without accumulated wealth, unexpected medical expenses, a natural disaster, or job loss can easily lead to a payment default. As a result, in 2022 the median Vantage score for a Black head of household is 629 compared to a median score of 726 for White households.[14] A startling 33% of Black consumers have a FICO score below 620, while only 15.7% of white consumers fall below that level.[15] More recent work shows those disparities increasing. A July 2025 paper from researchers affiliated with Opportunity Insights and the Census Bureau found that the median credit score is 743 for white individuals, but nearly 140 points lower for Black individuals at 604; the median score was 671 for Hispanic individuals and 779 for Asian individuals.[16] The persistent racial wealth gap has created a significant racial credit score gap, perpetuating a credit market that is highly unequal between Black and white borrowers and that fails to treat borrowers with similar credit risk similarly.

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[10] Aditya Aladangady, Andrew C. Chang et al, *Fed Notes: Greater Wealth, Greater Uncertainty: Changes in Racial Inequality in the Survey of Consumer Finances*, October 2023 *available at* https://www.federalreserve.gov/econres/notes/feds-notes/greater-wealth-greater-uncertainty-changes-in-racial-inequality-in-the-survey-of-consumer-finances-20231018.html.

[11] *Id*. at 9. (Urban Landscape Scan)

[12] Board of Governors of the Federal Reserve, Survey of the Economic Well-Being of U.S. Households (May 28, 2025), https://www.federalreserve.gov/consumerscommunities/sheddataviz/emergency-savings.html#shed_chart.

[13] Chi Chi Wu, National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination, Feb. 27, 2024.

[14] Caitlin Young, Micheal Neal, and Janneke Ratcliffe, A Landscape Scan of Homeownership for Households of Color, Urban Institute (Nov. 9, 2022), https://www.urban.org/research/publication/landscape-scan-homeownership-households-color.

[15] *Id*.

[16] Trevor J. Bakker, et al., Credit Access in the United States, Center for Economic Studies, CES-25-45, July 2025, https://www.census.gov/library/working-papers/2025/adrm/CES-WP-25-45.html?

2. Sex

Disparate treatment based on sex continues to be a fact of life in the United States. Creditors make assumptions that women are less credit worthy – less likely to be reliably employed and more likely to be carrying familial expenses and obligations, including caregiving for both children and aging parents. Employers make assumptions that women will be less likely to prioritize work over family. The gender pay gap in the U.S. has narrowed only slightly over the past two decades, after making somewhat better progress toward pay equity between 1980-2000.[17] The gender pay gap stood at 35-cents in 1982, and has been hovering around a 15-cent gap in recent years.[18]

Women still face significant structural barriers in the credit marketplace. Women in heterosexual couples are disproportionately likely to be left off of a credit application, with the male partner listed as the sole borrower.[19] A woman in that situation may contribute to making the mortgage payments year after year, through the joint household budget, and will not have any of that payment history reflected in her credit score. A significant number of women who end up owning the marital home after a divorce then struggle to communicate with the mortgage company or to refinance to remove their ex-spouse from the loan because they have not been shown as a borrower over the time period they were contributing to the payments.[20] Many of these women have experienced intimate partner violence, making it unsafe for them to attempt to communicate with a former partner regarding the mortgage loan.[21] Women have achieved homeownership rates getting closer to the rate for men in recent years, largely due to owning jointly with their spouse; but their denial rates for credit as a borrower are still significantly higher.[22] As one loan officer acknowledged in a recent article, sexism and gender discrimination "play a role," and "haven't disappeared in 2025."[23]

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[17] Richard Fry and Carolina Aragao, "Gender pay gap in U.S. has narrowed slightly over 2 decades," Pew Research Center (Mar. 4, 2025), https://www.pewresearch.org/short-reads/2025/03/04/gender-pay-gap-in-us-has-narrowed-slightly-over-2-decades/.

[18] *Id. (Pew pay gap)*

[19] National Consumer Law Center, "Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures" (Feb. 2024), https://www.nclc.org/resources/homeowners-at-risk-nationwide-survey-reveals-critical-gaps-the-cfpb-must-address-to-prevent-foreclosures/.

[20] Sarah Mancini and Alys Cohen, "Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information After a Death or Divorce," 43 Pepperdine L. Rev. 345 (2016), *available at* https://digitalcommons.pepperdine.edu/plr/vol43/iss2/3/.

[21] National Consumer Law Center, "Homeowners at Risk: Nationwide Survey Reveals Critical Gaps the CFPB Must Address to Prevent Foreclosures" (Feb. 2024), Appendix A, https://www.nclc.org/wp-content/uploads/2024/02/20240220_Issue-Brief_Homeowners-at-Risk_Appendix-A_Survey-Results.pdf (survey results showing 44% of respondents to a nationwide survey had clients struggling to deal with a mortgage and their cases had involved domestic violence).

[22] Lew Sichelman, "Research from LendingTree finds that single women are almost 30% more likely to be denid a mortgage," National Mortgage Professional (Oct. 1, 2025), https://nationalmortgageprofessional.com/news/single-women-rejected-most-often.

[23] *Id.*

3. *National Origin*

Immigrants and their descendants encounter prejudice and personal animus in the credit marketplace. Some lenders make assumptions about cultural differences and tendencies based on group status. They may assume that people from middle eastern countries are more likely to be terrorists; or that Latino households are more likely to pack multiple generations into one small home; or that Somali or Haitian families are generally bringing down the quality of communities. Creditors who carry these beliefs will exclude people from credit options by omitting to advertise or serve in their language or community, discouraging immigrants from applying, designing systems that will result in a credit denial for immigrant applicants, and refusing to exercise discretion or manual underwriting for this class of borrowers when it is an available option extended to applicants without the same national origin. These exclusions can happen without the creditor's conscious intent.

In addition to this direct discrimination that immigrants face, they also face structural barriers in the marketplace. Customary credit underwriting practices in the United States rely on credit scores provided by either FICO or Vantage Score – systems that draw primarily on years of credit history in this country. Immigrants are more likely to be "credit invisible" or "thin file," both because they have been in the U.S. for fewer years and they more often rely on informal credit that does not get reported to the credit bureaus.[24]

Immigrants and their descendants are also less likely to be able to document income and savings history in a bank account, due to similar patterns of exclusion, proof of identity issues, and linguistic barriers. The FDIC's National Survey of Unbanked and Underbanked households continually finds that minimum balance requirements, a general lack of trust in the banking system, fees, and inability to secure required personal identification are all prominent reasons a consumer may not have a bank account.[25] All of these factors are particularly likely to be barriers to the system for immigrant households. Banks market more heavily in high-wealth communities and have fewer physical branch locations in the neighborhoods where most immigrants live. This continues to be true despite Community Reinvestment Act (CRA) obligations, since CRA credits can be obtained through a variety of activities. Banks require photo IDs that immigrants may not yet be able to obtain. Some banks do not allow applicants to open a bank account without a

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[24] Coalition Comments to the White House Task Force on New Americans re: Expanding Language Access Within the Financial Services Sector, National Consumer Law Center (Feb 7, 2023), https://www.nclc.org/wp-content/uploads/2023/02/Comments-WH-Financial-Access-Subcommittee-on-Language-Access.pdf; Emily Starbuck Gerson, "5 Ways Immigrants Can Build Credit in the United States," Experian, (Oct. 15, 2021), https://www.experian.com/blogs/ask-experian/how-can-immigrants-build-credit/; Consumer Fin. Protection Bureau, Building a Bridge to Credit Visibility, (Jul. 2019), https://files.consumerfinance.gov/f/documents/cfpb_building-a-bridge-to-credit-visibility_report.pdf; Consumer Financial Protection Bureau, CFPB Data Point: Becoming Credit Visible, 4, (Jun. 2017), https://files.consumerfinance.gov/f/documents/BecomingCreditVisible_Data_Point_Final.pdf.

[25] FDIC National Survey of Unbanked and Underbanked Households, (Oct. 2022), https://www.fdic.gov/analysis/household-survey/2021report.pdf.

social security number. Moreover, traditional banks rarely offer services in a wide range of languages.[26]

Language barriers are another reason why immigrant communities experience challenges obtaining credit and building credit history. Throughout most of the mainstream credit market, lenders engage primarily in English. Even when sales associates negotiate with the applicant in their native language, transaction documents and terms sheets are likely to be provided in English-only.[27] Immigrants who feel more comfortable conducting important credit transactions in a language they can fully understand will seek out creditors that are willing to do business in their language – which are disproportionately likely to be in the shadow marketplace – inferior credit products taking advantage of a lack of access to the mainstream market.[28] These products are not typically reported to the credit bureaus, again perpetuating the likelihood of no or low credit scores.

4. *Consumers who exercise their rights under the CCPA*

In addition, ECOA contains critical protections against credit discrimination on the basis of the exercise of the rights under the Consumer Credit Protection Act, including asserting rights against harassing debt collection, illegal wage garnishment, and improper credit reporting. Particularly in a period when debt collection numbers are rising, and overall consumer debt is increasing, relaxing protections for people from illegal and harassing conduct in debt collection is dangerous. Lenders could well want to discourage potential borrowers they perceived as problematic or prone to filing complaints. Large Language Models could potentially flag litigation risk based on a borrower having previously exercised their rights as a potential risk for a new lender, regardless of the borrower's credit profile. These protections, ensuring the ability to exercise rights under the CCPA, cover all groups of people and are central to ECOA's mission and free and competitive markets.

Across all of these protected classes, significant barriers remain in the credit marketplace, preventing equal access to credit. The ECOA purpose, to remove these barriers and help economically disadvantaged classes is still as salient and necessary today as when the law was passed. If we want the credit market to evolve towards a more open and competitive market, we must ensure that history does not remain a dead weight on borrowers, preventing them from demonstrating their ability and willingness to pay back fairly priced credit. The CFPB's proposal

[26] Nicole Cabañez, "Cracking the Code: Understanding and Overcoming Language Barriers in Consumer Finance," National Consumer Law Center (Sept. 24, 2024), https://www.nclc.org/resources/cracking-the-code-understanding-and-overcoming-language-barriers-in-consumer-finance/.

[27] Nicole Cabañez, "Cracking the Code: Understanding and Overcoming Language Barriers in Consumer Finance," National Consumer Law Center (Sept. 24, 2024), https://www.nclc.org/resources/cracking-the-code-understanding-and-overcoming-language-barriers-in-consumer-finance/.

[28] Kleimann Communication Group, Language Access for Limited English Proficiency Borrowers: Final Report (April 2017), https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-AccessFinalReport-June-2017.pdf.

is a step backwards in time, towards further exclusion of millions of American borrowers from the mainstream consumer credit marketplace.

B. The Proposed Rule undermines the spirit and purpose of the ECOA, leaves consumers at risk of credit discrimination and should be withdrawn in full.

This Proposed Rule would undermine the ECOA's central purpose, to ensure that consumers have access to credit free of discrimination. Discrimination persists in the credit market fifty years after the ECOA's enactment. The proposal would water down or remove entirely key protections guaranteed by the Act and virtually eliminate targeted credit assistance programs established by Congress to benefit economically disadvantaged people. The Proposed Rule is inconsistent with consumer complaints, enforcement and other actions taken by the Bureau's in response to complaints. The Bureau's own research, data and past rulemaking support the need for ongoing intervention in the credit market to address persistent discrimination. The Proposed Rule presents no evidence of a definitive shift in market practices away from unlawful discrimination.

The consumer lending industry has filed numerous comments in support of a robust ECOA regulatory framework, including disparate impact liability, strong anti-discouragement rules, and special purpose credit programs. These comments show support from lenders for a continuing presence of disparate impact analysis under ECOA, and claiming the contrary to support this rulemaking fails to take these comments into account. The public record includes these prior comments, and they should be formally included in the administrative record. We have attached a number of these comments in Appendices A and B to this comment.

II. Disparate impact liability is cognizable under the ECOA and long recognized in legislative history, regulation and cases.

Disparate impact has been used by consumers, governments, and advocates for over fifty years to efficiently and successfully challenge discriminatory, predatory and unfair credit practices. Disparate impact continues to provide an effective legal framework for challenging credit policies that seem neutral on their face but unfairly exclude certain groups of people or communities from accessing fair and sustainable credit. The CFPB's proposal to remove disparate impact from ECOA can only be seen as a deliberate decision to upend Congressional intent and reduce the ability of private actors to remedy widespread and systemic discrimination in the marketplace.

Disparate impact has been cognizable under the ECOA for decades and affirmed by the statutory text, legislative history and purpose, and in case law, and interpretations by Federal Reserve Board and CFPB and other agencies. The proposed rule would upend decades of agency interpretation, backed by the text and legislative history, that disparate impact liability applies to the ECOA.[29]

The disparate impact doctrine emanated from *Griggs v. Duke Power Company*, an employment discrimination case which construed Title VII of the Civil Rights Act of 1964. [30] In *Griggs*, the U.S. Supreme Court held that Title VII prohibited employment discrimination because, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[31] The Court looked to the purpose of the act, legislative history and the interpretation of Title VII by the Equal Employment Opportunity Commission (EEOC). [32] For over fifty years, the Court has used this holistic analysis to discern whether a civil rights statute contains disparate impact liability. Importantly, *Griggs* was decided before ECOA was passed; Congress understood at the time it passed the ECOA that the operative standard would include disparate impact.

Most recently, the Supreme Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, held that disparate impact claims are cognizable under the Fair Housing Act (FHA).[33] The Court examined the FHA's statutory language and purpose, the Court's interpretation of similar language in other statutes, and Congress's ratification of these claims against the backdrop of the unanimous view of all of the federal circuit courts that have considered the issue.[34]

The court also looked at the historical context, referencing the National Advisory Commission on Disorders' report – otherwise known as the Kerner Report – which documented that racial segregation and discrimination in housing, employment, education, and consumer practices, including credit, were the root causes of nationwide protests in the 1960s.[35] There was an urgent need to dismantle these racist systems, including by putting reforms in place to ensure fair housing and economic opportunity.[36] The first of those reforms, the Fair Housing Act, was signed into law in 1968 within days of Dr. King's assassination.

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[29] *See* 90 Fed. Reg. 50902 (noting that the House Report "provides evidence that the ECOA authorizes disparate-impact claims").
[30] 401 U.S. 424 (1971).
[31] *Id.* at 430.
[32] *Id.* at 433-34.
[33] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015).
[34] *Id*.
[35] Kerner Comm'n Report of the Nat'l Advisory Comm'n on Civil Disorders (1968).
[36] *See id*.

A. The text, legislative history and purpose of the ECOA makes clear that this broad, remedial civil rights statute was designed to combat systemic discrimination in the credit market to protect a broad cross section of consumers and businesses.

The ECOA, passed during the Civil Rights Era, is an ambitious law that aims to eradicate widespread credit discrimination in American finance and foster economic inclusion. With passage of the ECOA, the Fair Housing Act and other laws, Congress aimed to disrupt rampant discrimination in housing, employment and credit, the building block for economic prosperity.

The enacting Congress was well aware of disparate impact liability and repeatedly reaffirmed its application with respect to the ECOA. Given the statute's purpose, to eradicate widespread discriminatory lending, limiting the Act as such would have hampered its effectiveness and ability to achieve its central aim of ending discrimination in all of its forms. As with other remedial statutes, the ECOA must be liberally construed in favor of consumers to effectuate the underlying Congressional purpose.[37]

1. Text

Congress understood that broad scale reform of credit policies and practices was necessary to redress discrimination in the credit market, not just for consumers but businesses as well. The text of the statute is far reaching, making it unlawful for "any creditor to discriminate against any applicant with respect to any aspect of a credit transaction" on the basis of protected characteristics.[38] The legislative record indicates that Congress considered other words that would cabin or limit "discriminate," but stuck with the broad undefined "discriminate" so that courts and legislators would have the flexibility to determine which policies and practices violate the Act.[39] Thus, nothing was added to the text to limit discrimination to conduct that is intentional.

The Supreme Court in *Inclusive Communities* instructed that antidiscrimination laws must be read to encompass disparate impact claims when their text refers to the consequences of action, not just the mindset of actors, and where the interpretation is consistent with statutory purpose.[40] The court compared the structure of several antidiscrimination laws, and in the case of the FHA considered the historical context to give shape and meaning to its understanding of the text. The text of the ECOA uses the outcome focused language highlighted positively in *Griggs* under the courts' disparate impact analysis of Title VII. In *Griggs* the court described the

[37] *See, e.g.*, Silverman v. Eastrich Multiple Inv'r Fund, Ltd. P'ship, 51 F.3d 28, 33 (3d Cir. 1995) (noting the broad remedial provisions in the ECOA). See also Peyton v. Rowe, 391 U.S. 54, 64–65, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968) (this approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed); Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967) (remedial legislation should be construed broadly to effectuate its purposes).

[38] 15 U.S.C. § 1691(a).

[39] Hearings on H.R. 14856.

[40] 576 U.S. at 533.

role of Congress in eliminating barriers to employment on the basis of racial or other impermissible classification.[41] The enacting Congress, well familiar with the *Griggs* decision used the same phrase, "on the basis of," in the text of the ECOA to outlaw discrimination based on enumerated characteristics. In other words, Congress studied the *Griggs* decision and tried to mold the phrasing in the new law to signify its intent to include disparate impact liability. Subsequent civil rights statutes, such as the ADA, incorporate this phrasing.[42]

2. Legislative history

The ECOA's legislative history clearly shows Congress' intent to outlaw credit practices that have a disparate impact on protected classes. Senate and House reports relied on to secure passage of ECOA in 1974 and the 1976 Amendments, hearings and other parts of the record indicate that Congress intended that the Act prohibit discrimination based on disparate impact, that an effects test should be used in actions brought under the statute, and that the statute applies to all manner of credit discrimination, including those actions which have a discriminatory effect.

In extensive hearings that accompanied passage of the Act and 1976 Amendments Congress received evidence of discriminatory policies and practices that systemically cut certain classes of consumers, most notably women and Black consumers off from credit.[43] Hearings by the National Commission on Consumer Finance in 1972, for example, documented widespread discrimination against women in the financial market.[44] Discriminatory policies and practices denied women full access to credit. Among them:

- Married women often could not obtain credit in their own names;
- Women frequently were asked to reapply for credit in their husbands' names when they got married;
- Creditors refused to consider part or all of the wife's income when a married couple applied for credit, even if she provided the primary or only source of income; and
- Divorced or widowed women found it extremely difficult to obtain credit because credit previously obtained in their husbands' names was not taken into consideration when they attempted to apply for credit in their own names.

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[41] 401 U.S. at 431. "What is required by Congress is the removal of artificial, unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classifications."

[42] *See* 42 U.S.C. § 12182(b)(1)(D).

[43] *See* National Consumer Law Center, Credit Discrimination (8th ed. 2022) §§ 1.3.2, 1.3.3.2.

[44] *See* Nat'l Comm'n on Consumer Fin., Report on Consumer Credit in the United States (1972).

The Congressional record and historical references underscore that the extreme discrimination against women in the credit market was enabled by facially neutral policies and policies that were common during the era but cut women off from credit.[45] Acknowledging these and other harmful practices Congress sought large scale systemic reform of credit practices. The House Committee on Banking, Currency and Housing's report stated:

> It would be difficult to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead. The availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing. Indeed, the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitutions.[46]

The first version of the ECOA enacted in 1974 made it unlawful for any creditor to discriminate on the basis of sex or marital status with respect to any aspect of a credit transaction.[47] The 1976 Amendments expanded the scope of the Act to cover a broad cross section of consumers.[48] The hearing before the House Committee on Banking, Currency, and Housing in 1975 gave special attention to age discrimination, finding that creditors often established arbitrary age limits after which credit would not be granted and existing credit would be revoked. The Committee recommended prohibiting discrimination on the basis of race, color, religion, national origin, and age.

Senate hearings in the same year before the Consumer Affairs Subcommittee[49] reached the same conclusion on age discrimination and also focused on discrimination based on race, especially related to mortgage credit.[50] The Senate hearings led to a revised bill which added age, race, color, religion, national origin, receipt of public assistance benefits, and the exercise of rights under the Consumer Credit Protection Act as prohibited bases for discrimination under the ECOA. The bill also added the ECOA's remedial scheme, supplementing and expanding on that found in the 1974 statute.[51]

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[45] *See* Winnie F. Taylor, The ECOA and Disparate Impact Theory: A Historical Perspective, 26 J. L. & Pol'y 575 (2018), p. 602-611, *available at:* https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/3.

[46] H.R. Rep. No. 210, at 3,5 (1975); 121 Cong. Rec. S10443-10445 (daily ed. June 12, 1975).

[47] 15 U.S.C. § 1691(a) (1974).

[48] The Equal Credit Opportunity Act Amendments signed into law on March 23, 1976. Pub. L. No. 94-239, 90 Stat. 251 (1976) (amending 15 U.S.C. §§ 1691–1691f).

[49] Equal Credit Opportunity Act Amendments and Consumer Leasing Act—1975: Hearings on S. 483, S. 1900, S. 1927, S. 1961 and H.R. 6516 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Hous. & Urban Affairs, 94th Cong. (1975).

[50] *Id*. at 39.

[51] See S. Rep. No. 94-589, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 403. The text of the revised Senate bill was substituted for H.R. 6516.

Congress was fully aware of the Supreme Court's decision in *Griggs* and discussed the efficacy of outlawing credit practices that had a discriminatory effect on protected classes. Congress debated whether or how to define "discriminate," and whether use of certain legal terms or phrases that would narrow or restrict liability.[52] Ultimately, Congress chose to rely on the plain meaning of the term "discriminate" which was commonly understood to encompass all forms of discrimination, including disparate impact.[53]

In crafting the 1976 Amendments Congress embraced the discriminatory effects construction outlined in *Griggs*. According to the Senate Report:

> In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) and *Albermarle Paper Company v. Moody*, [422 U.S. 405 (1975)] are intended to serve as guides in the application of this Act, especially with respect to the allocations of the burdens of proof.[54]

The House Committee Report also endorsed the Griggs "effect test" as a way of proving discrimination under the ECOA.[55] These reports followed discussions in Congress regarding limiting the availability of punitive damages to intentional discrimination, with some members expressing concern that this would diminish the effectiveness of private enforcement of the Act.[56] In the end, Congress was well aware of disparate impact and crafted the statutory language as broadly as possible to encompass this concept.

With each amendment of the ECOA after 1976 Congress took the opportunity to strengthen the Act. Congress broadened its scope, strengthened its enforcement, clarified its application, closed loopholes, and added protections for consumers and creditors. Congress did not water down the purpose of the Act. Nor, given the existence of *Griggs* and its progeny, did Congress change the text to bar disparate impact liability. In fact, Congress' rejected attempts to limit disparate impact in bills introduced in 1995 and 1997.[57] Rather Congress significantly beefed up enforcement of the Act during this period by giving public agencies more enforcement

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[52] See Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. On Consumer Affairs of the House Comm. On Banking and Currency, 93d Cong., 2d Sess. 35 (1974). See also Francesca Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, Harvard Law & Policy Review, Vol. 9 (2015).

[53] *See id.*

[54] S. Rep. No. 94-589, at 4-5 (1976).

[55] H.R. Rep. No. 210, at 5 (1975).

[56] *See* H.R. 6516, 94th Cong., at 16746. *See also* Winnie F. Taylor, The ECOA and Disparate Impact Theory: A Historical Perspective, 26 J. L. & Pol'y 575 (2018), p. 601 (highlighting members' discussion of effective private enforcement). *Available at:* https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/3.

[57] *See* H.R. 1699, 104th Cong. (1995); H.R. 229, 105th Cong. (1997).

powers. Strong enforcement of the ECOA is essential to accomplish Congress' goal of eradicating credit discrimination in the market.[58] Notable amendments to the ECOA include:

- The Women's Business Ownership Act of 1988[59] which addressed in part concerns about continued discrimination against women in business credit transactions.[60] The ECOA was amended to clarify that it applied to business and commercial loans and to preclude the Federal Reserve Board from making regulatory exceptions to the Act's coverage unless it expressly finds that applying the ECOA to the type of transaction exempted would not substantially affect the ECOA's purposes.

- In 1991, the ECOA was amended as part of the Federal Deposit Insurance Corporation Improvement Act of 1991.[61] The most significant change for consumers was the amendment to section 1691, which mandated that the creditor provide, upon the applicant's request, a copy of its appraisal report on residential real property offered as security for a loan. The amendments also broaden public agencies' enforcement powers in relation to branches of foreign banks, created additional requirements that federal enforcement agencies refer cases to the Department of Justice for prosecution, created additional requirements that federal enforcement agencies refer Fair Housing Act (FHA) violations to the Department of Housing and Urban Development (HUD), and clarified the Department of Justice's ability to seek monetary damages.

- In 1996, the ECOA was amended as part of the Omnibus Consolidated Appropriations Act of 1996.[62] Incentives for self-testing and self-correcting were added, providing that reports or results of self-tests are privileged information under specified conditions.

A 1991 amendment required that federal enforcement agencies refer discrimination cases to DOJ and HUD for prosecution, and clarified DOJ's ability to seek monetary damages. Congress did not prohibit disparate impact liability even though it was a commonly accepted and firmly established method of proving discrimination. Indeed, it would be incongruous for Congress to take such a step to prohibit or water down disparate impact, an important enforcement tool, while also aggressively expanding federal enforcement.

[58] *See* United States v. Landmark Fin. Servs. Inc., 612 F. Supp. 623, 628 (D. Md. 1985) (quoting S. Rep. No. 94-589 (1976)).
[59] Pub. L. No. 100-533, 102 Stat. 2689, 2692–2693 (1988).
[60] H.R. Rep. No. 100-955, at 7 (1988), reprinted in 1988 U.S.C.C.A.N. 3535.
[61] Pub. L. No. 102-242, 105 Stat. 2300 (1991).
[62] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

3. Court decisions

Following the lead of *Griggs*[63] and its progeny courts that have considered whether disparate impact is cognizable under the ECOA look to the broad language of the Act and its underlying anti-discriminatory purpose to reject unduly restrictive interpretations of the Act or its regulations.[64] Decades of case law underscore the uniformity of this analysis or conclude that disparate impact is cognizable under the ECOA.[65]

Courts have resoundingly rejected arguments brought by the credit industry challenging the doctrine of disparate impact[66] and repeatedly affirmed disparate impact claims under the ECOA. Creditors and the Bureau cite *Smith v. City of Jackson*, a case interpreting the Age Discrimination in Employment Act (ADEA), approvingly to argue that an effects test is not available under the ECOA. [67] In *Smith*, the Supreme Court held that the ADEA provides a cause of action for disparate impact, noting that the ADEA, like Title VII, contains express language prohibiting conditions that "adversely affect" employment status on account of age. As noted above the ECOA does not contain the same language. *Smith*, like *Griggs* and later *Inclusive*

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[63] Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing that discriminatory impact violates Title VII, which prohibits employment discrimination).

[64] *See, e.g.,* Consumer Fin. Prot. Bureau v. Townstone Fin. Inc., 107 F.4th 768 (7th Cir. 2024) (reversing district court and finding that Regulation B's prohibition on the discouragement of prospective applicants is consistent with the "plain text" of the ECOA); United States v. ITT Consumer Fin. Corp., 816 F.2d 487, 489 (9th Cir. 1986); Thompson v. Galles Chevrolet Co., 807 F.2d 163, 168 (10th Cir. 1986); Bros. v. First Leasing, 724 F.2d 789, 793–794 (9th Cir. 1984) (the ECOA should be liberally construed in light of the clear, strong purpose evidenced by the Act); Miller v. Am. Express Co., 688 F.2d 1235, 1239 (9th Cir. 1982) (a restrictive interpretation of the regulations is not warranted in light of ECOA's purpose to protect women against the arbitrary denial or termination of credit); Williams v. AT & T Wireless Servs., Inc., 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998) (ECOA should be interpreted broadly).

[65] *See* Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1101 (5th Cir.1987), vacated and remanded on other grounds, 492 U.S. 901 (1989); Haynes v. Bank of Wedowee, 634 F.2d 266, 270 (5th Cir. 1981); Vander Missen v. Kellogg Citizens Nat'l Bank of Green Bay, 481 F. Supp. 742, 745 (E.D. Wis. 1979); Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980); A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chicago, 962 F. Supp. 1056, 1060 (N.D.Ill.1997); Miller v. Countrywide Bank, N.A., 571 F. Supp.2d 251 (D. Mass. 2008); Ramirez v. GreenPoint Mortg. Funding, Inc., 2008 WL 2051018 (N.D. Cal. 2008); Masudi v. Ford Motor Credit Co., 2008 WL 2944643 (E.D.N.Y. 2008); Zamudio v. HSBC North America Holdings, Inc., 2008 WL 517138 (N.D. Ill. 2008); Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008); Powell v. Am. Gen. Fin., Inc., 310 F. Supp.2d 481, 487 (N.D.N.Y.2004); Duarte v. Quality Loan Serv. Corp., 2018 WL 2121800, at *4 (C.D. Cal. May 8, 2018); Mora v. US Bank, 2015 WL 4537218, at *6 (C.D. Cal. July 27, 2015); Palmer v. Homecomings Fin. LLC, 677 F. Supp. 2d 233, 240. *See also* Golden v. City of Columbus, 404 F.3d 950, 963 n. 11 (6th Cir.2005) (assuming that "disparate impact claims are permissible under ECOA"); Midkiff v. Adams Cnty. Reg'l Water Dist., 409 F.3d 758, 772 (6th Cir. 2005) (same); Garcia v. Johanns, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) ("[a]ssuming without deciding that a disparate impact claim is cognizable under the ECOA"); Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315, 325 (M.D. Tenn. 2000) (collecting authorities) vacated on other grounds, 296 F.3d 443 (6th Cir. 2002); Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (collecting cases); Hernandez v. Sutter W. Cap., 2010 WL 3385046, at *4 (N.D. Cal. Aug. 26, 2010) (pleading standard to state a claim for disparate impact).

[66] *See, e.g.,* Smith v. Chrysler Fin., Co., 2003 WL 328719 (D.N.J. Jan. 15, 2003); Osborne v. Bank of Am., 234 F. Supp. 2d 804 (M.D. Tenn. 2002) ("Properly construed then, Sandoval holds only that regulations may not create private rights of action where no such right was intended by Congress. But that is not the case with the ECOA.").

[67] *See* Smith v. City of Jackson, 544 U.S. 228 (2005).

Communities, employs a holistic analysis that relies on the statutes' text, purpose, history, and structure. Numerous courts have rejected the argument that *Smith* implies that the ECOA (and the FHA) do not permit disparate impact claims.[68]

Courts have also considered that the ECOA is part of a comprehensive umbrella statute, the Consumer Credit Protection Act (CCPA), designed to protect the interest of consumers.[69] In interpreting the other titles of the CCPA, most notably the Truth in Lending Act, courts have considered the overarching purpose and the remedial nature of these statutes and held that they must be liberally construed in favor of consumers.[70]

4. *Regulatory History & Policy Statements*

An unbroken line of regulation and policy statements starting within a year of passage of the ECOA confirms regulators' understanding that Congress intended to include disparate impact liability in the ECOA. Originally the Board of Governors of the Federal Reserve (FRB) had authority to implement regulations under the Act.[71] The FRB did that through enactment of Regulation B, 12 C.F.R. part 202. From the beginning the FRB interpreted the Act to include disparate impact liability, and issued regulations as such.[72] Several portions of the new regulation, for example, called out creditors' neutral policies that had a disparate impact on women, including those related to alimony and child support.[73] Given the diversity and nature of the policies that barred women from accessing credit, the FRB rightly concluded that Congress

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[68] *See, e.g.,* Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 711 (9th Cir. 2009); Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104 (D. Mass. 2009); NAACP v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096, 1104–1105 (C.D. Cal. 2009); Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co., 597 F. Supp. 2d 120 (D.D.C. 2009) (denying certification to appeal the issue as there was no substantial ground for a difference of opinion); Rodriguez v. SLM Corp., 2009 WL 598252, at *3 (D. Conn. Mar. 6, 2009); Guerra v. GMAC L.L.C., 2009 WL 449153, at *3 (E.D. Pa. Feb. 20, 2009). *See also* Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922 (N.D. Cal. 2008) (denying motion to dismiss; "GreenPoint reads Smith too broadly, and no court has applied Smith to find that disparate impact claims are not cognizable under the FHA or ECOA"); Amended Order Granting in Part & Denying in Part Defendants' Motion to Dismiss, Garcia v. Countrywide, No. CV 07-cv-1161 (C.D. Cal. Jan. 17, 2008) (noting that the Court in Smith v. City of Jackson relied on not only textual analysis but also the legislative history and purpose of the ADEA). *See generally* Michael Aleo & Pablo Svirsky, Foreclosure Fallout: The Banking Industry's Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act, 18 B.U. Pub. Int. L.J. 1 (2008) (arguing that, despite lenders' arguments to the contrary, Smith v. City of Jackson does not prohibit disparate impact claims under other statutes that do not contain "effects" language).

[69] *See, e.g.,* Silverman v. Eastrich Multiple Inv'r Fund, Ltd. P'ship, 51 F.3d 28, 33 (3d Cir. 1995); Bros. v. First Leasing, 724 F.2d 789, 793 (9th Cir. 1984).

[70] *See, e.g.,* Begala v. PNC Bank, 163 F.3d 948, 950 (6th Cir. 1998) (TILA is a remedial statute and therefore should be given a broad, liberal construction in favor of the consumer); Smith v. Fid. Consumer Disc. Co., 898 F.2d 896, 898 (3d Cir. 1988); Bizier v. Globe Fin. Servs., Inc., 654 F.2d 1, 2 (1st Cir. 1981) (the Truth in Lending Act is intended to balance scales thought to be weighted in favor of lenders and should be liberally construed in favor of borrowers). *See generally* National Consumer Law Center, Truth in Lending § 1.5.2.3 (11th ed. 2023), updated at www.nclc.org/library.

[71] 15 U.S.C. § 1691b(a)(1).

[72] *See* Reg. B, 40 Fed. Reg. 49,298 (Oct. 22, 1975) (to be codified at 12 C.F.R. pt. 202).

[73] *See also* Reg. B § 202 (d)(2).

intended for the ECOA to authorize disparate impact liability and that disparate impact liability was needed to address the rampant credit discrimination in the market at which ECOA was directed.

Each version of Regulation B reflects Congress' intent that the "effects test" doctrine apply in the credit area. As adopted by the FRB, it states:

> The legislative history of the Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness.[74]

The official interpretations to Regulation B also noted:

> The Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.[75]

In 1985 the Board republished Regulation B without substantive revisions but took the opportunity to restate Congress' intent:

> The legislative history of the act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness. [See Senate Report to accompany H.R. 6516, No. 94-589, pp. 4-5; House Report to accompany H.R. 6516, No. 94-210, p. 5.][76]

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

> Effects test. The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964. Congress intended this doctrine to be applicable to a creditor's determination of creditworthiness. This Congressional intent is documented in the Senate Report that accompanied H.R 6516, No. 94-589, pp. 4-5; and in the House Report that accompanied H.R. 6516, No. 94-210, p. 5. Thus, the act and regulation prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a

[74] 12 C.F.R. § 1002.6.

[75] Official Interpretations of Reg. B, 12 C.F.R. pt. 1002, supp. I, § 1002.6(a)-2

[76] 50 Fed. Reg. 10890-01 n. 2 (March 18, 1985) (codified as 12 C.F.R. § 202.6 n.2).

protected class, even though the creditor has no intent to discriminate, and even though the practice appears neutral on its face...[77]

Rulemaking authority was passed to the CFPB under the Dodd-Frank Act. On December 21, 2011, the Bureau issued its version of Regulation B and its official interpretations without substantive changes to its discussion of disparate impact.[78]

In CFPB Bulletin 2012-04 on lending discrimination, the Bureau affirmed its adherence to the fair lending principles outlined in Regulation B and expressly concurred with the *1994 Interagency Task Force on Fair Lending* policy statement which noted that courts have recognized disparate impact as a method of proving discrimination under ECOA.[79] In line with other federal agencies, the Bureau embraced the application of disparate impact in examinations of lending institutions under its supervision and enforcement.[80] Additionally, in a *Policy Statement on Discrimination in Lending* issued by HUD, DOJ, the Federal Reserve, Office of the Comptroller of the Currency, Office of Thrift Supervision, and other prudential regulators, the agencies issued guidance to lenders regarding enforcement of disparate impact under the ECOA and the FHA.[81]

The scope of disparate impact under the ECOA is for courts to resolve, not the CFPB. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* held that courts must exercise their independent judgment in interpreting statutes and look to agency interpretations for guidance only.[82] Courts can look to the uniform and consistent interpretation of the statutes to guide their own analysis of the ECOA. The CFPB's choice then to reverse 50 years of established law, including recent Supreme Court precedent, on the flimsiest of pretexts, at the same time it claims to lack funding for all but essential functions, lacks legal justification and steps outside its own authority into the province of the courts.

In summary, the Bureau's past embrace of disparate impact under the ECOA as expressed in Regulation B, its official interpretation, and Bulletins (now removed) for over fifty years is clear and the Bureau should withdraw the proposed changes to Section 1002.6(a) and

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[77] *Id.* at 10912 (codified at comment 6(a)-2))
[78] *See* 76 Fed. Reg. 79,445 (Dec. 21, 2011).
[79] CFPB Bulletin 2012-04 (Fair Lending)," Consumer Financial Protection Bureau. April 2012. *Available at:* https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.
[80] *Id* at 3.
[81] Department of Housing and Urban Development (HUD), the Office of Federal Housing Enterprise Oversight (OFHEO), the Department of Justice (DOJ), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Federal Housing Finance Board (FHFB), the Federal Trade Commission (FTC), and the National Credit Union Administration (NCUA), Policy Statement on Discrimination in Lending, April 15, 1994, *available at* https://www.occ.treas.gov/news-issuances/federal-register/2010/94fr9214.pdf.
[82] 603 U.S. 369 (2024)

Section 1002.2(p)-4 and corresponding sections of the Comment which contradict its long-standing analysis.

B. Disparate impact can effectively address fair lending and consumer protection concerns arising from emerging technology, including the use of Artificial Intelligence (AI) in credit.

Emerging technology, including AI, has the potential to enhance access to credit for consumers and to perpetuate and calcify historical patterns of discrimination. Already there is acknowledgment that some AI models produce biased outcomes. Given the deep-rooted history of credit discrimination in the United States, as discussed above, which may be reflected in data used to train the models, wide scale adoption of this technology by creditors calls for robust oversight, not a watering down of disparate impact, an outcome driven tool that can effectively redress discrimination.

Disparate impact has been used effectively and consistently for decades to challenge discriminatory practices. The tool is flexible enough to respond to AI-driven innovation in the credit market. Creditors use AI in marketing and advertising, underwriting and pricing of credit, evaluation of collateral, customer service, servicing and collections.[83] However, given the lack of transparency regarding whether and how this technology is used, it is difficult to catalog all the different ways AI impacts consumers' access to credit.[84]

AI systems with the capacity to make decisions regarding credit are high-risk systems that can cut consumers off from economic opportunity at the speed of light in violation of ECOA and other fair lending and civil rights laws.[85] In marketing and advertising for example, creditors make aggressive use of AI-driven models to target consumers online with highly personalized offers of credit. This hyper targeted marketing and advertising may steer consumers to higher priced credit, and predatory financial products.

[83] OCC, *Comptroller's Handbook, Safety and Soundness, Model Risk Management*, Ver. 1.0, August 2021. Examples of AI uses in banks include fraud detection and prevention, marketing, chatbots, credit underwriting, credit and fair lending risk management, robo-advising (i.e., an automated digital investment advisory service), trading algorithms and automation, financial marketing analysis, cybersecurity, Bank Secrecy Act/anti-money laundering (BSA/AML) suspicious activity monitoring and customer due diligence, robotic process automation, and audit and independent risk management.

[84] It is difficult to discern when and how companies are using this technology even when they disclose the use of AI in their marketing material and in statements to regulators, investors and the like. The industry has not adopted a uniform or set definition of AI, and in fact some models previously described as simple automated systems are now being rebranded as AI. To the extent a company touts its use of AI there is often no insight into the complexity of the model being deployed. These comments reference a wide range of AI-branded technology but the focus on the more complicated machine learning and generative models to the extent we can discern that this technology is being used by creditors, or a financial institution touts its use in marketing.

[85] *See e.g.,* GAO *Property Technology for Home buying Products Present Benefits and Risks Amid Evolving Federal Oversight,* September 2025.

Digital redlining can occur if creditors do not provide equal access to credit or provide credit on unequal terms based on race, color, national origin, or other protected factors.[86] Instead of being shown a wide array of competitively priced credit options and financial products, consumers are steered to high-cost, subprime products.[87] Targeting consumers based on detailed information about their online habits, preferences, financial patterns, geolocation, and other data may result in both digital redlining and steering of protected class members to high-cost credit.[88]

HUD issued guidance to shape the advertisement of housing and credit for real-estate related transactions, including mortgages.[89] The agency noted that the newest technology can be used to target advertising toward some consumers and away from others. Whether done deliberately or through the operation of a complex automated system, this ad-delivery system has the potential to cut certain consumers off from credit and housing.[90]

Discrimination may also occur in the pricing of credit. One study found that AI-driven models increased disparities in interest rates, especially for Black and Hispanic borrowers.[91] Another study found that fintech lenders reduced but did not erase discriminatory lending patterns with respect to the pricing of loans.[92] Latino and Black borrowers paid 7.9 and 3.6 basis points more in interest for home purchase and refinance mortgages respectively because of discrimination. This represented 11.5% of lenders' average profit per loan.[93]

Upstart, which was issued No Action Letters by the Bureau in 2017 and 2020, is another example of such price discrimination. Upstart's underwriting technology, which it sells to creditors, used educational data to make its credit decisions.[94] Upstart's AI model charged higher

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[86] *See* Carol Evans, Board of Governors of the Federal Reserve System, *From Catalog to Clicks, The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook (Second Issue 2017) at 4.

[87] *See* Carol Evans, Board of Governors of the Federal Reserve System, *From Catalog to Clicks, The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook (Second Issue 2017) at 4; Amit Datta et al. *Automated Experiments on Ad Privacy Settings: A Tale of Opacity, Choice, and Discrimination*, Cornell Univ., (2015) *available at* https://arxiv.org/abs/1408.6491.

[88] The FTC recently issued orders to eight companies (including Mastercard and JPMorgan Chase) seeking information about surveillance pricing of products and services that incorporate data about consumers' characteristics and behaviors. FTC Press Release, *FTC Issues Orders to Eight Companies Seeking Information on Surveillance Pricing*, *available at* https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-issues-orders-eight-companies-seeking-information-surveillance-pricing.

[89] U.S. Department of Housing and Urban Development, *Guidance on Application of the Fair Housing Act to Advertising of Housing, Credit, and Other Real Estate-Related Transactions through Digital Platforms*, April 29. 2024.

[90] *See id.*

[91] *See* Andreas Fuster, Paul Goldsmith-Pinkham, Tarun Ramadorai, and Ansgar Walther, *Predictably Unequal? The Effects of Machine Learning on Credit Markets* at 36 (Oct. 2020) (Technology penalizes some minority groups significantly by giving them higher and more disperse interest rates), *available at* https://ssrn.com/abstract=3072038..

[92] Robert Bartlett, Adair Morse, et al., *Consumer Lending Discrimination in the Fintech Era, National Bureau of Economic Research*, Working Paper 25943, June 2019.

[93] *Id.*

[94] *Credit Decision API*, Upstart (last viewed July 1, 2021) https://www.upstart.com/for-banks/credit-decision-api/.

interest rates to hypothetical students who attended community colleges, historically black colleges and universities (HBCUs), and Hispanic serving institutions (HSIs) than similarly situated white borrowers at predominately white institutions.[95]

Disparate impact provides a framework for evaluating whether emerging technology is safe and effective and helps regulators exercise enforcement authority to the fullest extent for systems that violate individual rights and consumer protection. Creditors also benefit when testing their models. As part of the larger fair lending evaluation of the outputs generated by AI creditors can evaluate the model for data gaps or exclusions, unfair treatment or higher pricing of consumers of color. According to the Lending Club, which touts itself as America's largest online credit marketplace, the:

> ECOA's disparate impact framework addresses these concerns of algorithmic discrimination by requiring lenders to address discriminatory outcomes in their lending practices, regardless of whether those outcomes are the result of new algorithms or traditional credit models, or any other reason. Whatever the cause, and whether or not there was any discriminatory intent, the outcomes-based disparate impact framework requires lenders to identify and prevent discriminatory outcomes.[96]

Use of AI can amplify discriminatory behavior in the credit market, increases costs to consumers, and creates barriers to access. Disparate impact can be used to combat the fair lending and consumer protection risks posed by these models so that discriminatory credit practices do not go unrecognized and unchallenged. Now is not the time to water down protections for consumers given the speed and rate of adoption of this technology by the industry but to put in place a robust regulatory scheme centered around disparate impact to protect consumers from the risk this technology poses.

C. Disparate impact plays a critical role in credit scoring and other analytical tools used to make credit decisions.

Another critical role of the disparate impact standard under ECOA and Regulation B is to help ensure the predictiveness of credit scoring and other analytical tools used in the credit decision-making process. Without disparate impact, the predictiveness and utility of such analytical tools could be compromised.

It is well documented that the credit score system produces enormous racial disparities. Over a dozen studies have found that Black and Latino consumers have lower credit scores as a group, including:

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[95] *Educational Redlining*, Student Borrower Protection Center, Feb. 2020, *available at* https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.
[96] Lending Club, *Statement in Response to CFPB's Request for Information on the Equal Credit Opportunity Act*, December 1, 2020, attached as Appendix A.

- A July 2025 paper from researchers affiliated with Opportunity Insights and the Census Bureau finding that the median credit score is 743 for White individuals, but nearly 140 points lower for Black individuals at 604; the median score was 671 for Hispanic individuals and 779 for Asian individuals.[97]
- An Urban Institute report finding that in 2021, the median credit score for Black consumers was 621 and for Hispanic consumers was 661, while it was 60-100 points higher for white consumers at 726 and for Asian American Pacific Islander consumers at 741.[98]

Older studies are available in the NCLC Policy Brief *Past Imperfect*, which is incorporated by reference into these comments.[99]

The racial disparities in credit scores are due to deep structural factors, created by centuries of intentional and legalized discrimination as well as present-day biases. Centuries of slavery and decades of Jim Crow have resulted in enormous economic disparities between white consumers and Black consumers. With fewer assets to draw on, people of color – and the friends and family who they might turn to – are far less able to cushion the blow of financial catastrophes, such as job losses, income reductions, sickness, or unplanned expenses, which shows up in credit scores. There is also present-day racial inequality in many settings, such as segregation in education, modern day employment discrimination, and the collateral consequences of mass incarceration.[100] And it's not just credit scores - any other analytical tool based on financial history will also show racial disparities due to these same factors.

Despite these disparities, credit scores are permissible under a disparate impact standard because they meet a legitimate business need standard under current Comment § 6(a)-2 – they are predictive of credit delinquencies. Thus, Regulation B's disparate impact standard actually helps to ensure that credit scoring and similar analytical tools do what they claim. Furthermore, Comment 6(a)-2 requires that the legitimate business need cannot reasonably be achieved as well by means that are less disparate in their impact, i.e. the "less discriminatory alternative" prong of the disparate impact test. This requirement serves as an incentive to improve scoring models so that they have less of a disparate impact on protected classes, and to improve their predictiveness.

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[97] Trevor J. Bakker, et al., Credit Access in the United States, Center for Economic Studies, CES-25-45, July 2025, https://www.census.gov/library/working-papers/2025/adrm/CES-WP-25-45.html?

[98] Aniket Mehrotra, et al., Urban Institute, Evidence of Disparities in Access to Mortgage Credit, at 19, March 2024, https://www.urban.org/sites/default/files/2024-03/Evidence_of_Disparities_in_Access_to_Mortgage_Credit.pdf.

[99] Chi Chi Wu, National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination, Feb. 27, 2024. *See also* studies cited in Section I.A.

[100] Chi Chi Wu, National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination, Feb. 27, 2024 (citing sources).

It is true that current credit scoring models have been tested and vetted by bank regulators and others. But the same may not be true for future models or new entrants to the marketplace. This is especially true if the model or analytical tool is used by a non-bank, non-mortgage creditor, such as an auto loan creditor.

We recognize that Section 1691(b)(3) of the ECOA and Reg. B § 1002.2(p) requires an empirically derived credit "system" or scoring model to be demonstrably and statistically sound in accordance with regulations of the Bureau. Furthermore, Reg. B § 1002.2(p) and Comment 2(P) set forth detailed requirements to meet that standard, include what data to use and requirements for periodic validation. However, these requirements only apply *if the system or scoring model considers age as a factor*. A credit scoring or other analytical tool that does not consider age need not be demonstrably and statistically sound or meet these detailed requirements.

It is the legitimate business need of the disparate impact standard that requires any scoring system in general to be not only demonstrably and statistically sound, but predictive. Getting rid of the standard removes any legal constraints that prevent scoring models or other analytical tools that cause a disproportionate impact on protected classes while providing little or no predictive value. If the CFPB eliminates the disparate impact standard, which we strongly oppose, the Bureau should at an absolute minimum apply the requirements of Reg. B § 1002.2(p) and Comment 2(p) to ***all*** credit scoring and other analytical tools for credit underwriting, regardless of whether they consider age as a factor.

D. Consumer advocates make use of disparate impact to challenge a large cross section of discriminatory marketplace practices.

Discrimination flourishes in the dark. Ordinary consumers have no knowledge of the policies and practices that disparately impact their ability to get credit for cars, mortgages, education or other wealth building activities. Individual borrowers in protected classes do not know that the loan terms they were offered are different or more burdensome than that offered to similarly situated white borrowers. Nor are they aware that the complex, opaque algorithmic models used in the underwriting process may produce disparate outcomes. Discriminatory practices often do not come to light until after the consumer has obtained credit and outside organizations, like fair housing organizations or regulatory bodies, uncover the abusive patterns. Disparate impact claims level the playing field and allow consumers to challenge discriminatory policies that would otherwise go unaddressed. NCLC and other consumer and civil rights advocates and governments have brought disparate impact claims under ECOA and other civil rights statutes to challenge a wide variety of abusive practices. Examples of such cases are discussed in Section IV.

III. The Bureau's proposed revision of Regulation B's discouragement provision would lead to a resurgence of redlining, and other overtly racist credit practices.

The Bureau's proposal would significantly narrow the definition of discouragement in ways that are not supported by empirical evidence nor Congressional intent. On the contrary, maintaining the existing regulatory standards for discouragement is supported by the facts and the law. The Bureau's proposed discouragement changes should be revoked in full.

A. The CFPB's proposed revisions of the discouragement regulation and commentary would undermine the purposes of ECOA and promote evasion, contrary to Congressional intent.

The ECOA's general rule against discrimination applies during every stage of a credit transaction. The first stage of a credit transaction in which discrimination may take place occurs *prior* to the actual application—i.e., when the creditor takes various actions to encourage or discourage persons from seeking credit from that creditor. While most of the ECOA applies only to "applicants,"[101] Regulation B includes a pre-application prohibition forbidding creditors from discouraging prospective applicants on a prohibited basis.[102] Cases continue to be brought alleging unlawful discouragement; a robust prohibition of discouragement, in all its forms, is still very much needed.[103]

Addressing pre-application discrimination is critical because creditors who want to discriminate illegally have a strong incentive to keep people of color, public assistance recipients, or others from applying. If an individual never applies for credit, it will be difficult for that individual to complain about being denied credit. The federal Home Mortgage Disclosure Act (HMDA) requires creditors to report racial and other characteristics of mortgage applicants.

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[101] Official Interpretations of Reg. B, 12 C.F.R. pt. 1002, supp. I, § 1002.4(b)-1. See § 2.2.4, supra (discussing scope of "applicant").

[102] Reg. B, 12 C.F.R. § 1002.4(b). *See* Consumer Fin. Prot. Bureau v. Townstone Fin. Inc., 107 F.4th 768 (7th Cir. 2024) (reversing district court and finding that Regulation B's prohibition on the discouragement of prospective applicants is consistent with the "plain text" of the ECOA);

[103] *See, e.g.*, Gray v. Seterus, Inc., 233 F. Supp. 3d 865, 870 (D. Or. 2017) (denying motion to dismiss claim based on violation of the ECOA's discouragement regulation where plaintiffs alleged that servicer had inadequately trained staff to handle the volume of loss mitigation workout requests, failed to respond or acknowledge one modification request, and where wife testified that she felt deterred on several occasions); Bartucci v. Wells Fargo Bank, 2015 WL 6955482, at *3 (N.D. Ill. Nov. 10, 2015) (allegations that bank discriminated against plaintiff based on his national origin when bank representative hung up the phone on him and refused to provide information concerning his loan because of his accent, and that bank discriminated against him based on age when representatives told him he would have "an easier time obtaining a loan modification if he were in fact much younger," presented a plausible scenario in which plaintiff was unlawfully discriminated against based on national origin or age under the ECOA); Page v. Midland Fed. Sav. & Loan Ass'n, 2013 WL 5211747, at *5 (N.D. Ill. Sept. 13, 2013) (explaining that, since ECOA applies to all stages of a credit transaction, including the pre-application stage, "[P]laintiff is correct that if [the loan officer] discouraged her from applying for a loan either with or through defendant because of her race and/or any other prohibitive basis, the complaint states a claim.").

However, if individuals never apply, the lender is not required to report the individual as being denied credit.

The Regulation B prohibition on pre–application discouragement is important in addressing a lender practice which is still all too common today: redlining. Redlining began as a result of policies of the Home Owners' Loan Corporation in the 1930's which restricted access to loans in communities of color.[104] Unfortunately, redlining continues to persist in the United States today primarily through pre-application discouragement and discriminatory marketing practices by lenders. [105] A significant number of studies and enforcement actions have documented the persistent problems of redlining over generations in the United States.[106] During the recent refinance boom due to historically low interest rates, Black homeowners had the lowest approval rates but also the lowest application rates.[107]

The Bureau certainly understood the risk these redlining posed to consumers. In 2016, the Bureau published an issue of Supervisory Highlights[108] identifying redlining as a supervisory priority and listing factors it considers when assessing redlining risk. In October 2021, the Bureau, the DOJ, and OCC announced an initiative to combat redlining. The DOJ described this

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[104] *See* Michael Fitzpatrick, Al Hofeld Jr. & Ira Rheingold, *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 Clearinghouse Rev. 642 (2001) (quoting John O. Calmore, Spatial Equality and the Kerner Commission Report: A Back to the Future Essay, in Race, Poverty, and American Cities 324 (John Charles Boger & Judith Welch Wegner eds. 1998)).

[105] *See, e.g.,* Charles L. Nier III, Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining under the Fair Housing Act, 32 J. Marshall L. Rev. 617, 637 (1999) (discussing study concluding that lack of loan applications, rather than low application approval rates, was the immediate cause of the most severe negative lending patterns, and that those low volumes resulted from lender strategies related to marketing, delineating lending territory, and other policies).

[106] Harriett Tee Taggart & Kevin W. Smith, "Redlining: An Assessment of the Evidence of Disinvestment in Metropolitan Boston," 17 URB. AFFAIRS Q. 91, 92 (1981) (identifying and describing three generations of studies regarding redlining); Jonathan Brown, *Racial Redlining: A Study of Racial Discrimination by Banks and Mortgage Companies in the United States* at 4 (1993) (examining redlining in 16 metropolitan areas which contained 38% of the Black population within the U.S.: New York, Boston, Los Angeles, Chicago, Washington D.C., Philadelphia, Detroit, Houston, Miami, Baltimore, Oakland, Atlanta, Dallas, St. Louis, Buffalo, and Pittsburgh); William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, Joint Center for Housing Studies (December 2005), https://www.jchs.harvard.edu/sites/default/files/w05-11.pdf; Ross, Stephen L., Margery Austin Turner, Erin Godfrey, and Robin R. Smith, "Mortgage lending in Chicago and Los Angeles: A paired testing study of the pre-application process," Journal of Urban Economics, 2008, 63 (3), 902–919; "Justice Department Reaches Significant Milestone in Combating Redlining Initiative After Securing Over $107 Million in Relief for Communities of Color Nationwide," U.S. Department of Justice (Oct. 19, 2023), https://www.justice.gov/archives/opa/pr/justice-department-reaches-significant-milestone-combating-redlining-initiative-after#:~:text=The%20Justice%20Department%20announced%20today,or%20other%20mortgage%20lending%20businesses..

[107] Shawn Donnan, Anna Choi, Hannah Levitt and Christopher Cannon, "Wells Fargo Rejected Half Its Black Applicants in Mortgage Refinancing Boom," Bloomberg (Mar. 11, 2022), https://www.bloomberg.com/graphics/2022-wells-fargo-black-home-loan-refinancing/?embedded-checkout=true.

[108] Consumer Fin. Prot. Bureau, Supervisory Highlights 29 (Issue 13 Oct. 31, 2016), *available at* www.consumerfinance.gov .

initiative as the "most aggressive and coordinated enforcement effort to address redlining,"[109] and pledged to "seek to address fair lending concerns on a broader geographic scale than the Justice Department has ever done before."[110] As of October 2024, the initiative resulted in settlements amounting to over $150 million in compensation for communities that have experienced unfair and discriminatory lending practices.[111]

Discouragement can manifest itself in a number of lender decisions, such as where to place branches and which communities to solicit for business. Certain borrowers may be asked to produce extra documents or made to wait for lengthy periods of time. This can happen when a loan officer believes that the potential borrower is not a good candidate for a loan, even before any examination of the income, wealth, or credit history of the potential borrower. These practices have led to a dual credit market where prime lenders have historically focused their marketing efforts almost exclusively in white neighborhoods providing safe products, while subprime lenders have focused their marketing efforts on communities of color often representing the sole option for borrowers, given the lack of bank branches in these neighborhoods.[112] Discouragement of Black, Latino and other applicants by mainstream lenders directly feeds into the targeting of these same applicants and communities for predatory loan products.[113]

Legal services attorneys from around the country communicating with NCLC during the subprime lending boom and the foreclosure crisis repeatedly reported that they had clients drawn into predatory, subprime loans who could have qualified for prime-rate credit. It was commonplace during the 2000-2008 time period for consumer attorneys to encounter clients with a toxic, unaffordable, high-interest-rate loan that had an 800 credit score. These clients would frequently explain, when asked, that they did not apply for prime rate loans because they did not believe such banks or lenders would make loans to them, based on their experiences with banks over the years as well as statements and actions taken by local banks at the time they were approached by the subprime lender.

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[109] Press Release, U.S. Dep't of Justice, Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021), *available at* www.justice.gov .

[110] Press Release, U.S. Dep't of Justice, Attorney General Merrick B. Garland Delivers Remarks Announcing a New Initiative to Combat Redlining (Oct. 22, 2021), *available at* www.justice.gov.

[111] Press Release, U.S. Dep't of Justice, Justice Department Secures $8M from Fairway Independent Mortgage Corporation to Address Redlining in Black Communities in Birmingham, Alabama (Oct. 15, 2024), *available at* www.justice.gov (noting that DOJ's Combating Redlining Initiative had secured over $150 million in relief as of its third anniversary).

[112] FDIC National Survey of Unbanked and Underbanked Households, FDIC 2, 6-7, 37 (2021), *available at:* https://www.fdic.gov/analysis/household-survey/2021report.pdf

[113] Lisa Rice, "Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color," National Fair Housing Alliance (Feb. 26, 2019), https://nationalfairhousing.org/wp-content/uploads/2019/04/Missing-Credit.pdf.

Extensive studies showed that borrowers of color were significantly more likely to receive subprime loans than white households with comparable credit profiles.[114] These studies reflect a pernicious form of market segmentation – with borrowers of color more likely to receive their loans from lenders that charge higher rates than the lenders primarily serving white customers.[115] Many of these borrowers of color could have qualified for prime interest rate loans, but did not believe such lenders would lend to them or attempt to apply with such lenders and were steered to the entity's subprime affiliate.[116] Fannie Mae estimated that up to 50% of subprime borrowers had credit profiles that could have qualified them for prime rate loans.[117]

Regulation B's pre-application discouragement protections are even more important now, given the increased use of digital marketing by lenders. Digital advertising and marketing through the use of sophisticated algorithms and online social media platforms can result in digital redlining, as discussed earlier, allowing lenders to preselect a targeted audience for certain prime products while discouraging applications for the same products from consumers of protected classes and instead, steering them into subprime products.[118] This can and does happen without any regard to the actual credit risk of the borrowers in the pools and instead relies on the perceived credit risk of different groups, absent supporting data.

The Bureau's proposed changes to Regulation B and the official interpretations are misguided and would undercut ECOA's purpose. The existing anti-discouragement rules are not

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[114] Alanna McCargo and Jung Hyun Choi, Closing the Gaps: Building Black Wealth through Homeownership at 7, Urban Institute at(Nov. 2020), https://www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_1.pdf; Boehm, Thomas P., Paul D. Thistle, and Alan Schlottmann. 2006. "Rates and Race: An Analysis of Racial Disparities in Mortgage Rates." Housing Policy Debate 17 (1): 109–49; Cheng, Ping, Zhenguo Lin, and Yingchun Lui. 2014. "Racial Discrepancy in Mortgage Interest Rates." Journal of Real Estate Finance and Economics 51:101–20.

[115] Debbie Gruenstein Bocian, Keith Ernst, and Wei Li, *Unfair lending: The effect of race and ethnicity on the price of subprime mortgages*, Center for Responsible Lending at 22 (2006), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr011-Unfair_Lending-0506.pdf.

[116] William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, Joint Center for Housing Studies (December 2005), https://www.jchs.harvard.edu/sites/default/files/w05-11.pdf.

[117] Linda Fisher, "Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining," 18 Journal of Law and Policy 121, 124 (April 2010), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1132&context=jlp; "Subprime Borrowers Say, 'Wow – I Could Have Had a Prime Mortgage!" Los Angelea Times (May 30, 2007), https://www.latimes.com/archives/blogs/money-company/story/2007-05-30/subprime-borrowers-say-wow-i-could-have-had-a-prime-mortgage#:~:text=More%3A%20'Fannie%20Mae%20estimated%20up,qualified%20them%20for%20prime%20rates.

[118] Jason Cover, Digital Targeted Marketing, Business Regulation & Regulated Industries (Feb. 9, 2022), *available at:* https://businesslawtoday.org/2022/02/digital-targeted-marketing-fair-lending-clickbait/; Bartlett, Robert, Adair Morse, Richard Stanton, and Nancy Wallace, "Consumer-lending discrimination in the FinTech Era," Journal of Financial Economics, 2022, 143 (1), 30–56; Stephens-Davidowitz, Seth, "The cost of racial animus on a black candidate: Evidence using Google search data," Journal of Public Economics, 2014, 118, 26–40.

"unwarranted" or "unnecessary" limitations on commercial activity – rather they are still very much needed in the credit marketplace. Comment 4(b)-1 must continue to provide that Section 1002.4(b) covers "acts or practices" that would discourage a reasonable person on a protected basis. The Board added this comment in 1985; it has been part of the regulatory framework for good reason, and those reasons remain. Decisions like where to locate branches, where to advertise, and how to engage with the community can make an enormous impact on whether members of protected classes apply for credit with a particular lender. To eliminate the words "act or practices" in the commentary would in fact promote circumvention and evasion of ECOA's prohibition against discrimination. All of us, in the ordinary course of the day, understand that we communicate in a vast number of ways that are, in themselves, nonverbal. Turning our back on someone can say "no" as effectively as if we hand the person a note to that effect. The CFPB proposal would allow creditors to turn their back on entire communities, so long as they didn't write it down or say it out loud.

Encouraging statements directed towards one group can, and may be intended to, discourage members of another group from applying for credit. The Bureau should not change the regulatory text such that statements of encouragement directed at a particular group may never be deemed discouragement of a different group.

The Bureau should not adopt its proposed examples of practices that would *not* constitute discouragement. In particular, a statement "in support of local law enforcement" could, depending on context, express a discriminatory preference or a policy of exclusion for borrowers of color. Of course, lenders can and do extend support to members of law enforcement. Credit unions only serving members of the law enforcement community and their families exist. But context matters. If the statement "of support" for law enforcement was combined with a "police lives matter" flag and displayed in a town that had recently experienced extreme police violence against a community member of color, or where there was an ongoing dispute about such violence, a statement of "support" could convey exclusion or discouragement to a potential credit applicant of color.

For all of the same reasons that the Bureau should withdraw its proposed changes to Special Purpose Credit Programs, it also should leave unchanged the regulatory text that currently allows lenders to affirmatively solicit members of traditionally disadvantaged groups.

The Bureau should abandon all of its proposed changes to Section 1002.4(b) and its commentary. The changes proposed in the Proposed Rule are likely to cause confusion in the industry as well as additional, unnecessary compliance costs to adapt to a different standard. This is especially true because a final rule based on this administrative record is not supported, would be arbitrary and capricious, and industry players would be subject to uncertainty until the lawfulness of the change were determined by a Court or reversed by a future administration.

Discrimination in credit markets continues to exist, often through the use of pre-application discouragement. The CFPB's proposals to revise section 1002.4(b) would, rather than expanding access to affordable credit, perpetuate discriminatory lender conduct, encourage the evasion of Regulation B, and undermine ECOA's ability to "anticipate and prevent discriminatory practices in the future."[119] The CFPB's discouragement proposals are misguided and must be revoked in their entirety.

IV. Disparate impact liability and strong anti-discouragement provisions under Regulation B are critical to the American financial system.

ECOA has been used to combat discrimination across the credit market, from mortgages to credit cards and small dollar loans. As consumers struggle to afford basic necessities, a credit market that functions free of discrimination is essential to preserve the resources that individuals and families need to advance economically. Moreover, segmented credit markets that steer some people into one segment and others into a different segment, are inherently anti-competitive and can be expected over time to result in higher costs to borrowers overall as well as increased financial instability.

A. Consumer and civil rights advocates and governments have used disparate impact for decades to challenge predatory practices that deny consumers equal access to credit, especially in the mortgage market.

ECOA remains an important tool to redress discrimination in the mortgage market. Predatory mortgage lending and the ensuing foreclosure crisis led to a significant loss of wealth for Black communities. Between 2000 and 2015 the gains of the previous decades were more than erased, bringing the Black homeownership rate down to 41.2%.[120] As of the fourth quarter of 2023, 73.8% of non-Hispanic white individuals owned homes, whereas only 45.9% of Black individuals and 49.8% of Hispanic individuals owned homes.[121] In fact, older Black homeowners have the lowest median home equity at $123,000, compared to $251,000 for older white homeowners and $200,000 for older Hispanic owners.[122] Ensuring that mortgage applicants are treated fairly no matter their background is essential to expanding homeownership opportunities in many underserved communities.

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[119] S. Rep. No.94-589, at 4 (1976).

[120] Laurie Goodman et al, *Are gains in black homeownership history?*, Urban Institute (Feb. 15, 2017), *available at* https://www.urban.org/urban-wire/are-gains-black-homeownership-history.

[121] Homeownership Rates by Race and Ethnicity, National Association of Home Builders Economic Research Blog (Feb. 6, 2024), *available at* https://eyeonhousing.org/2024/02/homeownership-rates-by-race-and-ethnicity-3/#:~:text=According%20to%20data%20from%20the,and%20Black%20Americans%20%2845.9%25%29.

[122] Jennifer Molinsky, *U.S. is Unprepared to Provide Housing and Care for Millions of Older Adults, Joint Center for Housing Studies, Harvard University* (Nov. 30, 2023), *available at https://www.jchs.harvard.edu/blog/us-unprepared-provide-housing-and-care-millions-older-adults.*

A review of housing discrimination cases points to the ongoing need to preserve the essential role of anti-discrimination laws, such as the ECOA, in building a more open, fair and robust mortgage market, including through disparate impact claims. In contrast with assertions by some that discrimination is a thing of the past, these cases make clear that full use of anti-discrimination laws in the mortgage market remains important to ensuring access. These cases demonstrate the need for legal protections both where individuals have been left out of lending opportunities and where they have been targeted for more expensive or abusive products.

Examples of the cases brought by civil rights and consumer advocates on behalf of impacted consumers include:

- *Saint-Jean et al. v. Emigrant Mortg. Co.*, 11-cv-2122 (E.D.N.Y.): Legal services and civil rights advocates brought a class action lawsuit against Emigrant Savings Bank for violation of ECOA, the Fair Housing Act, the City's Human Rights Law and other laws after minority homeowners were targeted for high-cost loans that the bank knew would likely result in default. In June 2016, after a month-long trial, a jury awarded six of the plaintiffs a total of $950,000 in damages.[123] Most recently, the Second Circuit upheld claims for reverse redlining in this case.[124]

- *Ramirez v. Greenpoint Mortg. Funding, Inc.*, 08-cv-0369 (N.D. Cal.): This class action alleged that Greenpoint's practices had a disparate impact on minority applicants for home mortgage loans. Specifically, the bank's discretionary pricing policy resulted in Black and Hispanic borrowers receiving less favorable loan pricing than similarly situated white borrowers. In April 2011, the parties settled for $14.75 million.[125]

- *Allen v. Decision One Mortg. Co.*, 07-cv-11669 (D. Mass.): Plaintiffs alleged that private banks and lenders maintained a policy that had a discriminatory impact on Black applicants because the policy allowed a discretionary surcharge of additional points and fees to an otherwise objective risk-based financing rate. In May 2010, the class members settled for $6.5 million, financial education, quarterly reporting, and loan restructuring for class members.[126]

- *Puello v. Citifinancial Servs., Inc.*, 08-cv-10417 (D. Mass.): This class action alleged that Citifinancial Services and Citigroup's lending practices had a discriminatory impact on

[123] Alan Feuer, *Emigrant Savings Bank Discriminated Against Minorities, Brooklyn Jury Says*, N.Y. Times, June 27, 2016, *available at* https://www.nytimes.com/2016/06/28/nyregion/emigrant-savings-bank-discriminated-against-minorities-brooklyn-jury-says.html?_r=0%20.

[124] *See Saint-Jean v. Emigrant Mortg. Co.*, ___ F.4th ___, 2025 WL 542335 (2nd Cir. Feb. 19, 2025).

[125] *See Case Profile: Ramirez v. Greenpoint Mortgage Funding, Inc.*, Civil Rights Litigation Clearinghouse, https://www.clearinghouse.net/detail.php?id=12537.

[126] *Case Profile: Allen v. One Decision Mortgage Company*, Civil Rights Litigation Clearinghouse, https://www.clearinghouse.net/detail.php?id=12531&search=source%7Cgeneral%3BsearchIssues%7C390%2C284%3BsearchCauses%7C49%2C29%3Borderby%7CfilingYear%3B.

minority applicants in their home financing policies and practices. In August 2012, the parties settled with Defendants paying compensation to class members who obtained their loans through mortgage brokers, housing counseling services for class members, a non-discretionary pricing policy, training, and Class Counsel's attorney fees.[127]

The disparate impact standard, as discussed in Section II, is essential to the enforcement of credit discrimination laws. Without disparate impact claims governments have fewer tools to address systemic discrimination that puts consumers in harm's way. A survey of mortgage lending-related discrimination cases brought by the federal government demonstrates the effectiveness of the disparate impact standard in addressing systemic discrimination in residential lending policies and practices. Most of the cases settled with a civil penalty and establishment of a settlement fund, often coupled with loan subsidy programs and outreach to impacted community members. The effective and consistent use of disparate impact claims by the government has brought relief to thousands of consumers in a manner that is not equally available to private litigants. Moreover, many of these cases are quite recent, illustrating the present nature of this conduct and the need for ongoing enforcement of the law. These cases include:

- *CFPB vs. Draper & Kramer Mortg. Corp.,* 25-cv-00605 (N.D. Ill.): The CFPB settled a case in 2025 against Draper & Kramer Mortgage Corporation (DKMC), a non-depository mortgage lender based in Illinois, for engaging in redlining in the Chicago and Boston metropolitan statistical areas. The complaint alleged that, in July 2019, the company was issued a supervisory letter from the CFPB stating that its internal compliance program was inadequate with respect to fair lending and providing DKMC with recommendations for attending to the inadequacies going forward. However, from 2019 through 2021, DKMC avoided providing mortgage services to residents in majority-Black and Hispanic neighborhoods and discouraged them from obtaining loans by locating all of its offices and focusing its marketing and outreach efforts in majority-white neighborhoods. The consent order barred DKMC from engaging in any residential mortgage lending activities or receiving compensation for any mortgage lending for a period of five years. It also directed the company to pay a civil penalty of $1.5 million to the CFPB.[128]

- *United States v. Mortg. Firm, Inc.,* 0:25-cv-60038 (S.D. Fla.): The DOJ announced a settlement in 2025 with The Mortgage Firm, Inc. to resolve allegations of redlining in predominantly Black and Hispanic neighborhoods in Miami. The complaint alleged that,

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[127] *Final Approval Order and Judgment*, *Puello v. v. Citifinancial Servs., Inc.*, 08-cv-10417 (D. Mass.), Aug. 10, 2012, Dkt. No. 128; *see also Case Profile: Puello v. Citifinancial Services, Inc.*, Civil Rights Litigation Clearinghouse, https://www.clearinghouse.net/detail.php?id=12449&search=source%7Cgeneral%3BsearchIssues%7C390%2C284%3BsearchCauses%7C49%2C29%3Borderby%7CfilingYear%3B.

[128] *See* Proposed Consent Order, Consumer Fin. Prot. Bureau v. Draper & Kramer Mortg. Corp., No. 1:25-cv-00605 (N.D. Ill. Jan. 17, 2025), *available at* https://files.consumerfinance.gov.

from 2016 through 2021, the company avoided providing mortgage services in these communities and discouraged individuals living there from seeking or applying for credit. The settlement required the company to invest $1.75 million in a loan subsidy fund, assess its programs, train its staff, maintain an office located in a majority-Black and Hispanic neighborhood in Miami-Dade County, and conduct digital marketing campaigns to reach this and other similarly populated neighborhoods.[129]

- *Consumer Fin. Prot. Bureau v. Fairway Indep. Mortg. Corp.,* 2:24-cv-01405 (N.D. Ala.): The CFPB and the DOJ reached a settlement in 2024 with Fairway Independent Mortgage Corporation to resolve claims of redlining in majority-Black neighborhoods in Birmingham, Alabama. The complaint alleged that, from 2018 through 2022, Fairway discouraged Black consumers from applying for loans, such as by concentrating all of its retail loan offices in majority-white areas and directing less than 3% of its direct mail advertising to consumers in majority-Black areas, despite the fact that such areas comprised 33% of the Birmingham metropolitan statistical area. The settlement required Fairway to invest $7 million in a loan subsidy fund and pay a $1.9 million civil penalty to the CFPB. Fairway also was required to spend at least $500,000 for advertising and outreach, $250,000 on consumer financial education, and $250,000 on community-based partnerships. Fairway also was required to open or acquire a new loan production office or full-service retail office in a majority-Black neighborhood.[130]

- *United States v. Citadel Fed. Credit Union,* 2:24-cv-05426 (E.D. Pa.): The DOJ announced a $6.5 million settlement agreement with Citadel Federal Credit Union in 2024 to resolve allegations that Citadel engaged in redlining in majority-Black and Hispanic communities in the Philadelphia area. The complaint alleged that, from 2017 through 2021, Citadel failed to provide mortgage services in majority-Black and Hispanic neighborhoods and discouraged individuals who were looking to obtain home loans for properties in those areas from doing so. Instead, Citadel's lending practices were concentrated disproportionately in white neighborhoods in and around Philadelphia, where the vast majority of its branches (all but one) were located. The settlement required Citadel to open or acquire three full-service branches in majority-Black and Hispanic census tracts in Philadelphia, invest a minimum of $6 million in a loan subsidy fund, and spend at least $250,000 on a community development partnership program and $270,000 on targeted advertising, outreach, consumer financial education, and credit counseling.[131]

- *United States v. OceanFirst Bank Nat'l Ass'n,* 3:24-cv-09248 (D.N.J.): The DOJ, HUD, and the U.S. Attorney's Office for the District of New Jersey announced a $15 million

[129] *See United States v. Mortg. Firm, Inc.,* No. 0:25-cv-60038 (S.D. Fla.), *available at* www.justice.gov.
[130] *See Consumer Fin. Prot. Bureau v. Fairway Indep. Mortg. Corp.,* No. 2:24-cv-01405 (N.D. Ala.), *available at* www.justice.gov.
[131] *See United States v. Citadel Fed. Credit Union,* No. 2:24-cv-05426 (E.D. Pa.), *available at* www.justice.gov.

settlement agreement with OceanFirst Bank in September 2024. The complaint alleged that OceanFirst redlined predominantly Black, Hispanic, and Asian neighborhoods in three counties in New Jersey. According to the complaint, from 2018 through 2022, OceanFirst avoided providing mortgage services in the subject communities and discouraged individuals living there from seeking or applying for credit. Specifically, the complaint alleged that OceanFirst concentrated its branches in majority-white areas while it closed its few locations in majority-Black, Hispanic, and Asian census tracts, and that it disproportionately focused its outreach and advertising efforts on majority-white communities. The settlement required the bank to invest at least $14 million in a loan subsidy fund and for OceanFirst to spend $400,000 on a community development partnership program, plus $700,000 on targeted advertising, outreach, consumer financial education, and credit counseling.[132]

- *United States & North Carolina ex rel. Josh Stein v. First Nat'l Bank of Pa.*, 24-CV-88 (M.D.N.C.): The DOJ and the state of North Carolina announced an agreement in 2024 relating to allegations that First National Bank of Pennsylvania had engaged in redlining Black and Hispanic neighborhoods in the cities of Charlotte and Winston-Salem. The complaint alleged that, from 2017 through 2021, the bank discouraged people in those neighborhoods from seeking and obtaining credit by focusing its lending disproportionately on white neighborhoods, where the majority of the branches were located. In 2021, the bank closed its lone branch in a predominantly Black and Hispanic neighborhood. The consent order mandated staffing and training changes and two full-service branches in majority-Black and Hispanic census tracts in Charlotte and one such branch in Winston-Salem. In addition, the bank was required to invest at least $11.75 million in a loan subsidy fund, spend $1 million on a community development partnership program, and $750,000 on targeted advertising, outreach, consumer financial education, and credit counseling.[133]

- *United States v. Patriot Bank*, 2:24-cv-2029 (W.D. Tenn.): The DOJ announced a $1.9 settlement with Patriot Bank in 2024 resolving allegations of redlining in Memphis. According to the complaint, during the period 2015 through 2020 the bank directed its lending efforts disproportionately toward white areas. Peer lenders generated loan applications from majority-Black and Hispanic areas at 3.5 times the rate of Patriot during the relevant time period. The settlement required Patriot to invest at least $1.3 million in a loan subsidy fund and spend additional monies for community partnerships

[132] *See United States v. OceanFirst Bank Nat'l Ass'n,* No. 3:24-cv-09248 (D.N.J.), *available at* www.justice.gov.
[133] *See United States & North Carolina ex rel. Josh Stein v. First Nat'l Bank of Pa.,* No. 24-CV-88 (M.D.N.C.), *available at* www.justice.gov.

and targeted advertising, outreach, consumer financial education, and credit counseling.[134]

- *United States v. Ameris Bank*, 3:23-cv-01232 (M.D. Fla.): The DOJ reached a $9 million settlement in 2023 with Ameris Bank relating to allegations of redlining in Jacksonville, Florida in some of the same neighborhoods that were redlined by the Home Owners' Loan Corporation in the 1930s. The complaint alleged that, from 2016 through 2021, Ameris concentrated nearly all of its branches in majority-white areas, and avoided marketing and outreach in majority-Black and Hispanic areas. During the relevant time period, other lenders in the area generated loan applications from residents in majority-Black and Hispanic census tracts at more than three times Ameris's rate. The consent order required Ameris to invest $7.5 million in a loan subsidy fund, as well as $900,000 for targeted advertising and outreach, and $600,000 for community partnerships. The bank also was required to open a new branch in a majority-Black and Hispanic neighborhood.[135]

- *United States v. Wash. Tr. Co.*, 1:23-cv-00399 (D.R.I.): The DOJ announced in 2023 that it had settled allegations that Washington Trust Company, from 2106 through 2021, did not open a branch in a majority-Black and Hispanic neighborhood despite expanding across the state. Over the relevant time period, other banks received nearly four times the number of mortgage loan applications each year compared to Washington Trust in majority-Black and Hispanic areas, and even when the bank did generate applications in these areas the applicants were mostly white. The consent order provided for fair lending compliance measures, the opening of two new full-service branches located in majority-Black and Hispanic census tracts, and investments of at least $7 million in a loan subsidy fund, $1 million over a period of five years on a community development partnership program, and $1 million over that same period on targeted advertising, outreach, consumer financial education, and credit counseling.[136]

- *United States v. Am. Bank of Okla.*, 23-cv-00371 (N.D. Okla.): The DOJ announced a settlement in 2023 resolving allegations that American Bank of Oklahoma engaged in redlining in the historically Black neighborhoods that comprised the location of the 1921 Tulsa Race Massacre. The complaint alleged that, between 2017 and 2021, it avoided proving home loans in majority-Black and Hispanic neighborhoods by locating all of its branches in majority-white areas and relying on mortgage loan officers who worked in those locations as the main source for generating loan applications. The bank did not market or advertise in majority-Black and Hispanic neighborhoods, nor did it train or incentivize its staff to conduct outreach or marketing in order to compensate for its lack

[134] *See United States v. Patriot Bank*, No. 2:24-cv-2029 (W.D. Tenn.), *available at* www.justice.gov.
[135] *See United States v. Ameris Bank*, No. 3:23-cv-01232 (M.D. Fla.), *available at* www.justice.gov.
[136] *See United States v. Wash. Tr. Co.*, No. 1:23-cv-00399 (D.R.I.), *available at* www.justice.gov.

of physical presence in those areas. Despite being informed by the FDIC, in 2018, that it had significant fair lending risk, the bank failed to take steps to address that risk and did not implement any of the agency's recommended measures. The settlement provided that the bank would invest in a loan subsidy fund of at least $950,000 and participate in a community development partnership program. The bank also was required to establish a community-oriented production office in a majority-Black and Hispanic census tract and spend at least $100,000 over a period of five years on advertising and outreach directed at both current and prospective residents in the affected areas.[137]

- *United States v. ESSA Bank & Tr.,*2:23-cv-02065 (E.D. Pa.): The DOJ reached a settlement in 2023 resolving allegations of redlining by ESSA Bank & Trust in Philadelphia. The complaint alleged that, from 2017 through 2021, the bank failed to assign loan officers to provide adequate staffing in its branches that served majority-Black and Hispanic neighborhoods, excluded these neighborhoods from its marketing and outreach efforts, and adopted a policy that excluded residents from participating in a home ownership opportunity program for low-income and moderate-income households. It also failed to address its redlining risk, of which it was aware via third-party reports. Under the consent order, ESSA was required to invest almost $2.92 million in a loan subsidy fund and spend additional monies on community partnerships, as well as targeted advertising, outreach, consumer financial education, and credit counseling. In addition, the bank was required to hire two new loan officers to serve its branches in West Philadelphia.[138]

- *United States v. Park Nat'l Bank,* 2:23-cv-00822 (S.D. Ohio): The DOJ announced a $9 million settlement in 2023 resolving allegations that Park National Bank of Newark, Ohio engaged in redlining in the Columbus metropolitan area. The complaint alleged that, between 2015 and 2021, the bank avoided the provision of and discouraged home loans and other mortgage services in majority-Black and Hispanic neighborhoods. The consent order provided for a loan subsidy fund of at least $7.75, required the bank to partner with local service organizations, and required the bank to open a new branch and a new loan production office.[139]

- *United States v. City Nat'l Bank*, 2:23-cv-00204 (C.D. Cal): The DOJ announced a $31 million settlement in 2023 resolving redlining allegations against City National Bank—the largest bank headquartered in Los Angeles. The complaint alleged that, from 2017 through at least 2020, the bank avoided providing mortgage services to residents in majority-Black and Hispanic neighborhoods and discouraged them from obtaining loans. During the relevant time period, other banks received over six times as many applications

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[137] *See United States v. Am. Bank of Okla.*, No. 23-cv-00371 (N.D. Okla.), *available at* www.justice.gov.

[138] *See United States v. ESSA Bank & Tr.*, No. 2:23-cv-02065 (E.D. Pa.), *available at* www.justice.gov.

[139] *See United States v. Park Nat'l Bank,* No. 2:23-cv-00822 (S.D. Ohio), *available at* www.justice.gov.

per year in majority-Black and Hispanic neighborhoods in Los Angeles County than City National Bank. The consent order provided for a $29.5 million loan subsidy program, plus additional amounts for advertising and outreach, consumer financial education, and the development of community partnerships.[140]

- *United States v. Lakeland Bank*, 2:22-cv-05746 (D.N.J.): The DOJ entered into an agreement to resolve allegations that Lakeland Bank engaged in redlining in the Newark metropolitan area. The complaint alleged that, at least from 2015 through 2021, the bank avoided providing home loans and other services in majority-Black and Hispanic neighborhoods by having all of its branches outside of these neighborhoods, and largely excluding these areas from its advertising and outreach efforts. Although none of the loan officers at the branches in majority-white areas were assigned to target customers in majority-Black and Hispanic neighborhoods—and the bank knew for years that its branches were not serving the needs of those communities—it took no meaningful steps to address the disparity. As part of the $13 million settlement in 2022, the proposed consent order provided that the bank would invest a minimum of $12 million in a loan subsidy fund, dedicate $750,000 for advertising and outreach, and direct $400,000 toward community partnerships. In addition, the bank was required to open two new branches in neighborhoods of color and employ a full-time Community Development Officer who would oversee the development of the bank's lending practices in majority-Black and Hispanic census tracts in the Newark Area.[141]

- *CFPB & United States v. Trident Mortg. Co. LP*, 2:22-cv-02936 (E.D. Pa.): The CFPB and the DOJ's complaint alleged that Trident Mortgage Company engaged in a pattern and practice of redlining. The complaint alleged that, from at least 2015 through 2019, Trident avoided providing loans in majority-minority neighborhoods, located nearly all of its offices in white neighborhoods, had predominately white loan officers, and restricted its outreach and marketing activity to white neighborhoods, all while neglecting to place loan offices in or marketing to majority-minority areas. In 2022, the parties reached a $22 million dollar settlement. The consent order required Trident to create a loan subsidy program, participate in community education programs, open branches in majority-minority neighborhoods, partner with a community-based organization to provide home repair grants or foreclosure prevention services, and pay a $4 million dollar fine.[142]

- *United States v. Trustmark Nat'l Bank,* 2:21-cv-02664 (W.D. Tenn.): The CFPB and the DOJ, in concert with the Office of the Comptroller of the Currency, alleged that Trustmark National Bank structured its business and outreach to circumvent majority-

[140] *See United States v. City Nat'l Bank*, No. 2:23-cv-00204 (C.D. Cal), *available at* www.justice.gov.
[141] *See United States v. Lakeland Bank*, No. 2:22-cv-05746 (D.N.J.), *available at* www.justice.gov.
[142] Press Release, Consumer Fin. Prot. Bureau, CFPB, DOJ Order Trident Mortgage Company to Pay More Than $22 Million for Deliberate Discrimination Against Minority Families (July 27, 2022), *available at* www.consumerfinance.gov.

Black-and-Hispanic neighborhoods in its residential mortgage lending, thereby discouraging residents from applying for credit. The consent order in 2021 provided that Trustmark would invest $3.85 million in a loan subsidy program, increase the bank's physical presence and expand its outreach efforts in those neighborhoods. It also provided that Trustmark would pay a $5 million penalty to the CFPB.[143]

- *United States v. Cadence Bank, N.A.*, 1:21-mi-9999 (N.D. Ga.): The Department of Justice (DOJ) alleged that from 2013 to 2017 Atlanta-based Cadence Bank violated federal law by locating almost all of its branches and loan officers in majority-white neighborhoods, focusing its advertising and marketing outreach in majority-white neighborhoods, and avoiding "majority-Black and Hispanic neighborhoods." The DOJ's consent order in 2021 provided that the bank will invest $4.17 million in a loan subsidy fund, $750,000 for community partnerships, and at least $625,000 toward advertising, outreach, consumer education, and credit repair initiatives. In addition, Cadence was required to open a full-service branch in a majority-Black and Hispanic census tract and assign four mortgage loan officers within that area to solicit mortgage applications from residents of majority-Black and Hispanic areas.[144]

- *United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.): The DOJ and CFPB alleged that BancorpSouth failed to provide its home mortgage lending services to majority-minority neighborhoods on an equal basis as it provided those services to predominantly white neighborhoods in the Memphis metropolitan area. In July 2016, the parties settled for a $3 million civil penalty, a $4 million loan subsidy program, at least $800,000 in advertising, outreach, and community partnership, and a $2.78 million settlement fund.[145]

- *United States v. Sage Bank*, 15-cv-13969 (D. Mass.): The DOJ alleged that Sage Bank engaged in discrimination on the basis of race and national origin in the pricing of its residential mortgage loans. In December 2015, the parties settled for monitoring, training, and a settlement fund of $1.175 million.[146]

- *CFPB v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.): CFPB alleged that from 2009 to 2013, Hudson City failed to provide its home mortgage lending services to majority Black and Hispanic neighborhoods on an equal basis. In November 2015, the parties settled for a $25 million loan-subsidy fund, $2.25 million for advertising, outreach, financial education, and community partnership, opening two full-service

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[143] *See* Consent Order, *United States v. Trustmark Nat'l Bank*, No. 2:21-cv-02664 (W.D. Tenn. Oct. 27, 2021), *available at* https://files.consumerfinance.gov.

[144] *See United States v. Cadence Bank, N.A.*, No. 1:21-mi-9999 (N.D. Ga.), *available at* www.justice.gov.

[145] *See United States & CFPB v. BancorpSouth Bank*, 16-cv-0118 (N.D. Miss.), *available at* www.justice.gov.

[146] *See United States v. Sage Bank*, 15-cv-13969 (D. Mass.), *available at* www.justice.gov.

branches in affected neighborhoods, and paying a further civil monetary penalty of $5.5 million.[147]

- *CFPB and United States v. Nat'l City Bank*, 13-cv-1817 (W.D. Pa.): CFPB and the DOJ alleged that between 2002 and 2008 National City Bank charged more than 75,000 Black and Hispanic borrowers higher loan prices not based on borrower risk, but because of their race or national origin. In December 2013, the parties settled for $35 million.[148]

- *United States v. Southport Bank*, 13-cv-1086 (E.D. Wis.): The DOJ alleged that from 2007 to 2008 Southport charged higher broker fees on wholesale mortgage loans made to Black and Hispanic borrowers as compared to non-Hispanic white borrowers. In October 2013, the parties settled for $687,000.[149]

- *United States v. Chevy Chase Bank, F.S.B.*, 13-cv-1214 (E.D. Va.): The DOJ alleged that Chevy Chase Bank charged elevated prices on mortgage loans made to Black and Hispanic borrowers. In September 2013, the parties settled for $2.85 million.[150]

- *United States v. Plaza Home Mortg.*, 13-cv-2327 (S.D. Cal.): The DOJ alleged that Plaza Home Mortgage charged Black and Hispanic borrowers higher fees than white borrowers on wholesale mortgage loans. In September 2013, the parties settled for $3 million, monitoring, fair lending training, and a community enrichment program.[151]

- *United States v. Cmty. State Bank*, 13-cv-10142 (E.D. Mich.): The DOJ alleged that Community State Bank of St. Charles Michigan served the credit needs of the residents of predominantly white neighborhoods in the Saginaw and Flint metropolitan areas to a significantly greater extent than it served the credit needs of majority Black neighborhoods. In January 2013, the parties settled for $165,000 and a nondiscrimination injunction.[152]

- *United States v. Luther Burbank Savings*, 12-cv-7809 (C.D. Cal.): The DOJ alleged that from 2006 to 2011 Luther Burbank Savings enforced a $400,000 minimum loan amount policy for its wholesale single-family residential mortgage loan program and originated

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[147] *See CFPB and United States v. Hudson City Savings Bank, F.S.B.*, 15-cv-7056 (D. N.J.), *available at* www.justice.gov.

[148] *See CFPB and United States v. Nat'l City Bank*, 13-cv-1817 (W.D. Pa.), *available at* www.justice.gov.

[149] *See United States v. Southport Bank*, 13-cv-1086 (E.D. Wis.), Oct. 11, 2013, *available at* www.justice.gov.

[150] *Justice Department Reaches Fair Lending Settlement with Chevy Chase Bank Resulting in $2.85 Million in Relief for Homeowners*, Sept. 30, 2013, https://www.justice.gov/opa/pr/justice-department-reaches-fair-lending-settlement-chevy-chase-bank-resulting-285-million.

[151] *Justice Department Reaches Settlement with Plaza Home Mortgage Inc. to Resolve Allegations of Mortgage Lending Discrimination*, Sept. 27, 2013, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-plaza-home-mortgage-inc-resolve-allegations-mortgage.

[152] *Justice Department Reaches Settlement with Community State Bank Regarding Alleged Lending Discrimination in Michigan*, Jan. 15, 2013, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-community-state-bank-regarding-alleged-lending.

very few single-family residential mortgage loans to Black or Hispanic borrowers throughout California. In September 2012, the parties settled for $2 million and a prohibition on establishing or implementing a $400,000 minimum loan amount policy.[153]

- *United States v. GFI Mortg. Bankers*, 12-cv-2502 (S.D.N.Y.): The DOJ alleged that GFI charged Black and Hispanic borrowers higher interest rates and fees on home mortgage loans because of their race or national origin, not based on their creditworthiness. In August 2012, the parties settled for $3.55 million, compliance monitoring, revised lending, monitoring, and training policies, and a nondiscrimination injunction.[154]

- *United States v. Wells Fargo Bank, N.A.*, 12-cv-1150 (D.D.C.): The DOJ alleged that Wells Fargo engaged in pattern or practice of discrimination against qualified Black and Hispanic borrowers from 2004 to 2009. In July 2012, the parties settled for $184.3 million and an internal review of Wells Fargo's retail mortgage lending.[155]

- *United States v. SunTrust Mortg.*, 12-cv-0397 (E.D. Va.): The DOJ alleged that SunTrust engaged in a pattern or practice of discrimination that increased loan prices for many of the qualified Black and Hispanic borrowers who obtained loans between 2005 and 2009. In May 2012, the parties settled for $21 million.[156]

- *United States v. Midwest BankCentre*, 11-cv-1086 (E.D. Mo.): The DOJ alleged that Midwest BankCentre served the credit needs of the residents of predominantly white neighborhoods in the Missouri portion of the St. Louis metropolitan area to a significantly greater extent than it served the credit needs of majority Black neighborhoods. In April 2012, the parties settled for $1.45 million, the bank opening a full-service branch in a majority Black area, and fair lending training for its employees.[157]

- *United States v. Countrywide Fin. Corp.*, 11-cv-10540 (C.D. Cal.): The DOJ alleged that between 2004 and 2008 Countrywide discriminated by charging more than 200,000 Black and Hispanic borrowers higher fees and interest rates because of their race or national origin, and not because of the borrowers' creditworthiness or other objective

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153 *Justice Department Reaches Settlement with Luther Burbank Savings to Resolve Allegations of Lending Discrimination in California*, Sept. 12, 2012, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-luther-burbank-savings-resolve-allegations-lending.

154 *United States v. GFI Mortg. Bankers*, 12-cv-2502 (S.D.N.Y.), Aug. 27, 2012, *available at* www.justice.gov.

155 *Justice Department Reaches Settlement with Wells Fargo Resulting in More than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims*, July 12, 2012, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief.

156 *Justice Department Reaches $21 Million Settlement to Resolve Allegations of Lending Discrimination by SunTrust Mortgage*, May 31, 2012, https://www.justice.gov/opa/pr/justice-department-reaches-21-million-settlement-resolve-allegations-lending-discrimination.

157 *Justice Department Reaches Settlement with Midwest BankCentre Regarding Alleged Lending Discrimination in St. Louis*, June 16, 2011, https://www.justice.gov/opa/pr/justice-department-reaches-settlement-midwest-bankcentre-regarding-alleged-lending.

criteria related to borrower risk. In December 2011, the parties settled for $335 million.[158]

- *United States v. C&F Mortg. Corp.*, 11-cv-0653 (E.D. Va.): The DOJ claimed that in 2007 C&F obtained higher prices on certain home-mortgage loans to Black and Hispanic borrowers than on loans to certain non-Hispanic white borrowers. In October 2011, the parties settled for $140,000, a nondiscrimination injunction, and monitoring.[159]

- *United States v. Primelending*, 10-cv-2494 (N.D. Tex.): The DOJ claimed that Primelending charged Black borrowers higher annual percentage rates of interest for certain fixed rate loans and loans insured by the Federal Housing Administration In January 2011, the parties settled for $2 million, a nondiscrimination injunction, and monitoring.[160]

- *United States v. AIG Fed. Savings Bank and Wilmington Fin.*, 10-cv-0178 (D. Del.): The DOJ alleged that AIG and Wilmington Finance violated federal discrimination laws when they charged higher fees on wholesale loans to Black borrowers nationwide between July 2003 and May 2006. In March 2010, the parties settled for $6.1 million, an investment of at least $1 million in consumer financial education efforts, and nondiscrimination injunction.[161]

- *United States v. First United Sec. Bank*, 09-cv-0644 (S.D. Ala.): The DOJ alleged discriminatory pricing and redlining. In November 2009, the parties settled for First United opening one new branch, investing $500,000 in a special financing program, and spending more than $110,000 for outreach, promotion, and education.[162]

- *United States v. Centier Bank*, 06-cv-0344 (N.D. Ind.): The DOJ alleged that Centier Bank avoided serving the lending and credit needs of majority minority neighborhoods in Gary, East Chicago, and Hammond. In October 2006, the parties settled for a minimum $3.5 million investment in a special financing program, at least $375,000 in targeted advertising, a $500,000 investment to provide credit counseling, financial literacy, business planning, and other related education programs, training, and reporting.[163]

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[158] *Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, Dec. 21, 2011, https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination.

[159] *United States v. C&F Mortg. Corp.*, 11-cv-653 (E.D. Va.), Oct. 4, 2011, *available at* www.justice.gov.

[160] *United States v. Primelending Inc.*, 10-cv-2494 (N.D. Tex.), Jan. 11, 2011, *available at* www.justice.gov.

[161] *United States v. AIG Fed. Savings Bank & Wilmington Fin., Inc.*, 10-cv-0178 (D. Del.), Mar. 19, 2010, *available at* www.justice.gov.

[162] *United States v. First United Sec. Bank*, 09-cv-0644 (S.D. Ala.), Nov. 18, 2009, *available at* www.justice.gov.

[163] *United States v. Centier Bank*, 06-cv-0344 (N.D. Ind.), Oct. 16, 2006, *available at* www.justice.gov.

- *United States v. First Am. Bank*, 04-cv-4585 (N.D. Ill.): The DOJ alleged that First American violated federal discrimination laws by redlining in the Chicago and Kankakee metropolitan neighborhoods. In July 2004, the parties settled for First American Bank opening four full-service branch offices, investing at least $300,000 for consumer education programs, spending at least $400,000 to advertise its products to minority communities, and investing $5 million in a special financing program for residents.[164]

- *United States v. Huntington Mortg. Co.*, 95-cv-2211 (N.D. Ohio): The DOJ alleged that Huntington Mortgage Co. charged African Americans higher upfront fees on home mortgages. In October 1995, the company agreed to create a $420,000 fund to compensate victims and change its policies.[165]

In addition to the federal government, states, cities and local governments have brought cases using disparate impact to redress the severe economic consequences of lending discrimination on their communities. The Supreme Court, in *Bank of Am. Corp. v. City of Miami, Fla.*, affirmed that a city has standing to sue as an "aggrieved person . . . .[166] Like many major American cities, Miami bore the brunt of the fallout from the foreclosure crisis and sought to remedy the racially discriminatory lending practices that caused harm to its vulnerable communities and drained public resources.

The settlements below highlight some of the holistic solutions local governments sought to help citizens. The ability to bring disparate impact claims is critical for holding lenders accountable and for restoring some of the wealth that has been drained from communities and city coffers.

- *The People of the State of New York v. Evans Bancorp*, 14-cv-0726 (W.D.N.Y.): New York State alleged that Evans systematically denied its mortgages and services to Black residents of the Buffalo metro area by redlining from at least 2009 to the date of the filing of the suit. In September 2015, the parties settled, with Evans establishing an $825,000 settlement fund and a revision of its lending area to include areas previously excluded.[167]

- *Baltimore v. Wells Fargo Bank, N.A.*, 1:08-cv-00062-JFM (D. Md.): Baltimore alleged that Wells Fargo intentionally targeted the City's minority communities for predatory mortgage loans with discriminatory and unfair terms. Under its agreement with the City in 2012 and a related settlement between DOJ and Wells Fargo, the company would

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[164] *United States v. First Am. Bank*, 04-cv-4585 (N.D. Ill.), July 19, 2004, *available at* www.justice.gov.

[165] *United States v. The Huntington Mortg. Co.*, 95-cv-2211 (N.D. Ohio), Oct. 18, 1995, *available at* www.justice.gov.

[166] 137 S. Ct. 1296 (2017). The court vacated and remanded the case to the Eleventh Circuit to determine the contours of the FHA's proximate cause requirement.

[167] *A.G. Schneiderman Secures Agreement with Evans Bank Ending Discriminatory Mortgage Redlining in Buffalo*, Sept. 10, 2015, https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining.

provide $4.5 million in direct down payment assistance, provide an additional $3 million for priority housing and foreclosure-related initiatives, and $425 million in prime mortgage loans in Baltimore over several years, $125 million of which would be in low- and moderate- income neighborhoods. As part of DOJ's settlement with Wells Fargo, the company also would provide $50 million in direct down payment assistance to borrowers in communities around the country, including Baltimore, where the Department identified large numbers of discrimination victims and which were hard hit by the housing crisis.[168]

Discrimination based on race, national origin and other factors in mortgage financing persists and is widespread. The ability of governments and private parties to bring enforcement actions against banks and other lenders that engage in a pattern or practice of discrimination with disparate impact claims is essential to obtaining redress for victims, restoring community resources used to support impacted citizens, and maintaining a competitive and fair financing market.

The fallout from the foreclosure crisis and decades-old discriminatory housing and lending policies also resulted in a resurgence of predatory land installment contracts. NCLC filed a reverse redlining lawsuit with legal services in Atlanta against a Wall-Street backed company that offered this form of predatory financing to Black buyers. Disparate impact claims were brought. This case survived a motion to dismiss with the court noting that the plaintiffs had alleged facts that, if true, would show that the company's marketing practices had a disparate impact on Black borrowers.[169]

It strains credulity that all of these cases, and the decisions and court-approved settlements, reflect anything other than the ongoing persistence of invidious, unlawful discrimination in the credit market. The evidence clearly demonstrates ongoing, invidious, and unlawful discrimination. The CFPB, in declaring that there is no longer a need for these 50-year old provisions of ECOA, invades the territory of both courts and Congress, and flies against the facts.

B. The Proposed Rule creates gaps in regulatory oversight of the auto finance industry that will harm consumers and create inconsistencies in the treatment of auto lenders.

For many consumers, a car provides not only physical mobility but is also vital for economic mobility. Yet numerous studies have shown that the cost of financing a car can vary

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[168] Press release (Jul. 12, 2012), *available at* https://mayor.baltimorecity.gov/news/press-releases/2012-07-12-mayor-rawlings-blake-department-justice-announce-settlement-wells.

[169] Horne v. Harbour Portfolio VI, LP, 304 F. Supp. 3d 1332, 1337 (N.D. Ga. 2018).

based upon race or ethnicity.[170] Dealers make much of their profit from working with financing sources to mark up interest rates.[171] Analyses of investigations into these markups show that consumers with the same credit risk can pay very different interest rates depending on how much the interest rate is marked up, and that Black and Hispanic car buyers were marked up more often and by a greater amount than other car buyers.[172] Black and Hispanic applicants' loan approval rates are 1.5 percentage points lower despite controlling for creditworthiness.[173] These borrowers pay seventy basis point higher interest rates, but default less, all things equal.[174]

These discriminatory patterns were confirmed in an investigation by the CFPB and DOJ, which determined that over 235,000 people of color were charged higher interest rates for car loans than other consumers between April 2011 and December 2013.[175]

More recently, research has shown continued differences in financing terms between white and Black and Hispanic car buyers. In 2018, the National Fair Housing Alliance released findings showing that better qualified non-white testers were quoted more expensive financing options than less qualified white testers, with their average total payment being $2,662.56 higher.[176] In 2020, the FTC filed a complaint and stipulated order against a New York car dealer that included data analysis showing that the practices at the dealership resulted in higher charges

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[170] *See* John W. Van Alst, National Consumer Law Center, Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car (Apr. 2019) *available at* https://www.nclc.org/wp-content/uploads/2022/08/report-time-to-stop-racing-cars-april2019-1.pdf.

[171] Ian Ayres, Guess how Much Cheaper Your Auto Loan Would be if Dealers had to Play Fair, The Wash. Post, June 26, 2019, *available at* https://www.washingtonpost.com/opinions/2019/06/26/guess-how-much-cheaper-your-auto-loan-would-be-if-dealers-had-play-fair/.

[172] Analyses by Professor Ian Ayres of the Yale Schools of Law and Management and Professor of Vanderbilt University's School of Management showed that African Americans were marked up more often than whites and that their average markup was higher. Since the buyer's credit score and other indicia of creditworthiness are already included in the buy rate, the differences in markup were not a reflection of any differences in creditworthiness. *See* Ian Ayres, Expert Report, Willis v. American Honda Fin. Corp., No. 3-02-0490 (M.D. Tenn. July 1, 2004), *available at* https://www.nclc.org/wp-content/uploads/2023/07/ahfc-ianayresreportexhibits.pdf ; Mark A. Cohen, Report on the Racial Impact of AHFC's Finance Charge Markup Policy, Willis v. American Honda Fin. Corp., No. 3-02-0490 (M.D. Tenn. June 30, 2004), *available at* https://www.nclc.org/wp-content/uploads/2023/07/ahfc-cohenreportappendices-a-c.pdf.

[173] Alexander W. Butler, Erik J. Mayer, & James P. Weston, Racial Discrimination in the Auto Loan Market 41-42 (Mar. 31, 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_mayer_racial-discrimination-in-the-auto-loan-market.pdf.

[174] *Id.*

[175] Administrative Proceeding Consent Order, In re Ally Financial Inc. & Ally Bank, File No. 2013-CFPB-0010 (CFPB Dec. 20, 2013), *available at* https://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf . This analysis focused on just one major car financing company, Ally Financial, Inc. Subsequent enforcement actions followed, based on similar analyses against American Honda Finance Corporation, Fifth Third Bank, and Toyota Motor Credit Corporation. Information about the enforcement actions is *available at* https://www.consumerfinance.gov/policy-compliance/enforcement/actions/?page=1&topics=auto-loans#ofilterable-list-controls.

[176] Lisa Rice & Erich Schwartz Jr., National Fair Housing Alliance, Discrimination When Buying A Car: How the Color of Your Skin Can Affect Your Car-Shopping Experience (Jan. 2018), *available at* https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf .

to Black and Hispanic customers, who were charged the maximum allowable interest rate markup 50% more often than non-Hispanic white borrowers. Non-Hispanic white consumers were not charged any markup, or were given an interest rate below the buy rate the dealer was provided, about twice as often as Black or Hispanic borrowers.[177]

Discrimination reduces the ability of consumers to successfully negotiate for better terms. One hypothesis that is sometimes suggested to explain why people of color are charged more for financing is that perhaps they just do not negotiate enough to obtain better terms. Research by the Center for Responsible Lending looking at attempts to negotiate financing terms for car sales at dealers found that Black and Latino consumers attempted to negotiate financing terms slightly more often than white car buyers, yet were still left with worse terms.[178] These results are in line with what we might expect from a process that places a great deal of discretion with a dealership employee in an F&I office. The need to quickly size up a potential car buyer and quickly reach the most profitable deal possibly leads many to rely, consciously or subconsciously, on race and ethnicity.[179]

These disparities make cars more expensive for some racial and ethnic groups and keep some families from getting a car at all. They contribute to the differences we see in the ability of families to get a car. For those at or below the poverty line, 13% of white households lack access to a car, compared to 31% of Black households and 20% of Hispanic Households.[180] Research shows in aggregate that discrimination in auto financing alone crowds out 80,000 auto financings each year by Black and Hispanic consumers.[181]

Despite the breadth and significance of disparities in auto finance costs it is very difficult for any consumer to determine if their financing costs have been increased relative to other

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[177] *See, e.g.*, Complaint, Federal Trade Comm'n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda, Case No. 20-CV3945 (S.D.N.Y. May 21, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf .

[178] Delvin Davis, Non-Negotiable: Negotiation Doesn't Help African Americans and Latinos on Dealer Financed Car Loans, Center for Responsible Lending, January 2014, *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386005 .

[179] Gregory Arroyo, The Editor Goes One-On-One With the Man who Helped Chart the CFPB's Course Into the Auto Finance Industry, F&I and Showroom, Apr. 2014 (citing Rick Hackett, former assistant director at the CFPB who represented auto finance companies both before and after his service with the CFPB, and who was told by a dealer: "Look, you've got to understand, we've got a very short period of time to figure out the best way to put together all the moving parts of a complex transaction for the consumer, and how we're going to be able to negotiate to have a deal the consumer can accept and is adequate for the dealership. And so we have to make quick judgments when we sort out the process. So when you pick that initial rate for negotiating a finance rate, we all know Asians are better negotiators.").

[180] *See* John W. Van Alst, National Consumer Law Center, Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car (Apr. 2019) *available at* https://www.nclc.org/wp-content/uploads/2022/08/report-time-to-stop-racing-cars-april2019-1.pdf.

[181] Alexander W. Butler, Erik J. Mayer, & James P. Weston, Racial Discrimination in the Auto Loan Market 41-42 (Mar. 31, 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_mayer_racial-discrimination-in-the-auto-loan-market.pdf .

consumers of different races or ethnicities. The market for cars and car financing is troublingly opaque and inconsistent. Consumers have no way of knowing that their interest rate is being marked up or by how much. Even those charged with supervising auto finance for fair lending purposes find it difficult to follow racial bias in these markups, because the ECOA prohibits the collection of race data for consumers financing a car.[182] While such a prohibition may help avoid discrimination when the decision about whether to extend credit and at what terms is made by someone without physical access to the consumer borrower, auto dealers, through interest rate markups and the selection of finance entities, are playing a very real role in the extension of credit and typically are sitting across the desk from car buyers. This role of the people in the room with the consumer with discretion to affect terms of financing is reflected in the fact that the differences in terms for reasons other than credit worthiness are stronger where racial biases are more prevalent and banking competition is lower.[183]

While there are occasions where a "smoking gun" can provide evidence of an intent to discriminate,[184] in most instances the fact that certain races or ethnicities are being treated differently can only be shown through the statistical differences in outcomes between similarly situated consumers despite the lack of any evidence of overt intent to discriminate. Strong enforcement actions by governmental and private parties primarily relied upon disparate impact. Class actions brought in the late 1990s and early 2000s resulted in settlements with the major auto financing entities.[185] The settlements varied but included caps on interest rate markups, monetary relief to some class members, programs to provide more affordable credit to diverse consumers, interest rate reductions through refinancing, and other terms.[186] The terms agreed to in the settlement of these cases, including the caps, have all now expired, and similar private actions are unlikely given the widespread use of arbitration clauses and certain Supreme Court decisions that impede class actions. In addition, those class actions relied on state driver's license information to determine the race or ethnicity of borrowers, but the number of states that record race or ethnicity data on driver's licenses has declined, and the ECOA does not require or allow data about race or ethnicity of car buyers to be collected. These restraints on the ability of

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[182] 12 C.F.R. §§ 1002.5(b), 1002.12(a), (b).

[183] Alexander W. Butler, Erik J. Mayer, & James P. Weston, Racial Discrimination in the Auto Loan Market 41-42 (Mar. 31, 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_mayer_racial-discrimination-in-the-auto-loan-market.pdf.

[184] *See, e.g.*, Complaint, Federal Trade Comm'n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda, Case No. 20-CV3945 (S.D.N.Y. May 21, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf (alleging that defendant dealership instructed sales personnel to charge Black and Hispanic consumers higher markups and additional fees, leading to higher prices for vehicles, and to perform these practices with Black and Hispanic consumers only, stating that these consumers have limited education and not to attempt these practices with non-Hispanic white consumers, as well as using derogatory terms to refer to Black and Hispanic consumers).

[185] *See, e.g.*, Cohen, Mark A. Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation, *available at:* http://ssrn.com/abstract=951827.

[186] An example of one such judgement for (Osborne v. Bank of America Nat. Ass'n., 234. F.Supp.2d 804 (M.D. Tenn. 2002) is *available at* https://library.nclc.org/sites/default/files/field_media_file/2019-02/Osborne_Settlement.pdf .

consumers to address discrimination through private litigation have made vigilant enforcement of fair lending laws by public entities all the more important.

Starting in 2013, the CFPB and DOJ filed a series of enforcement actions against major car financing entities, based on data analysis by the Bureau that showed that consumers of color were charged higher interest rate markups than white buyers without regard to credit scores. As a result of the first enforcement action, Ally Financial, Inc. and Ally Bank were ordered to pay $80 million in damages to harmed consumers and $18 million in penalties.[187] Other enforcement actions followed. American Honda Finance Corporation was ordered to pay $24 million in damages to harmed Black, Hispanic, and Asian and Pacific Islander car buyers and to change its pricing and compensation system to reduce the risk of discrimination.[188] Fifth Third Bank was required to pay $18 million to harmed Black and Hispanic borrowers and change its pricing and compensation system.[189] Toyota Motor Credit Corporation agreed, as part of its settlement, to pay up to $21.9 million in restitution to Black and Asian and Pacific Islander car buyers who were charged higher interest rates than white borrowers for their auto loans, without regard to their creditworthiness, and to change its pricing and compensation system to substantially reduce dealer discretion and financial incentives to mark up interest rates.[190] Enforcement actions like these brought redress to consumers and gave companies a strong incentive to examine and reform their financing practices to eliminate pricing disparities. They also made it easier for other finance entities to adopt pricing and compensation systems that reduce dealer discretion and the opportunity for discrimination and still be able to compete.

At the same time as it was bringing these enforcement actions, the CFPB issued a bulletin designed to assist the finance entities over which it had enforcement authority to limit their risk of violating the ECOA.[191] This was a proactive step to help financing companies move forward and avoid the practices that led to disparate pricing.

However, in 2018, Congress passed a joint resolution disapproving the bulletin that the CFPB issued in 2013 to help financing entities avoid ECOA violations. There were also indications that the attitude of the Bureau towards enforcing fair lending laws was changing. CFPB Acting Director Mick Mulvaney was widely quoted as saying at a speaking engagement

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[187] "CFPB and DOJ Order Ally to Pay $80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing Ally to Pay Additional $18 Million in Civil Penalties for Harming More Than 235,000 Minority Borrowers," December 20, 2013.

[188] "CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing African-American, Hispanic, and Asian and Pacific Islander Borrowers Will Receive $24 Million," July 14, 2015.

[189] "CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices Company to Pay $18 Million to Minority Auto Borrowers, $3 Million to Credit Card," September 28, 2015.

[190] "CFPB and DOJ Reach Resolution With Toyota Motor Credit To Address Loan Pricing Policies With Discriminatory Effects, Minority Borrowers Who Paid Higher Rates for Auto Loans Will Receive Up to $21.9 Million," February 2, 2016.

[191] CFPB Bulletin 2013-02, March 21, 2013.

that the Bureau would be "reexamining the requirements" of the ECOA and that if the rate of violations were not frequent "maybe — it's evidence of a lack of criminal intent, and maybe there's a good place … for me to execute some prosecutorial discretion ."[192] As the changes at the CFPB in regard to the enforcement of fair lending laws became apparent, the market was quick to react. Large auto finance entities, such as BB&T and BMO Harris Bank, had implemented compensation systems that paid dealers a flat fee, rather than one that varied based on the terms of the credit, for assigning car financing contracts to them. Both reverted to policies that allowed for large variable markups. BB&T, which had implemented a flat fee system in 2015, announced in early 2018 that it was moving to allow maximum dealer interest rate markups of 2% on loans up to 75 months and allow the dealer to keep a maximum of $5,000 for marking up the consumer's interest rate.[193] Meanwhile, despite Congress's disapproval of the CFPB's 2013 bulletin, the CFPB's authority and duty to enforce fair lending laws remains the same.[194]

In addition to other problematic issues with the CFPB's proposal, the current proposal would create a messy regulatory environment for the marketplace. While the Bureau has ECOA rulemaking authority over its regulated entities, it doesn't have authority to regulate auto dealer creditors under ECOA. Auto dealers, who play a central role in decisions around the extension of credit and credit terms and are typically the originating creditors for auto credit through retail installment sales contracts, are excluded from the CFPB's ECOA rulemaking authority.[195] Recognition of this authority of different entities is found in previous multiagency work on these issues. When the Bureau acted alone, the Federal Reserve Board retained authority to issue rules for dealers covered by section 1029(a) of Dodd-Frank.[196] The FTC has authority to enforce the ECOA against businesses that fall within its jurisdiction[197] but would look to the rule making authority of the Federal Reserve Board. If the CFPB finalized its proposed rule, different players in the auto finance industry would be subject to different fair lending rules.

C. ECOA's disparate impact and discouragement provisions are important for preventing discrimination in credit cards and other forms of small dollar lending.

Eliminating Regulation B's disparate impact provisions and gutting the prohibitions on discouragement will remove tools to prevent and redress discrimination in credit cards, small dollar loans and other forms of small dollar lending. Discrimination remains a risk in those markets. It is critical to require lenders to encourage and accept all qualified borrowers,

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[192] Katy O'Donnell, "Mulvaney: Rate of violations to factor in future CFPB actions," Politico, May 29, 2018.
[193] Hannah Lutz, "As CFPB retreats, what's next for dealer reserve?" Automotive News, February 19, 2018.
[194] 12 U.S.C. § 5516(d).
[195] 12 U.S.C. § 5519.
[196] *See* https://www.federalreserve.gov/newsevents/pressreleases/bcreg20110620a.htm
[197] 12 U.S.C. § 5519.

regardless of their membership in a protected class, and to assess the actual discriminatory impact of their practices.

Without the tools against disparate impact and discouragement, how would the Proposed Rule prevent or redress the following types of discriminatory impact on protected classes? Is the Bureau unconcerned about the discriminatory *impact* of industry practices?

In September 2023, the General Accounting Office published a study of pandemic assistance, finding that credit terms varied among demographic groups.[198] The study found, among other findings:

> Cardholder accounts in the sample that were in billing zip codes with a majority of Black or African American or Hispanic or Latino residents likely had higher interest rates and lower credit limits and carried balances longer compared with accounts in predominantly White zip codes, as indicated by GAO analysis. For example, the difference in interest rates was on average about 1.3 percentage points. Cardholders in the sample that were in majority-Black or -Hispanic zip codes continued to face higher interest rates and lower credit limits as compared with cardholders in predominantly White zip codes ***who had the same credit scores, zip-code income distribution, and revolving status***. While accounts in the sample that were in majority-Black or -Hispanic zip codes carried smaller balances than accounts in predominantly White zip codes, higher interest rates combined with carrying balances longer can result in higher credit costs.[199]

In 2022, the CFPB conducted a study on credit card late fees. It found that credit card late fees are "a major source of revenue" for credit card companies – over ten percent of interest and fee revenue on average and as high as 31 percent at some banks.[200] The Bureau further found: "Credit card late fees disproportionately burden consumers in low-income and majority-Black neighborhoods."[201] Separately, the Bureau found that the amount of late fees charged to consumers grossly exceeds the amount necessary to cover bank expenses in processing the late payments – five times greater than the collection costs that the companies incur for late payment violations.[202] These costs not only disproportionately burden protected classes, but also create a discriminatory market where they cannot comparison shop as significant costs are hidden on the back end.

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[198] U.S. GAO, CREDIT CARDS: Pandemic Assistance Likely Helped Reduce Balances, and Credit Terms Varied among Demographic Groups (Sept. 2023).
[199] *Id.* (summary of "What GAO Found") (emphasis added).
[200] CFPB, Credit card late fees at 3, 13-14 (Mar. 2022).
[201] *Id.* at 2; *see also id.* at 10.
[202] 88 Fed. Reg. 18906, 19917 (Mar. 29, 2023).

In 2019, complaints surfaced that indicated that Apple's new credit card might be discriminating against women.[203] It appeared that the card's algorithm was treating women differently than men even if they had the same or better credit score.[204] While the New York Department of Financial Services ultimately concluded that there were no fair lending violations,[205] it was critical to investigate the allegations of disparities even though they were attributed to a computer and there was no smoking gun of intentional discrimination by human beings. As AI underwriting systems become more and more complex and opaque, it is all the more important to ensure that companies work prevent systems from leaving out or preying on protected class members and that regulators have the authority to investigate potential disparities. These investigations can clear companies and give people confidence to use their products without fear that they will be treated unfairly.

In 2013, Demos and NAACP issued a report on *The Challenge of Credit Card Debt for the African American Middle Class*.[206] Among other findings, the report found that moderate income Black households had similar rates of default and late payments to moderate income white households, but that Black households were more likely to have a credit card cancelled, see their credit limit reduced, or be denied for a credit card in the three years following the Great Recession.[207]

Beyond the credit card markets, Regulation B's prohibitions against disparate impacts and discouragement are also important to other types of small dollar loan lending. The redlining and predatory lending that has happened in the housing markets and physical neighborhoods also happens in other markets. For example, payday lenders that offer predatory, debt trap loans at rates of 300% APR or higher have been found to concentrate in communities of color – the same areas impacted by redlining.[208]

As small dollar loans are increasingly made online and through mobile apps, advertising, marketing and underwriting practices can still have discriminatory impacts and can discourage

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[203] Neil Vigdor, New York Times, Apple Card Investigated After Gender Discrimination Complaints (Nov. 10, 2019).

[204] Will Knight, Wired, The Apple Card Didn't 'See' Gender—and That's the Problem (Nov. 19, 2019).

[205] New York State, DFS Issues Findings on the Apple Card and Its Underwriter Goldman Sachs Bank (Mar. 23, 2021).

[206] Catherine Ruetschlin, Demos, Dedrick Asant-Muhammad, NAACP, The Challenge of Credit Card Debt for the African American Middle Class (Dec. 2013).

[207] *Id.* at 2.

[208] *See, e.g.*, Center for Responsible Lending, Payday and vehicle title lending disproportionately harm communities of color, exploiting and perpetuating the racial wealth gap (Nov. 2020); Delvin Davis, et al., Race Matters: The Concentration of Payday Lenders in African-American Communities in North Carolina, Center for Responsible Lending (2005), (finding that, even when controlling for a variety of other factors, African-American neighborhoods had three times as many payday lending stores per capita as white neighborhoods in North Carolina in 2005); Assaf Oron, Easy Prey: Evidence for Race and Military Related Targeting in the Distribution of Payday Loan Branches in Washington State, Department of Statistics, University of Washington (2006) (concluding based on a study of Washington State payday lenders that "payday businesses do intentionally target localities with a high percentage of African Americans.").

protected classes from applying for lower cost forms of credit while targeting them for higher cost ones.[209] As discussed above, this can happen through algorithms choosing who gets ads through social media and other platforms,[210] what outlets in which to advertise, what color faces to use in advertisements, and the incorporation of data that leads to disparate impacts.[211] Disparate impact and discouragement bans are necessary to address many, if not all, of the potential discriminatory abuses occurring in online and mobile app lending.

V. Congress created a targeted credit assistance program to meet the needs of economically disadvantaged consumers, and the Bureau's Proposed Rule would effectively eliminate Special Purpose Credit Programs and increase the cost of credit.

In 1976, when Congress amended ECOA to bar racial discrimination in addition to sex discrimination in credit, Congress took care to carve out from its credit discrimination ban particular programs created by creditors to benefit economically disadvantaged members of protected classes. The Bureau's current proposal would directly contradict the language and intent of the statute with respect to special purpose credit programs.

A. Special Purpose Credit Programs are constitutional.

Although it is not the province of the CFPB to determine the constitutionality of a statute, special purpose credit programs (SPCPs) are constitutional. Actions taken by private actors have no constitutional implications. The equal protection clause has no bearing unless there is a close nexus with government action.[212]

SPCPs are targeted credit assistance programs exempted from ECOA's prohibitions against credit discrimination. Such programs, designed to address "special social needs" or for an "economically disadvantaged class of persons," may condition programmatic eligibility on bases otherwise prohibited by law, such as race or sex. Regulation B has for decades made clear that SPCPs may be designed to "extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than … other applicants applying to the organization for a similar type and amount of credit."[213]

When Congress passed ECOA, it intended to make certain discriminatory conduct illegal. That conduct - intentional or effects-based discrimination based on a protected class - was

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[209] *See, e.g.,* Carol A. Evans, Wester Miller, Federal Reserve Board, From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing, Consumer Compliance Outlook (Third Issue 2019); Matthew Bui, University of Michigan, et al., .Algorithmic discrimination: a grounded conceptualization (June 19, 2025).

[210] *See, e.g.,* Jinyan Zang, Brookings, Solving the problem of racially discriminatory advertising on Facebook (Oct. 19, 2021).

[211] *See, e.g.,* NCLC, Past Imperfect: How Credit Scores "Bake In" and Perpetuate Past Discrimination (Updated February 2024); NCLC, No Silver Bullet: Using Alternative Data for Financial Inclusion and Racial Justice (June 2022).

[212] Jessica Mitten, et al., *Equal Protection*, The Georgetown Journal of Gender and the Law, Vol. XXIII:267 (2022).

[213] 12 C.F.R. § 1002.8.

constitutional if it lacked a government nexus. But Congress desired to make it *illegal*. However, Congress desired *not* to make illegal conduct that was attempting to remedy a disparity in access, helping a protected class that was economically disadvantaged. Congress intentionally carved out from the statutory credit-discrimination ban the exact kind of "reverse discrimination" which the Bureau seeks to end through this rulemaking - affirmative action in the credit context. Congress intended to carve out from ECOA's statutory credit discrimination ban those programs which were intended to benefit a group that had been "effectively denied access to credit."[214] Because of the SPCP provision, private actors may take actions to benefit historically disadvantaged groups without violating a civil rights statute.

Congress made this decision because decades of legal discrimination had created a highly unequal credit marketplace, and it was consistent with the goals of ECOA to allow private actors to attempt to remediate this highly unequal state of the world. Unfortunately, because SPCPs are voluntary and private actors are mostly motivated by profit, SPCPs have never been undertaken on a significant level, and the credit marketplace remains highly unequal today, just as it was in 1976. Nonetheless, SPCPs and the Congressional decision not to make them illegal do not raise constitutional questions.

Even if there were a sufficient nexus with government action through the decision not to outlaw SPCPs, this section of ECOA easily passes constitutional muster. The desire to permit redress of decades of discrimination is a compelling government interest. Redressing past discrimination remains a constitutionally viable purpose for programs aimed at benefiting historically disadvantaged groups.[215] The statutory scheme is narrowly tailored to meet that compelling interest because Congress directly authorized the administrative agency to issue standards for the programs. In those regulations, the agency specified that companies making use of SPCPs must lay out a factual basis for the program need, determine the appropriate scope and duration, and reevaluate the purpose and execution of that program in regular intervals. This narrow tailoring and proportionality satisfy the Supreme Court's strict scrutiny standard. Congress's decision not to ban programs that meet the SPCP standards rests on solid constitutional footing, in 2025 as it did fifty years ago.

B. The proposed regulatory changes regarding SPCPs are directly contradictory to the relevant statutory section and Congressional intent.

The Proposed Rule purports to modify Regulation B's SPCP provisions to make them "directionally consistent with" the purpose of ECOA.[216] However, ECOA contains two purposes: to *ban* negative treatment based on protected class status and to *permit* beneficial treatment of protected classes that have been economically disadvantaged. The Bureau's Proposed Rule

[214] H. Rep. No. 94-891, at 8 (Mar. 4, 1976).

[215] *See* Brad Blower, "Special Purpose Credit Programs Remain on Solid Legal Ground Despite Supreme Court's Affirmative Action Decision," National Community Reinvestment Coalition (Sept. 11, 2003), https://ncrc.org/special-purpose-credit-programs-remain-on-solid-legal-ground-despite-supreme-courts-affirmative-action-decision/.

[216] 90 Fed. Reg. at 50911-12.

emphasizes only the Congressional intent of § 1691(a) (general anti-discrimination), but disregards and dishonors the Congressional intent of § 1691(c) (SPCPs).

The legislative history of § 1691(c) makes clear that Congress intended to permit for-profit creditors to continue making credit available on preferential terms where the program was designed to benefit a protected class that had been economically disadvantaged. The Senate Report acknowledged that, "[c]ertain credit programs are specifically designed to prefer members of economically disadvantaged classes," and stated, "the Committee does not intend to undermine these programs."[217] According to the Conference Report, the SPCP provisions, "specifically permit[] the continuance of affirmative action type programs," noting that the "[c]onferees were aware that there are a number of such ongoing programs."[218]

As an OCC Interpretive Letter recounting the legislative history described, "[w]hen debating enactment of the ECOA, Congress was concerned that the Act may inhibit experimental and affirmative programs that help to meet special credit needs of persons who, without such programs, would not receive credit. To ensure such programs would not be foreclosed by ECOA, Congress enacted the provision allowing 'Special Purpose Credit Programs.'"[219]

The Chairperson of the House Subcommittee responsible for drafting section 1691(c)(3) provided examples of these existing programs:

> [w]hen we wrote 701(c)(3) in the Subcommittee last year, we definitely had in mind programs offered by banks and other profitmaking organizations to extend credit to young people, or to old people, or to minority groups, but we did want firm standards to be set.[220]

In floor debates on the SPCP amendments, the House specifically approved of "laws which provide specific benefits for loans to minority enterprises."[221] One member explained that "we do not want to prohibit discrimination in the granting of credit to a particular ethnic group," noting support for an existing program focused on lending money to "a black-oriented group."[222] In short, the SPCP language confirms that discrimination of this kind is not a violation of ECOA.[223] Congress delegated to the Board the authority to prescribe standards by which

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[217] S. Rep. No. 94-589, at 409 (Jan. 21, 1976), 1976 U.S.C.C.A.N. 403, 409; *see also United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 175 (3d Cir. 1984) (summarizing legislative history).
[218] H.R. Conf. Rep. 94-873, at 8 (Mar. 4, 1976), 1976 U.S.C.C.A.N. 426, 428.
[219] OCC Interpretive Letter, 1994 WL 763814, at *1 (June 13, 1994) (citing legislative history).
[220] *United States v. American Future Systems, Inc*., 743 F.2d 169, 175 (3d Cir. 1984) (quoting 121 Cong. Rec. 27, 138 (1975) (emphasis in original)).
[221] 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/.
[222] *Id*.
[223] Relman Colfax PLLC and the National Fair Housing Alliance, *Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem* (Nov. 2020), https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

creditors could offer programs "designed to increase access to the credit marketplace by persons previously foreclosed from it."[224] Congress understood—and intended to confirm—that affirmative action programs making eligible a protected class that had special social needs were lawful.

Contrary to the statutory language and Congressional intent of §1691(c), the Bureau now seeks to prohibit SPCPs which condition eligibility on race, color, sex, or national origin. For any other protected class status (and for these if the proposed prohibition does not become final), the Bureau proposes to require evidence that the fact of protected class status is *directly causing* the inability to obtain credit. Yet this is inconsistent with the Congressional intent. The legislative history shows Congress intended to allow preferential programs if the group in question has been "effectively denied" access to credit.[225] This is *effects* language. Congress did not intend SPCPs to be limited to only remediating intentional disparate treatment. Section 1691(c) permits for-profit SPCPs to meet "special social needs" of a particular protected class, including those based on race, sex, or national origin.

C. The available evidence does not reflect a material change of circumstances in the credit marketplace.

Contrary to the preliminary findings in the Proposed Rule, the credit marketplace has not changed significantly since Congress made the decision to permit SPCPs to benefit a protected class based on special social needs. The CFPB now claims that "fifty years of legal prohibitions against credit discrimination… have substantially reshaped credit markets relative to what Congress, the Board, and consumers would have encountered in 1976," but admits that it has no data regarding credit access disparities in 1976 nor the present on which to base this claim.[226]

The only change in circumstances the NPRM points to is the fact that intentional discrimination in a number of contexts has now been illegal for a longer period of time. However, as described above, Congress designed the SPCP carve-out from ECOA's general anti-discrimination rule due to its awareness of *the effects* of decades of unequal access.[227]

The Bureau says it is not aware of any credit markets in which consumers would be "*effectively* denied credit" because of their race, color, national origin, or sex, and requests comments on "whether and the extent to which there may remain any such credit markets."[228] In fact, members of these protected classes are effectively denied credit in a range of transaction types, due to ongoing structural barriers and the continuing effects of decades of government-sanctioned discrimination. Section I.A. fully discusses the ongoing barriers each protected class faces for which the Bureau proposes to ban protected class-based eligibility. Beneficial programs

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[224] S. Rep. No. 94-589, at 7 (1976).
[225] H. Rep. No. 94-891, at 8 (Mar. 4, 1976).
[226] 90 Fed. Reg. at 50910.
[227] 90 Fed. Reg. at 50910.
[228] 90 Fed. Reg. at 50910.

like SPCPs designed to help economically disadvantaged classes are still necessary and appropriate to fulfill ECOA's statutory goals.

D. The proposed new regulatory requirements for SPCPs are so excessively burdensome that SPCPs will become impossible to operate.

In addition to barring SPCPs that use race, sex, or national origin as eligibility criteria, The Bureau proposes a number of additional restrictions on any SPCP operated by a creditor. The written plan of the SPCP that uses protected class status as a criteria must explain and show why a facially neutral proxy would not be sufficient to address the credit barrier.[229] The lender operating an SPCP must provide individual evidence for each applicant that they would not have otherwise gotten credit. The Bureau proposes to limit SPCP eligibility to applicants that would have otherwise been denied credit, rather than denied or received credit on worse terms.

The proposed regulatory text would make designing and implementing a SPCP so burdensome as to be impossible. Lenders have been slow to adopt SPCPs without significant regulatory clarity, fearing that they might run afoul of either ECOA or the Fair Housing Act. The kinds of additional hoops contained in the proposed rule send a message that lenders interested in having an SPCP have to do all the more analysis to justify it, and expose themselves to significant risk that the regulator will deem it noncompliant or that they will face litigation from private parties. These additional restrictions, documentation and justification requirements are unnecessarily burdensome and will thwart the Congressional intent behind the SPCP authorization.

E. The costs of the proposed SPCP changes far outweigh any benefits.

As the Bureau suggests may be the case, the costs and burdens of the SPCP proposal far outweigh any potential benefits. The Bureau acknowledges that the proposed changes "would impose additional costs on creditors who attempt to develop an SPCP."[230] The SPCP changes involve significantly increasing the regulatory complexity in this space. Lenders who elect to undertake an SPCP would have to make significant investments in adjusting to and complying with these new regulatory requirements. The only way the compliance costs to lenders would not skyrocket as a result of the proposal would be if they determine not to undertake an SPCP at all based on an assessment that the costs of compliance would be too high.

There are no benefits from the proposed SPCP changes. The only potential benefit suggested by the Bureau is that perhaps people who are not members of the protected classes previously benefited by SPCPs might enjoy greater access to credit due to creditors no longer offering SPCPs – a possibility which is entirely hypothetical, and since there have been an astonishingly low number of SPCPs to date, any impact would be undetectable.

The CFPB recognizes that some consumers who are currently able to obtain credit under existing SPCP program rules would be unable to obtain credit, or obtain it on more costly terms,

[229] 90 Fed. Reg. at 50912.
[230] 90 Feb. Reb. at 50917.

as a result of the proposed rule. The Bureau quantifies this cost as small because there are currently relatively few SPCPs in operation in any event. However, SPCPs do have the potential to make credit accessible to significant numbers of members of economically disadvantaged groups. They have not been utilized to nearly the extent of their potential, but in recent years creditors were just starting to explore SPCPs. Those creditors engaged in SPCPs because they found a benefit – perhaps through societal good, perhaps through profit potential of accessing a previously untapped market. Creditors were beginning to utilize and benefit from SPCPs, and consumers were beginning to access and benefit from them as well. One enormous cost of this proposed rule would be that it would destroy the possibility of SPCP programs that could grow and expand in the future. The potential good that SPCPs could do is significant – and the loss of that potential good is a significant cost.

VI. Conclusion

This proposal to amend Regulation B conflicts with the Congressional purpose of the Act, is not supported by the statutory text, and flies in the face of consumers' current lived experience with discriminatory practices in the marketplace. The Bureau should withdraw the Proposed Rules in its entirety and advance protections that remove barriers to credit for consumers.