CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1002

[Docket No. CFPB–2025–0039]

RIN 3170–AB54

Equal Credit Opportunity Act (Regulation B)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing a final rule that amends provisions related to disparate impact, discouragement of applicants or prospective applicants, and special purpose credit programs under Regulation B, the regulation implementing the Equal Credit Opportunity Act (ECOA or Act). The amendments facilitate compliance with ECOA by clarifying the obligations imposed by the statute.

DATES: This final rule is effective July 21, 2026.

FOR FURTHER INFORMATION CONTACT: Dave Gettler, Paralegal Specialist, Office of Regulations, at 202–435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary

Pursuant to its authority under ECOA, 15 U.S.C. 1691b(a), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5512(b), the Bureau is amending provisions in Regulation B, 12 CFR part 1002, pertaining to: whether disparate impact is cognizable under the Act; under what circumstances a creditor may be deemed to be discouraging an applicant or prospective applicant; and under what conditions a creditor may offer special purpose credit programs (SPCPs).

In 2020, the Bureau issued a Request for Information on ECOA and Regulation B (RFI).[1] The RFI solicited information about disparate impact, prospective applicants, and SPCPs, among other topics. The Bureau reviewed the comments submitted in response to the RFI and obtained other information in the course of carrying out its statutory responsibilities. In November 2025, the Bureau issued a notice of proposed rulemaking amending Regulation B (proposal or proposed rule). The Bureau has considered the comments submitted in response to the proposed rule.[2]

The Bureau now finalizes the rule as proposed. The Bureau's final rule provides that ECOA does not authorize disparate-impact liability (effects test), further defines discouragement, and adds prohibitions and conditions for SPCPs.

II. Background

A. Introduction

Congress enacted ECOA in 1974 (1974 Act)[3] "to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status." To that end, section 701(a) of ECOA made it "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction." The Board of Governors of the Federal Reserve System (Board) promulgated regulations implementing ECOA. In 1976, Congress reenacted ECOA in its entirety, amending ECOA to add additional categories of prohibited discrimination (1976 Act).[4] Since 1976, ECOA makes it unlawful for

> any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act] (prohibited basis).[5]

The Board, which at the time had exclusive rulemaking authority under ECOA, promulgated regulations, after notice-and-comment, to implement the 1976 Act.

In 2011, the Dodd-Frank Act transferred responsibility for ECOA from the Board to the Bureau.[6] It granted primary authority to the Bureau to supervise and enforce compliance with ECOA and Regulation B for entities within the Bureau's jurisdiction and to issue regulations and guidance to implement and interpret ECOA.[7] On December 21, 2011, the Bureau established a new Regulation B, 12 CFR part 1002, that substantially duplicated the Board's Regulation B, 12 CFR part 202, making only certain non-substantive, technical, formatting, and stylistic changes.[8] Under the Dodd-Frank Act, it is the Bureau's responsibility to ensure that outdated, unnecessary, or unduly burdensome regulations over which the Bureau has authority are regularly identified and addressed,[9] and to correctly interpret ECOA.

In 2020, the Bureau published an RFI seeking comments and information to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and non-discriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under ECOA and Regulation B.[10] The RFI requested information related to disparate impact, prospective applicants, and SPCPs, among other issues. In response to the RFI, the Bureau received and reviewed over 35 comment letters. In addition, the Bureau has obtained pertinent information in the course of carrying out its supervisory and enforcement responsibilities.

In 2025, the President issued several Executive Orders (E.O.s) relevant to the Bureau's administration of ECOA. E.O. 14173, entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," states in part that "[t]he Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination." [11] E.O. 14281, entitled "Restoring Equality of Opportunity and Meritocracy," states in part that "[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." [12]

On November 13, 2025, the Bureau issued a proposed rule that would amend Regulation B. The proposed rule:

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[1] 85 FR 46600 (Aug. 3, 2020).

[2] 90 FR 50901 (Nov. 13, 2025). Corrections to the proposed amendatory text to conform with the public inspection copy were published at 91 FR 9191 (Feb. 25, 2026).

[3] Public Law 90–321, tit. VII, *as added by* Public Law 93–495, tit. V, sec. 502, 88 Stat. 1521 (15 U.S.C. 1691 *et seq.*).

[4] Equal Credit Opportunity Act Amendments of 1976, Public Law 94–239, 90 Stat. 251.

[5] 15 U.S.C. 1691(a).

[6] Public Law 111–203, 124 Stat. 1376 (2010).

[7] Dodd-Frank Act section 1029 generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

[8] 76 FR 79442 (Dec. 21, 2011).

[9] 12 U.S.C. 5511(b)(3).

[10] 85 FR 46600.

[11] 90 FR 8633 (Jan. 31, 2025).

[12] 90 FR 17537 (Apr. 28, 2025).

(1) provided that ECOA does not authorize disparate-impact claims; (2) proposed to amend the prohibition on discouraging applicants or prospective applicants to clarify that it prohibits statements of intent to discriminate in violation of ECOA and is not triggered merely by negative consumer impressions, and to clarify that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements; and (3) proposed to amend the standards for SPCPs offered or participated in by for-profit organizations to include new standards and related conditions.

The Bureau received approximately 64,500 comments on the proposed rule. A majority of those comments were from individual commenters, including consumers and individuals commenting from their personal and professional experience. The Bureau also received many comments from consumer advocate commenters, industry commenters, policy group commenters, State Attorneys General commenters, and Members of Congress. All comments are available on the public docket for this rulemaking.[13] Relevant information received via comment letters is discussed below in subsequent parts of this document, as applicable.

Consistent with the above discussed actions and after consideration of the comments, the Bureau is finalizing the rule as proposed. This final rule will take effect 90 days after publication in the **Federal Register**.

B. Disparate Impact

In *Griggs* v. *Duke Power Co.*[14] and subsequent cases, the Supreme Court held that certain provisions in antidiscrimination statutes may authorize disparate-impact claims. Under a disparate-impact claim, a plaintiff may challenge as unlawful discrimination facially neutral policies that have a disproportionate effect along prohibited basis lines. The Supreme Court has noted that ''[i]n contrast to a disparate-treatment case, . . . a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.'' [15]

In *Griggs,* the Supreme Court held that disparate-impact claims are cognizable under section 703(a)(2) of title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices. In *Smith* v. *City of Jackson,*[16] a plurality of the Supreme Court held that the Age Discrimination in Employment Act (ADEA) authorizes disparate-impact claims. Most recently, in *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.,*[17] the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act (FHA). However, the Supreme Court has not held that disparate-impact claims are necessarily available under all antidiscrimination statutes. Instead, the Court has reviewed each statutory provision, when challenged, to determine whether it authorizes disparate-impact claims, whether disparate-impact claims are consonant with the intended operation of the statute, and in particular whether the statutory provisions have ''effects-based'' language that indicates that Congress intended for the statutory provision to permit disparate-impact claims.

The Supreme Court has not examined whether a disparate-impact claim is permitted under ECOA. As noted above, section 701(a) of ECOA, as enacted in 1974, made it ''unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.'' In the 1976 Act, ECOA makes it unlawful for ''any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act].'' [18]

The text of ECOA does not state that disparate-impact claims are cognizable under ECOA, nor does it contain effects-based language of the type that has been found in other statutes to invoke disparate-impact liability. However, in promulgating Regulation B, the Board relied on legislative history to support authorizing disparate-impact liability. For example, the Senate Report accompanying the 1976 Act stated:

> 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 practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs* . . . and *Albemarle Paper Company* v. *Moody,* are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.[19]

A House Report similarly provides evidence that ECOA authorizes disparate-impact claims.[20]

The Board's regulations to implement the 1976 Act explicitly and solely relied on this legislative history to conclude that Congress intended for ECOA to permit an ''effects test concept,'' *i.e.,* disparate-impact proof of liability.[21] Although there have been minor amendments to the relevant language in Regulation B since 1977, Regulation B has continued to point to the legislative history of ECOA to support the conclusion that disparate-impact claims are cognizable under ECOA.[22]

Current Rule

Regulation B provides in § 1002.6 that the legislative history of ECOA indicates that the Congress intended an ''effects test'' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness. Current comment 6(a)–2 explains the ''effects test,'' cited to the legislative history of ECOA, and provides an example. Current comment 2(p)–4, which relates to the definition of ''empirically derived and other credit scoring systems,'' refers to the ''effects test,'' noting that neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test and cross-referencing comment 6(a)–2.

Part III.B below discusses the ways in which this final rule changes the current rule regarding disparate impact.

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[13] *See https://www.regulations.gov/docket/CFPB-2025-0039/comments.*

[14] 401 U.S. 424 (1971).

[15] *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 524 (2015).

[16] 544 U.S. 228 (2005) (plurality op.).

[17] 576 U.S. 519.

[18] 15 U.S.C. 1691(a).

[19] S. Rep. No. 94–589, at 4–5 (1976).

[20] H. Rep. No. 94–210, at 5 (1975).

[21] 42 FR 1242, 1255 n.7 (Jan. 6, 1977) (''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,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness.''). This footnote was later moved to the text of § 1002.6 when the Bureau republished Regulation B after responsibility for the rule was transferred from the Board to the Bureau. *See* 76 FR 79442.

[22] *See, e.g.,* 50 FR 48018, 48050 (Nov. 20, 1985) (adopting official staff commentary, including comment 6(a)-2, which explains that the ''effects test'' is a ''judicial doctrine'' that Congress intended to ''apply to the credit area'').

C. Discouragement

Regulation B § 1002.4(b) provides that, ''[a] creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.'' [23] The commentary to § 1002.4(b) provides additional details about conduct prohibited or permitted under the provision.

The Board adopted § 202.4(a), a precursor to current § 1002.4(b), in its 1975 final rule implementing the 1974 Act.[24] The 1974 Act did not specifically mention discouragement of applicants or prospective applicants. To adopt the provision, the Board thus relied on its authority under ECOA section 703(a)—authority that the Dodd-Frank Act subsequently transferred to the Bureau—to make adjustments in Regulation B that, in its judgment, were necessary or proper to effectuate ECOA's purposes.[25] Specifically, ECOA section 703(a) provides that the Bureau (previously the Board) ''shall prescribe regulations to carry out the purposes of [ECOA],'' and that such regulations:

> [M]ay contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.[26]

In its rulemaking, the Board stated that it believed that a prohibition against discouragement was ''necessary to protect applicants against discriminatory acts occurring before an application is initiated.'' [27]

In 1975, ECOA prohibited discrimination based only on sex or marital status, and the discouragement prohibition as initially adopted was limited accordingly. In 1977, consistent with the 1976 Act that expanded ECOA to prohibit discrimination based on protected characteristics beyond sex or marital status, the Board revised the discouragement provision to its current phrasing, prohibiting discouragement ''on a prohibited basis.'' [28] The Board later added commentary providing examples of prohibited conduct.[29] In 1991, Congress amended ECOA to require enforcing regulatory agencies to refer to the Department of Justice (DOJ) cases that the agencies believed involved a pattern or practice of one or more creditors *discouraging* or denying applications for credit in violation of ECOA section 701(a).[30]

In 2011, the Bureau republished Regulation B's discouragement provision without material change in what is now § 1002.4(b) and the commentary thereto. In 2024, the U.S. Court of Appeals for the Seventh Circuit held that Regulation B's prohibition against discouragement is consistent with the plain text of the ECOA. In so holding, the court observed that the discouragement provision had been adopted pursuant to the Board's (now the Bureau's) broad authority to ''prescribe regulations to carry out the purposes of [ECOA],'' and to ''provide for such adjustments and exceptions'' that, in the Bureau's judgment, ''are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.'' [31]

Part III.C below discusses the ways in which this final rule changes the current rule regarding discouragement.

D. Special Purpose Credit Programs

As noted above, ECOA prohibits a creditor from discriminating on a prohibited basis regarding any aspect of a credit transaction. At the same time, ECOA section 701(c)(3) (15 U.S.C. 1691(c)(3)) states that it does not constitute discrimination under the Act for a creditor ''to refuse to extend credit offered pursuant to . . . any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the [Bureau].'' [32]

The intent of ECOA section 701(c)(3), as reflected in the legislative history, is as follows:

> [I]n the case of special purpose credit programs offered by profit-making organizations, the Conferees approved the language common to both the House bill and the Senate amendment exempting such programs from the restrictions of the Act so long as they conform to Board regulations. The intent of this section of the statute is to authorize the Board to specify standards for the exemption of classes of transactions when it has been clearly demonstrated on the public record that without such exemption the consumers involved would effectively be denied credit.[33]

The Board promulgated regulations implementing the 1976 Act's SPCP provision in what was then § 202.8.[34] As noted above, the Dodd-Frank Act transferred ECOA rulemaking authority to the Bureau, which in 2011 republished Regulation B's SPCP provision without material change in what is now § 1002.8 and the commentary thereto. More recently, the Bureau in January 2021 issued an advisory opinion (AO) addressing SPCPs implemented by for-profit organizations to meet special social needs.[35] The AO clarified the content that a for-profit organization must include in a written plan that establishes and administers an SPCP under Regulation B.[36]

Current Rule

Under current Regulation B, a for-profit organization that offers or participates in an SPCP to meet special social needs is required to establish and administer the SPCP pursuant to a written plan that identifies the class of persons the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.[37] In addition, the for-profit organization is required to establish and administer the SPCP to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.[38]

A for-profit organization's SPCP qualifies as such only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis.[39] However, the

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[23] Regulation B § 1002.2(z) defines ''prohibited basis'' as ''race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the Bureau.''

[24] 40 FR 49298 (Oct. 22, 1975). In 1977, the Board moved this provision, with minimal changes, to § 202.5(a). *See* 42 FR 1242. In 2003, the Board moved this provision to § 202.4(b). *See* 68 FR 13144.

[25] 15 U.S.C. 1691b(a). For ease of reference, the Bureau refers to this authority herein as ''adjustment'' authority.

[26] 15 U.S.C. 1691b.

[27] 40 FR 49298 at 49299.

[28] 42 FR 1242.

[29] 50 FR 48018.

[30] 15 U.S.C. 1691e(g) (emphasis added).

[31] *Consumer Fin. Prot. Bureau* v. *Townstone Fin., Inc.,* 107 F.4th 768, 774, 777 (7th Cir. 2024).

[32] *See* Public Law 94–239, sec. 701(c)(3), 90 Stat. 251, 251 (1976).

[33] *Joint Explanatory Statement of the Committee of the Conference,* Cong. Rec. H5493 (daily ed. Mar. 4, 1976) (text appears in House and Senate Reports).

[34] *See* 42 FR 1242.

[35] 86 FR 3762 (Jan. 15, 2021).

[36] *Id.*

[37] 12 CFR 1002.8(a)(3)(i).

[38] 12 CFR 1002.8(a)(3)(ii).

[39] 12 CFR 1002.8(b)(2).

SPCP is permitted to require its participants to share one or more common characteristics that would otherwise be ECOA-prohibited bases so long as the program does not evade the requirements of ECOA or Regulation B.[40] If the SPCP does require its participants to share one or more common characteristics, and if the program otherwise complies with current Regulation B, a creditor is able to request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.[41]

The Bureau discusses the ways in which this final rule changes the current rule regarding SPCPs provided by for-profit organizations in part III.D below.

E. Consultation

The Bureau has consulted with the appropriate prudential regulators and other Federal agencies regarding consistency with any prudential, market, or systemic objectives administered by these agencies as required by section 1022(b)(2)(B) of the Dodd-Frank Act.

III. Discussion of the Final Rule

A. Overview of Bureau's Approach

As discussed in the background section above, in November 2025, the Bureau issued a proposed rule that (i) provided that ECOA does not authorize disparate-impact claims; (ii) proposed to amend the prohibition on discouraging applicants or prospective applicants to clarify that it prohibits statements of intent to discriminate in violation of ECOA and is not triggered merely by negative consumer impressions, and to clarify that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements; and (iii) proposed to amend the standards for SPCPs offered or participated in by for-profit organizations to include new standards and related conditions.[42]

The Bureau received approximately 64,500 comments in response to the proposed rule. A majority of those comments, including individual commenters, consumer advocate commenters, policy group commenters, State Attorneys General commenters, and Members of Congress, opposed the proposed rule. Several commenters stated that the proposed rule is deficient under the Administrative Procedure Act (APA). Some commenters argued that the proposed rule is arbitrary and capricious because after fifty years of the current rule, the Bureau did not provide the required explanation for the significant change in the current rule. Furthermore, the 30-day comment period over the Thanksgiving holiday did not provide a meaningful opportunity to comment on a rule of this significance, according to these commenters. These commenters also stated that the Bureau is exceeding its rulemaking authority with this rule, and that the proposed rule conflicts with ECOA. They also asserted that the proposed rule is inconsistent with ECOA's legislative history and case law.

Numerous commenters stated that the proposed rule ignores or dismisses that the current credit market continues to show structural barriers to credit access for certain protected class groups, and that the proposed rule would result in an increase in discrimination for these protected classes. These groups include women, Black, Hispanic, Asian, and American Indian consumers, those who receive income from public assistance programs such as disability income and social security income, and those who exercised their rights under the Consumer Credit Protection Act such as by asserting their rights against improper debt collection, wage garnishment, and credit reporting. Commenters also asserted that the proposed rule runs counter to the goals of growing the economy with small businesses and increasing homeownership as these small business owners and first-time homeowners are likely to be women, Black, or Hispanic consumers who apply for credit for their small business or to buy their first home. In addition, commenters had other comments such as requesting a public hearing on the proposed rule, questioning whether AI was used to draft the proposed rule, and whether the other agencies were in fact consulted on the proposed rule as required by law.

The commenters who supported the proposal, including many industry commenters and some policy group commenters agreed the proposed rule more closely aligns with the Constitution, ECOA's text and purpose, congressional intent, case law, and the policy goals of providing compliance clarity and relief while encouraging innovation and business in the credit markets. Some of these commenters also asked for further clarifications, modifications, exemptions, and safe harbors in the rule. They also requested interagency coordination such as with the prudential regulators on the Community Reinvestment Act of 1977 (CRA),[43] and the Board on rules for motor vehicle dealers.[44] Finally, one commenter noted an error with the proposed amendatory text.

In both the proposed rule and in this final rule, each of the discussions of disparate impact, discouragement, and SPCPs provides detailed explanations for the rule, satisfying the APA. The discussions include explanations about how the Bureau is acting within its rulemaking authority and how the rule is consistent with ECOA, legislative history, and case law. The sufficiency of the comment period is evidenced by the robust response the Bureau received. The Bureau received approximately 64,500 comment letters from a diverse range of stakeholders. Many of these comments were detailed and substantive. The number and depth of these comments demonstrate that interested parties had adequate time to review the proposal and formulate comprehensive views during the comment period. Thus, the Bureau concludes that the comment period provided a reasonable opportunity to participate in the rulemaking process.

With regard to comments related to policy, policy cannot override the law. As explained in the discussions below, these amendments to Regulation B are to ensure consistency with the letter and intent of ECOA. These amendments in the proposed rule clarify the obligations imposed by ECOA and facilitate compliance with ECOA. As for requests for a public hearing on the proposed rule, a hearing is not necessary to obtain additional information nor required by law. There has been ample exchange of analysis and information through the notice-and-comment process, including the delivery and review of the comment letters on the RFI, and the over 64,500 comment letters on the proposed rule. A public hearing on the proposed rule would not provide more insight or information than what had been collected through the notice-and-comment process required by law. With regard to the Bureau using AI with the proposed rule, that did not occur. Bureau attorneys, paralegals, economists, analysts, and other employees worked on the proposed rule and on this final rule, including its drafting and underlying research. As to whether other agencies were consulted prior to the issuance of the proposed

[40] *Id.*

[41] 12 CFR 1002.8(c).

[42] *See* 90 FR 50901.

[43] Public Law 95–128, tit. VIII, 91 Stat. 1147 (12 U.S.C. 2901 *et seq.*).

[44] As mentioned earlier, under Dodd-Frank Act section 1029, subject to certain exceptions, the Board retains ECOA rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

rule, the Bureau consulted or offered to consult with other agencies as required by the Dodd-Frank Act and ECOA, and considered the feedback the agencies provided. The Bureau is also available for consultations with the prudential regulators regarding their CRA rule and the Board regarding its rule for motor vehicle dealers. Other clarifications, modifications, exemptions, and safe harbors requested by commenters are addressed in detail further below. Finally, with regard to the inadvertent publication errors in the proposed amendatory text in the **Federal Register**, the commenter was correct. The errors were not present in the Public Inspection version of the **Federal Register** published on November 12, 2025.[45] The Office of the Federal Register published a correction on February 25, 2026.[46]

After consideration of the comments, the Bureau is finalizing the proposed Regulation B amendments addressing disparate impact, discouragement, and SPCPs as discussed in further detail below.

B. Disparate Impact

Proposed Rule

The Bureau proposed changes to § 1002.6(a) and its accompanying commentary. As the Bureau explained in the proposal, consistent with E.O. 14281 the Bureau examined Regulation B and considered whether disparate-impact claims may be cognizable under ECOA. The Bureau preliminarily determined that, under the best reading of the statute, disparate-impact claims are not cognizable under ECOA. As a result, the Bureau proposed to delete language in § 1002.6(a) and its accompanying commentary indicating that disparate-impact liability, which is referred to in the rule as the ''effects test,'' may be applicable under ECOA, and proposed to add language stating that the Act does not recognize the ''effects test.'' The Bureau also proposed deleting the language in comment 2(p)–4 referring to the ''effects test.'' In the proposal, the Bureau requested comment on these changes and on its preliminary determination that disparate-impact claims are not applicable under ECOA. For the reasons discussed below, the Bureau is adopting the changes as proposed.

In the proposal, the Bureau preliminarily determined that the interpretation in Regulation B that disparate-impact claims may be cognizable under ECOA is not the best interpretation of ECOA. The Bureau noted that the Board (and later the Bureau) relied solely on the legislative history of ECOA to support its conclusion and failed to consider whether ECOA's statutory language itself authorized disparate-impact liability. The Bureau preliminarily determined that ECOA's statutory language does not authorize disparate-impact liability and that the application of disparate-impact liability in the credit context may undermine ECOA's purposes.

The Bureau explained in the proposal that since *Griggs,* although it has not decided the question under ECOA, the Supreme Court has closely examined the relevant statutory language of other antidiscrimination laws to determine whether disparate-impact liability is authorized by those laws. In particular, the Bureau explained that the Supreme Court has examined whether those other statutes include language focused on the effects of the action rather than the motivation of the actor. The Bureau noted that in *Inclusive Communities,* the Supreme Court concluded that ''*Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.''[47] The Bureau explained in the proposal that the relevant language of ECOA, in contrast, does not include similar effects-based language supporting disparate-impact liability. Section 701(a)(1) of ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age.[48]

In the proposal, the Bureau explained that section 701(a) of ECOA is a straightforward, plainly stated prohibition against discrimination on the basis of certain characteristics and that it therefore does not require additional consideration of the structure, history, and purpose to interpret its meaning. As a result, the Bureau preliminarily determined that section 701(a) does not authorize disparate-impact claims. As the Bureau explained in the proposal, its conclusion would not change even if it were necessary to resort to other considerations to interpret section 701(a). After balancing these factors, giving the most weight to the language of the statute, the Bureau preliminarily determined that the best interpretation of ECOA is that section 701(a) does not authorize disparate-impact claims.

The Bureau also preliminarily determined that when read together, the Supreme Court cases *Board of Education of City School District of New York* v. *Harris,* 444 U.S. 130 (1979), and *Inclusive Communities* suggest that a statutory provision without effects-based language may be ambiguous as to whether it authorizes disparate-impact liability when there is closely connected statutory language that provides for disparate-impact liability. The Bureau's proposal explained, however, that unlike the statutory provisions at issue in *Harris* and *Inclusive Communities* neither section 701(a) of ECOA nor any closely connected statutory provisions include any effects-based language supporting disparate-impact liability. In the absence of such closely connected effects-based language, the Bureau preliminarily determined that the best interpretation of the text of section 701(a) is that it does not provide for disparate-impact liability.

In the proposal, the Bureau also preliminarily determined that interpreting ECOA as not authorizing disparate-impact claims is consistent with the statutory purposes of ECOA. The Bureau, in exercising its expertise, explained that it was concerned that disparate-impact liability may lead some creditors to consider prohibited characteristics in developing policies and procedures, contrary to ECOA's purposes, in order to minimize potential liability. Moreover, the Bureau explained that it was concerned that creditors may be deterred from pursuing innovative or cost-reducing policies and procedures because they are uncertain about the impact on protected classes. In the proposal, the Bureau requested comment on its preliminary determination that interpreting ECOA as not authorizing disparate-impact liability is consistent with the statutory purpose.

The Bureau recognized in the proposal that Regulation B previously relied on the legislative history of ECOA for evidence of congressional intent that disparate-impact claims may be cognizable under ECOA. As the Bureau explained, if ECOA contained effects-based language or if the statutory language were ambiguous, then the legislative history would provide stronger evidence to support an interpretation that disparate-impact liability is permitted under ECOA. The Bureau explained, however, that consistent with Supreme Court precedent, the most important

[45] *See https://public-inspection.federalregister.gov/2025-19864.pdf.*

[46] 91 FR 9191.

[47] 576 U.S. 519, 533 (2015).

[48] 15 U.S.C. 1691(a)(1).

consideration is the statutory language. The Bureau preliminarily determined, therefore, that the evidence from the legislative history is insufficient to support an effects test given the statutory language and the absence of effects-based language in section 701 or anywhere else in ECOA. In the proposal, the Bureau requested comment on this preliminary determination.

In the proposal, the Bureau preliminarily concluded that any reliance interests in the existing regulatory interpretation permitting disparate-impact liability do not outweigh revising Regulation B to bring it into alignment with the statutory text. The Bureau requested comment on this preliminary determination.

In the proposal, the Bureau noted that notwithstanding *Griggs* and its progeny, there are serious concerns about the constitutionality of disparate-impact liability as to certain ECOA-protected classes. The Bureau made no conclusion as to these constitutional questions but noted that its preliminary finding that ECOA does not encompass disparate-impact liability appropriately avoids such constitutional concerns.

The Bureau's proposal noted that, alternatively, it could remove the provisions relating to disparate impact, given the statutory text and based on the fact that neither the Supreme Court nor any other court has made a specific holding with respect to this theory and ECOA. The Bureau noted that, as the Supreme Court made clear in *Loper Bright Enterprises* v. *Raimondo,*[49] courts are the ultimate arbiters of statutory meaning. In the proposal, the Bureau requested comment on this alternative rationale for removing the provisions related to disparate impact.

Based on its preliminary determination that disparate-impact claims are not cognizable under ECOA, the Bureau proposed deleting language in § 1002.6(a) and its accompanying commentary indicating that disparate-impact liability, which is referred to in the rule as the ''effects test,'' may be applicable under ECOA, and proposed adding language stating that the Act does not recognize the ''effects test.'' The Bureau also proposed deleting the language in comment 2(p)–4 referring to the ''effects test.''

Comments Received

Several commenters, including policy group, industry, and individual commenters, supported amending Regulation B to provide that ECOA does not authorize disparate-impact liability. One industry commenter explained that its members and lenders in general have every incentive to make loans to all creditworthy borrowers regardless of their protected characteristics and to identify any unnecessary policies that limit their ability to make prudent loans. Some commenters stated that ECOA's prohibition on disparate treatment provides consumers with appropriate protection against discrimination, including where a creditor intentionally uses a proxy for a prohibited basis to discriminate.

A number of commenters, including consumer advocate commenters, policy group commenters, the State Attorneys General commenters, Members of Congress, and individual commenters, opposed amending Regulation B to provide that ECOA does not authorize disparate-impact liability. Many of these commenters stated that the proposed rule's interpretation of ECOA to not authorize disparate-impact liability is inconsistent with the statutory text. Many of these commenters also maintained that the legislative history, statutory purpose, longstanding agency interpretations, and judicial interpretation all support the conclusion that disparate-impact liability is authorized by ECOA. Many of these commenters also stated that disparate-impact liability is an important tool for identifying and addressing discrimination, particularly with the growth of complex technologies and processes driven by artificial intelligence, and provided examples of circumstances in which they argued that disparate-impact liability was important for addressing discrimination. Several commenters also maintained that disparate-impact liability does not raise constitutional concerns. Some commenters also stated that disparate-impact liability does not stifle innovation or raise significant policy concerns that might undermine the purposes of ECOA.

Many commenters expressing support for the proposed rule agreed with the Bureau's preliminary determination that under the best reading of ECOA, disparate-impact claims are not cognizable under the Act. Commenters generally noted that the proposed rule, if adopted, will harmonize Regulation B with the actual statutory scheme Congress enacted. In addition, some commenters raised various concerns about the application of disparate-impact liability to creditors, including potential unintended consequences that may undermine the purpose of ECOA. A few commenters requested that the Bureau provide clarification on certain topics, including whether creditors may lawfully use statistical techniques, such as proxy analysis, to assess their compliance with ECOA.

Several commenters disagreed with the proposed rule's preliminary determination that ECOA did not include effects-based language and that the absence of this language should lead to the conclusion that ECOA does not authorize disparate-impact liability. As discussed in more detail below, several commenters stated that ECOA includes effects-based language supporting disparate-impact liability and maintained that the Supreme Court has found that other antidiscrimination statutes with similar language authorize disparate-impact liability. Some commenters also stated that Supreme Court precedent does not preclude recognizing disparate-impact liability in statutes that lack specific wording.

Several commenters agreed with the Bureau's preliminary analysis of the text of section 701(a) of ECOA. Commenters supporting the proposal to amend Regulation B were generally in favor of deleting language in the existing regulation referring to an ''effects test'' concept and replacing it with new language clarifying that disparate-impact claims are not cognizable under ECOA. One industry commenter supported deleting the language in the existing rule referring to an ''effects test'' concept but did not support adding new language to Regulation B clarifying that disparate impact is not cognizable under ECOA. This commenter noted that simply removing the existing ''effects test'' language without replacing it respects the Supreme Court's instruction, in *Loper Bright Enterprises* v. *Raimondo,*[50] that courts—not agencies—are the ultimate arbiter of statutory meaning, particularly when it comes to the availability of a particular cause of action under a statute.

Some commenters agreed with the Bureau's statement in the proposed rule that the Supreme Court has not determined whether a disparate-impact claim is permitted under ECOA. A few commenters supporting the proposed rule stated that the Supreme Court, in *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.,*[51] provided the proper instruction for determining whether an antidiscrimination statute such as ECOA gives rise to disparate-impact liability. Commenters explained that in *Inclusive Communities* the Court instructed that disparate-impact claims may be authorized under an antidiscrimination statute where the

[49] 603 U.S. 369 (2024).

[50] 603 U.S. 369 (2024).

[51] 576 U.S. 519 (2015).

statute's text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.

Most commenters supporting the proposed rule generally agreed with the Bureau's preliminary determination that under the best reading of the Act, the text of section 701(a) of ECOA does not authorize disparate-impact liability. One industry commenter, agreeing with the Bureau's statement that the Supreme Court has not determined whether disparate-impact claims are cognizable under the ECOA, took no position and offered no comment on whether the Bureau's preliminary determination is legally correct. Some commenters agreeing with the Bureau's preliminary determination specifically cited the text of section 701(a) of ECOA, which makes it ''unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction'' ''on the basis of'' race, sex, or any other prohibited characteristic. A few commenters noted that section 701(a) makes it unlawful for a creditor to ''discriminate''—language those commenters pointed out has been construed in other contexts as giving rise to disparate-treatment liability. Some commenters also noted section 701(a)'s use of ''on the basis of,'' which one industry commenter indicated directs attention to intentional conduct, not outcomes alone.

Numerous commenters noted the absence of any effects-based language in section 701(a), in contrast with language found in other statutes like title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) and the Fair Housing Act (FHA), which the Supreme Court has held all authorize disparate-impact liability. One industry commenter noted that in *Inclusive Communities* the Court deemed the presence of such language to be ''of central importance'' to its analysis. Some commenters agreed with the Bureau's preliminary analysis that interpreting ECOA to conclude that there is no disparate-impact liability under the Act is consistent with the purpose of ECOA. Other commenters supporting the proposed rule stated that because the statutory text of ECOA does not contain any ''effects-based'' language whatsoever there is no need to analyze whether the Bureau's proposed interpretation is consistent with ECOA's purpose.

Several consumer advocate commenters stated that the text of ECOA shows that Congress intended to authorize disparate-impact liability. Several consumer advocate commenters argued that by prohibiting discrimination ''on the basis of'' certain protected classes in 15 U.S.C. 1691(a)(1), ECOA allows disparate-impact claims. These commenters asserted that the term ''on the basis of'' refers to the consequences of actions and not just the mindset of actors. These commenters stated that Congress was aware of the Supreme Court's precedents concerning disparate-impact liability and used the term ''on the basis of'' because the Supreme Court had used that language to describe disparate-impact liability under title VII in *Griggs* v. *Duke Power Co.* A consumer advocate commenter also stated that other antidiscrimination statutes also use ''on the basis of'' or similar language to characterize the scope of prohibited discrimination to include disparate-impact claims. The commenter noted that the Americans with Disabilities Act (ADA) and the Equal Pay Act (EPA) both use ''on the basis of'' language and that both of these statutes authorize disparate-impact claims.

A consumer advocate commenter also noted that in ECOA, Congress used ''on the basis of'' in section 701(a)(1) of ECOA but different language in section 701(a)(2) and (3), which prohibit discrimination ''because'' of certain characteristics or conduct. The commenter argued that the choice by Congress to use ''on the basis of'' in section 701(a)(1), but different language in section (a)(2) and (3), suggests Congress intended for section (a)(1) to reach broadly to include disparate-impact liability.

Another consumer advocate commenter stated that certain exceptions to ''discrimination'' support interpreting ECOA to authorize disparate-impact liability. That commenter noted that the exceptions in section 701(b)(1) and (2) provide that inquiries about an applicant's marital status, age, or income status can only be made for a specified purpose. The commenter argued that this provision forbids the collection of data for other purposes, including neutral purposes, and that the only reason an antidiscrimination provision would forbid data collection for neutral purposes is if such a neutral practice could lead to a discriminatory effect that could be actionable under a disparate-impact theory of liability.

However, a few commenters supporting the proposed rule expressed a different understanding of the interplay between section 701(a) and the exceptions in section 701(b). Those commenters noted that Congress carved out specific conduct from the reach of section 701(a) of ECOA and deemed such conduct not to constitute discrimination. One industry commenter, a trade association, noted that conduct deemed not to constitute discrimination under section 701(b) is conduct that, but for those carve outs, would constitute disparate treatment; the commenter stated that there are no exceptions for conduct that would otherwise constitute disparate impact. This commenter also noted that actions permissible under section 701(c) of ECOA include conduct that involves directly considering an applicant's prohibited basis status. The commenter contrasted these provisions with exceptions in the FHA that the *Inclusive Communities* majority had relied on in support of its holding, noting that those exceptions shielded covered persons from liability for conduct that would have otherwise resulted in disparate-impact liability.

Several consumer advocate commenters noted that ECOA provides that one factor considered by courts when imposing punitive damages is whether the violation was ''intentional.'' They argued that this provision assumes that some violations are not intentional, indicating that ECOA was intended to authorize disparate-impact claims. One consumer advocate commenter noted that in the debate over this language, some House members objected that limiting punitive damages to intentional violations would mean that punitive damages would not be available for disparate impact violations, indicating these House members believed that disparate-impact liability was authorized. The commenter stated that the Supreme Court has found that where a provision limits only the scope of disparate-impact claims, Congress must have assumed the existence of disparate-impact claims or the provision would be superfluous.

Several consumer advocate commenters stated that the Supreme Court has found that other antidiscrimination statutes authorize disparate-impact liability and has not held that the absence of effects-based language precludes a finding that a statute authorizes disparate-impact liability. Some commenters noted that in *Inclusive Communities,* the Supreme Court found that section 805(a) of the FHA authorizes disparate-impact liability even though that provision does not include effects-based language. Several commenters argued that the Supreme Court has made clear the importance of determining the purpose of the statute in determining whether it provides for disparate-impact liability.

Although several consumer advocate commenters stated that the text of ECOA supports disparate-impact liability,

some of these commenters noted that at the very least ECOA's language in 15 U.S.C. 1691(a)(1) that makes it unlawful for a creditor to ''discriminate'' against an applicant ''on the basis of'' certain prohibited characteristics is ambiguous as to whether it authorizes disparate-impact liability. These commenters stated that the Supreme Court has looked to other factors, including the statutory purpose and legislative history, to determine whether an ambiguous statute authorizes disparate-impact claims. These commenters maintained that these other factors, including the statutory purpose and the legislative history, support interpreting ECOA to authorize disparate-impact claims.

Several consumer advocate commenters stated that interpreting ECOA to permit disparate-impact claims is consistent with the statutory purpose. They noted that the Supreme Court considered the statutory purposes of title VII and the FHA to support finding that those statutes authorized disparate-impact liability. The commenters maintained that, similar to the broad remedial purposes of those other statutes, ECOA was intended to achieve the objective of addressing discrimination in obtaining credit. They stated that disparate-impact liability is similarly consistent with ECOA's goal of ensuring that creditors make credit available equally and impartially, without regard to protected classes. These commenters stated that interpreting ECOA to not permit disparate-impact liability would undermine the purpose of making credit equally available.

Commenters supporting the removal of the ''effects test'' language from Regulation B generally agreed with the Bureau that the evidence from the legislative history is insufficient to support an effects test concept under Regulation B given the statutory language and the absence of any effects-based language in section 701 or anywhere else in ECOA. Several commenters agreed with the Bureau's preliminary analysis that the Board, when it inserted the ''effects test'' language into Regulation B, relied solely on ECOA's legislative history. These commenters stated that the Board's—and later the Bureau's—reliance on ECOA's legislative history to the exclusion of ECOA's statutory text was flawed.

Some commenters noted that the Board's and the Bureau's reliance on legislative history in interpreting ECOA as authorizing disparate-impact liability conflicts with *Inclusive Communities'* instruction that statutory text controls when analyzing whether an antidiscrimination statute such as ECOA encompasses disparate impact. An industry commenter stated that *Inclusive Communities* instructs that the statutory text is paramount, with legislative history serving as a secondary consideration at most. Other commenters stated that resort to extrinsic materials like legislative history is generally inappropriate in the face of ECOA's authoritative text.

A few commenters also noted that the committee reports relied on by the Board postdated by two years the original enactment of the operative antidiscrimination language in ECOA. One industry commenter explained that the Board relied on committee reports tied to the 1976 Act, which among other things expanded the list of prohibited bases under ECOA. This commenter noted that although Congress in 1976 expanded the *scope* of ECOA's prohibition on discrimination, it did not speak to the *type* of conduct (*e.g.,* disparate treatment or disparate impact) Congress proscribed in 1974. One policy group commenter explained that the legislative history relied upon by the Board and later the Bureau is not sufficient support for disparate-impact liability because committee reports have not been passed by both houses of Congress and presented to the President for his signature. An industry commenter stated that even if legislative history should be consulted, there are other statements found in the legislative history that the commenter believed suggest Congress intended ECOA to reach only disparate treatment.

Several consumer advocate commenters stated that the legislative history of ECOA confirms that Congress intended to authorize disparate-impact liability. A consumer advocate commenter noted that during a hearing on legislation that eventually became the 1974 Act, a witness testified that revising the bill to define the term ''discriminate'' as ''to make any invidious distinction''—as Congress was then considering—could narrow the scope of prohibited discrimination. The commenter noted that the witness pointed to the broad standard for discrimination under *Griggs* and, stating that the term ''invidious'' does not appear in the Civil Rights Act of 1964, raised the concern that using the term ''invidious'' could indicate that some degree of intent is required. The commenter stated that the subcommittee removed the proposed definition of ''discriminate,'' leaving in place language that was generally understood to include disparate-impact liability.

Several consumer advocate commenters also stated that the legislative history of the 1976 Act, which added race, color, national origin, religion and age as prohibited bases, similarly supports interpreting ECOA to authorize disparate-impact liability. These commenters maintained that House and Senate reports supported interpreting ECOA to permit disparate-impact claims. For example, one consumer advocate commenter pointed to a Senate report stating that courts or agencies could ''look at the effects of a creditor's practices,'' consistent with cases such as *Griggs* and *Albemarle.* As noted above, several commenters also stated that some House members also raised concerns that punitive damages would only be available for intentional discrimination and would not be allowed for disparate-impact claims, supporting the assumption that disparate-impact liability is authorized.

Several consumer advocate commenters maintained that later congressional activity also supports interpreting ECOA to permit disparate-impact claims. One consumer advocate noted that Congress rejected bills in 1995 and 1997 that would have restricted ECOA liability to intentional discrimination. That commenter stated that Congress amended ECOA in 1996 to provide incentives for creditors to engage in self-testing and self-correction. The commenter argued that by declining to amend ECOA to eliminate disparate-impact liability, Congress indicated an intent to maintain the statute's liability for disparate-impact claims.

Several commenters noted that courts have consistently found that ECOA authorizes disparate-impact liability. One commenter noted that the Ninth Circuit has explicitly held that ECOA allows disparate-impact claims while the D.C. and the Sixth Circuits have assumed without deciding that disparate-impact claims are permissible under ECOA. One consumer advocate commenter stated that no courts have diverged from a consensus view that ECOA permits disparate-impact claims. Another consumer advocate commenter noted that numerous courts have rejected the argument that the absence of effects-based language in ECOA precludes disparate-impact liability.

Several consumer advocate commenters also stated that Federal agencies interpreting ECOA have uniformly found that ECOA permits disparate-impact claims. One consumer advocate commenter noted that shortly after ECOA was enacted, the Board interpreted ECOA as authorizing disparate-impact liability. The

commenter argued that, under *Loper Bright,* such a contemporaneous interpretation should be accorded great weight. Several commenters stated that the Board, and later the Bureau, have consistently confirmed in subsequent regulatory interpretations that ECOA authorizes disparate-impact liability and these interpretations have pointed to the legislative history to support those conclusions. Commenters also stated that other Federal regulators and the DOJ also have uniformly interpreted ECOA to permit disparate-impact claims.

One commenter supportive of the proposed rule noted that by the time the Supreme Court decided *Inclusive Communities,* all Courts of Appeals to have addressed the issue had concluded that the FHA permitted disparate-impact claims. This commenter noted that when the Board inserted the ''effects test'' language into Regulation B, there was no such consensus among appellate courts. Moreover, a few commenters noted that even today only some appellate courts have concluded that ECOA authorizes disparate-impact liability, with most merely assuming but not actually deciding the issue. A few commenters stated that only one appellate court has squarely determined that ECOA authorizes disparate-impact liability, and that court's analysis—like the Board's—almost exclusively relied on the legislative history of ECOA to reach that determination.

A few commenters supporting the proposal directly addressed the topic of reliance interests. One industry commenter explained that any reliance interests in the existing interpretation of Regulation B are outweighed by the need to amend the regulation to bring it into harmony with the statutory text of ECOA. This commenter, a trade association representing credit unions, explained that although credit unions have developed policies, procedures, and training to ensure their compliance with the existing interpretation of ECOA, the association would appreciate the greater flexibility offered by the proposed rule.

Several commenters stated that the proposed rule did not adequately consider the reliance interests in the current rule's interpretation that ECOA authorizes disparate-impact liability. One consumer advocate noted that creditors have developed compliance systems designed to ensure compliance with disparate-impact risks and that interpreting ECOA not to permit disparate-impact liability would create confusion and potential conflicting standards because creditors would still have to ensure compliance with the FHA and State antidiscrimination laws that recognize disparate-impact liability. State Attorneys General commenters stated that the proposed rule failed to consider the reliance interests of State and local governments in a strong Federal enforcement mechanism to address discrimination in the credit market.

Some commenters agreed with the Bureau's preliminary determination that consumers will still be protected from discrimination if the proposed rule is finalized. These commenters believed ECOA's prohibition on disparate treatment provides appropriate protection for consumers against discrimination. An industry commenter stated that disparate impact is unnecessary to prevent discriminatory lending practices; this commenter explained that a creditor will remain liable based on disparate treatment where the creditor makes a lending decision or adopts a credit policy with discriminatory intent, even if the lender characterizes its actions as facially neutral. Another industry commenter noted that some aspects of a disparate-impact claim could have evidentiary value in a disparate-treatment case; this commenter described situations where a creditor uses or adopts a neutral policy for a discriminatory reason or applies it inconsistently on a prohibited basis. The commenter noted that creditors in these situations would remain liable for disparate treatment.

Several commenters supporting the proposed rule raised concerns about the application of disparate-impact liability under ECOA. Some commenters agreed with the Bureau's preliminary determination that imposition of disparate-impact liability in the credit context may undermine the purpose of ECOA. According to one industry commenter, ECOA's purpose is to ensure that all creditworthy applicants receive fair and equal access to credit without regard to protected characteristics.

Many commenters, including consumer advocate commenters, the State Attorneys General commenters, Members of Congress, and individual commenters, stated that the proposed rule did not adequately consider the importance of disparate-impact liability in addressing discriminatory practices. They provided evidence and examples that, in their view, showed that discrimination in credit markets remains a significant problem. They maintained that disparate-treatment liability is insufficient to address discrimination where intentional discrimination is difficult to prove. They stated that disparate-impact liability is particularly important in addressing discrimination in certain circumstances, including automated credit models (specifically AI-driven models), indirect auto lending, mortgage lending, and small business lending. Several commenters provided examples of discrimination cases that relied on disparate-impact liability theories and raised concerns that proving discrimination would be impossible without being able to advance disparate-impact claims.

A policy group commenter shared the Bureau's concern that application of disparate-impact liability could lead some creditors to consider prohibited basis characteristics in developing policies and procedures, contrary to ECOA's purpose, to minimize potential liability. One individual commenter stated that disparate-impact liability discourages responsible lending and incentivizes overly conservative credit policies, which reduces credit access and increases costs to consumers. This commenter stated that Regulation B currently discourages nuanced decision-making in favor of rigid compliance standards and that this disproportionately burdens female borrowers. An anonymous commenter noted that there is no clear empirical evidence that disparate impact improves credit access or outcomes for specific protected class groups; this commenter marshaled evidence and data that, in the commenter's opinion, demonstrates that the application of disparate-impact liability has the opposite effect. Other commenters indicated that disparate-impact liability reduces innovation in credit markets.

One policy group commenter stated that disparate impact is incompatible with the Equal Protection Clause of the U.S. Constitution. This commenter noted that the Supreme Court has condemned racial balancing as unconstitutional but the threat of disparate-impact liability, according to the commenter, requires creditors to engage in that very conduct. An industry commenter stated that the proposed rule is warranted because the existing regulation, in the commenter's view, drives outcome balancing—raising reverse discrimination and equal protection concerns. Another policy group commenter stated that application of disparate-impact liability threatens fundamental freedoms, such as free speech and free exercise of religion, potentially chilling the speech and religious practices of businesses.

Several commenters opposed to the proposed rule stated that interpreting ECOA to permit disparate-impact liability does not raise constitutional

concerns. They argued that although the Bureau had raised concerns that creditors might consider prohibited characteristics in developing policies and procedures in order to avoid potential disparate-impact liability, the proposed rule did not provide any examples of this occurring. Commenters noted that the Supreme Court has allowed disparate-impact liability in other statutory contexts and noted that, properly applied, disparate-impact liability does not raise constitutional concerns. Some commenters claimed that, unlike with college admissions or employment, credit applications are not zero-sum situations in which applicants are competing for a limited number of opportunities and stated that disparate-impact liability under ECOA does not disadvantage certain credit applicants compared to other applicants or require creditors to achieve specific outcomes.

A few commenters raised concerns that application of disparate-impact liability had led to abusive enforcement efforts and examiner overreach. An industry commenter stated that disparate impact is prone to abuse by government agencies and private plaintiffs, pointing to the Bureau's allegations against indirect auto lenders as one example. Another industry commenter stated that the Bureau used disparate impact to impose a de facto national Community Reinvestment Act (CRA) requirement on independent mortgage banks (IMBs), by pressuring IMBs to do more lending to certain protected classes and to take actions such as opening new branch locations; the commenter noted that ECOA does not authorize or contemplate these remedies. This commenter further noted that ECOA is an antidiscrimination statute and not a vehicle to force IMBs to take affirmative actions to increase loans to certain classes of borrowers. The commenter stated that ECOA should not be allowed to morph into a backdoor Federal CRA requirement for IMBs. A different industry commenter stated that disparate impact has been measured and determined inconsistently by financial services regulators and examiners, and credit unions have endured unpredictable and shifting application and examination findings.

Commenters generally noted that the proposed rule, if finalized, would address these concerns. One industry commenter explained that the proposed rule will help avoid arbitrary ECOA enforcement in the future, allowing creditors to focus on maintaining effective ECOA compliance programs.

A few commenters responded to the Bureau's request for comment on the potential benefits of the proposal. One industry commenter agreed with the Bureau's observation in the proposed rule that the impact of the amendments to Regulation B will be substantially limited by the ongoing need to comply with other State and Federal fair lending laws, such as the FHA. An anonymous commenter offered comments on the anticipated practical consequences for the fair lending compliance programs of banks. This commenter indicated that amending Regulation B is unlikely to have any material impact on the organization or structure of fair lending compliance programs maintained by banks; according to the commenter, covered banks will remain subject to disparate-impact claims that might be asserted in State enforcement actions or by private parties in litigation, and therefore bank compliance programs must continue to appropriately identify and mitigate those risks. One industry commenter stated that ending disparate-impact enforcement and returning ECOA to its statutory standard of intent-based discrimination will promote clarity, reduce unintended barriers to credit, and ultimately improve access to capital for consumers and small businesses. This commenter noted that removing disparate-impact enforcement will result in more product offerings, more flexible lending standards and new market entrants, ultimately expanding access to credit.

Some commenters supporting the proposed changes to Regulation B requested that the Bureau provide clarification on certain discrete issues. A few commenters requested that the Bureau clarify that creditors may still use proxy analysis to assess the demographic makeup of their applicant pool to evaluate compliance with ECOA. An industry commenter explained that because creditors will remain subject to other Federal and State laws imposing disparate-impact liability, creditors will still be obligated to consider the impact of their facially neutral policies and procedures and make appropriate adjustments based on that evaluation. Another industry commenter explained that creditors' obligations under the CRA and their business objectives may include expanding access to credit or serving underserved communities. Because creditors may wish to continue to evaluate the demographic impact of their policies and procedures—both to help inform business and community reinvestment strategies, and because of other laws imposing disparate-impact liability—commenters requested that the Bureau's final rule specifically acknowledge that creditors would retain the flexibility to utilize such practices.

An individual commenter urged the Bureau to clarify that while ECOA does not give rise to a standalone disparate-impact cause of action, the Bureau may still prohibit practices that are intentionally designed or applied as proxies for prohibited characteristics. An industry commenter urged the Bureau to prevent circumventions of the regulation by clarifying that statistical imbalances alone are not a sufficient basis for establishing disparate treatment under ECOA. Similarly, an industry commenter requested that the Bureau clarify that statistical evidence that a creditor lags behind peers in applications or originations does not, standing alone, support a disparate-treatment claim.

Final Rule

The Bureau is making changes to § 1002.6(a) and its accompanying commentary. It is the Bureau's responsibility to correctly interpret ECOA. The Supreme Court in *Loper Bright Enterprises* v. *Raimondo* confirmed that ''statutes . . . have a single, best meaning'' that is '' 'fixed at the time of enactment.' ''[52] The Bureau has examined Regulation B, considered comments, and determined that, under the best reading of the statute, disparate-impact claims are not cognizable under ECOA. As a result, the Bureau is deleting language in § 1002.6(a) and its accompanying commentary indicating that disparate-impact liability, which is referred to in the rule as the ''effects test,'' may be applicable under ECOA, and adding language stating that the Act does not recognize the ''effects test.'' The Bureau is also deleting the language in comment 2(p)–4 referring to the ''effects test.''

The Bureau has determined that the Board's—and later the Bureau's—conclusion that disparate-impact claims may be cognizable under ECOA is not the best interpretation of ECOA. In particular, the Board (and later the Bureau) relied solely on the legislative history of ECOA to support its conclusion and failed to consider whether ECOA's statutory language authorized disparate-impact liability. The Bureau has determined that ECOA's statutory language does not authorize disparate-impact liability and that the application of disparate-impact liability in the credit context may undermine ECOA's purposes.

The Board's regulations to implement the 1976 Act relied solely on the

[52] 603 U.S. 369, 400 (2024) (quoting *Wis. Cent. Ltd.* v. *United States,* 585 U.S. 274, 284 (2018)).

legislative history to support its conclusion that Congress intended for ECOA to permit an ''effects test concept'' (*i.e.,* disparate-impact) proof of liability. Section 202.6(a), the precursor to § 1002.6(a), provided in a footnote that 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,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness.[53] Further discussion of the effects test was later added to the commentary to what is now § 1002.6(a).[54] Although there have been minor revisions to what is now § 1002.6(a), that provision has continued to provide, based solely on legislative history, that disparate-impact liability may apply to ECOA.

Although *Griggs* is the foundational case for disparate-impact theory, the Bureau recognizes that *Griggs* itself has been subject to significant and extensive criticism. Justice Thomas has described *Griggs* as ''poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress,'' [55] observing that the true ''author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC).'' [56] *Griggs* involved virtually no analysis of the actual text of title VII; rather, *Griggs* endorsed the EEOC's view mainly by deferring to the agency's view in light of title VII's purpose.[57] ''But statutory provisions—not purposes—go through the process of bicameralism and presentment mandated by our Constitution.'' [58] Indeed, members of the Court—including the author of the majority opinion in *Inclusive Communities*—have expressed reservations about allowing the logic of *Griggs* to extend into other areas of law.[59]

Since *Griggs,* the Supreme Court has closely examined the relevant statutory language of other antidiscrimination laws to determine whether disparate-impact liability is authorized by those laws (but it has not decided the question under ECOA). In particular, the Supreme Court has examined whether the statute in question includes language focused on the effects of the action rather than the motivation of the actor. For example, in *Smith* v. *City of Jackson,* the Supreme Court noted that section 4(a)(1) of the ADEA does not authorize disparate-impact liability.[60] Section 4(a)(1) of the ADEA, like section 701(a) of ECOA, is a straightforward prohibition on discrimination that does not include effects-based language.[61] However, a plurality of the Supreme Court found in *Smith* that section 4(a)(2) of the ADEA does authorize disparate-impact liability, emphasizing that section 4(a)(2) of the ADEA and section 703(a)(2) of title VII—which was found to authorize disparate-impact claims in *Griggs*—both contain language that ''prohibit[s] such actions that deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age.'' [62] In *Inclusive Communities,* the Supreme Court concluded that ''*Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.'' [63] The Supreme Court held in *Inclusive Communities* that the language ''otherwise make unavailable'' in section 804(a) of the FHA refers to the consequences of an action rather than the actor's intent and therefore supports recognizing disparate-impact claims.[64]

Several commenters disagreed with the proposed rule's preliminary determination that ECOA does not include similar effects-based language supporting disparate-impact liability. As noted above, section 701(a)(1) of ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).[65] Several commenters argued that the phrase ''on the basis of'' is effects-based language and that Congress intended for section 701(a) of ECOA to authorize disparate-impact liability. They maintained that the ''on the basis of'' language was used in *Griggs* to describe disparate-impact liability under title VII and that Congress—acting just a short time after *Griggs*—used the same language to demonstrate its intent to authorize disparate-impact liability under ECOA. Some commenters also stated that other statutes such as the ADA and the EPA have used ''on the basis of'' language, and that these statutes have been found to authorize disparate-impact liability. One consumer advocate commenter also noted that section 701(a) makes it unlawful to discriminate ''on the basis of'' certain protected classes, while section 701(b) and (c) makes it unlawful for a creditor to discriminate ''because'' of certain characteristics or conduct, and this commenter argued that this difference in language is significant and indicates that Congress intended for section 701(a) to authorize disparate-impact liability. However, a number of commenters disagreed, stating that ECOA should not be interpreted to authorize disparate-impact liability because it does not include effects-based language.

The Bureau has determined that the best reading of the statute is that section 701(a) of ECOA does not include effects-based language. The Bureau concludes that ''on the basis of'' does not refer to the effects of an action and notes that ECOA does not contain any language like ''otherwise make unavailable'' or ''otherwise adversely affect'' that refers to the effects of actions and thereby suggests that disparate-impact claims are cognizable.

Some commenters pointed to other statutes like the ADA and the EPA that use ''on the basis of'' or similar language and claimed that they have been interpreted to authorize disparate-impact liability. However, as discussed in more detail below, those statutes have significant differences and therefore are of limited value in interpreting ECOA's language.

Several commenters maintained that the ADA has similar language to ECOA and has been interpreted to authorize disparate-impact liability, which they claimed supports construing ECOA to

[53] 42 FR 1242 at 1255 n.7. This footnote was later moved to the text of § 1002.6(a) when the Bureau republished Regulation B after responsibility for the rule was transferred from the Board to the Bureau. *See* 76 FR 79442.

[54] *See* 50 FR 48018.

[55] *Inclusive Communities,* 576 U.S. at 550 n.3 (Thomas, J., dissenting) (internal quotation marks omitted).

[56] *Id.* at 547.

[57] *See id.* at 552–53; *see also id.* at 577–78 (Alito, J., dissenting) (''The only reference [in *Griggs*] to § 703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim.'').

[58] *Id.* at 553.

[59] *See id.* at 556.

[60] 544 U.S. 228, 235 n.6, 249 (2005) (plurality and dissent agreeing that section 4(a)(1) of the ADEA does not authorize disparate-impact liability).

[61] Section 4(a)(1) of the ADEA provides that it is unlawful to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. 623(a)(1).

[62] 544 U.S. 228, 235 (2005) (citation omitted).

[63] 576 U.S. 519, 533 (2015).

[64] *Id.* at 534. Section 804(a) provides that it shall be unlawful ''[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'' 42 U.S.C. 3604(a).

[65] 15 U.S.C. 1691(a)(1).

authorize disparate-impact liability. Two commenters noted that both title I and title III of the ADA, which apply to employment and public accommodations, respectively, prohibit discrimination ''on the basis of'' a disability and have been interpreted to authorize disparate-impact liability. However, as those commenters acknowledged, both title I and title III include effects-based language. For example, title I provides that ''discriminat[ing] against a qualified individual on the basis of disability'' includes utilizing standards ''that have the effect of discrimination on the basis of disability.'' [66] Among other things, title III prohibits utilizing standards or criteria or methods of administration ''that have the effect of discriminating on the basis of disability.'' [67] By contrast, ECOA does not have any effects-based language.

Several commenters claimed that title II of the ADA, which covers public services, uses similar language to ECOA and has been interpreted to authorize disparate-impact liability. Title II provides that ''no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'' [68] The commenters noted that title II specifies that the remedies, procedures, and rights set forth in the Rehabilitation Act of 1973 are the remedies, procedures, and rights for any person alleging discrimination ''on the basis of disability'' in violation of title II of the ADA.[69] The commenters claimed that the Rehabilitation Act has been interpreted to authorize disparate-impact liability and that title II therefore should also be construed to authorize disparate-impact liability. They maintain that, because title II, like ECOA, uses ''on the basis of'' language, ECOA should likewise be interpreted to authorize disparate-impact liability. However, this argument suffers from significant weaknesses. The Supreme Court has never held that the Rehabilitation Act authorizes disparate-impact liability. Rather, the Supreme Court ''assume[d] without deciding'' that the Rehabilitation Act ''reaches at least some conduct that has an unjustifiable impact upon the handicapped.'' [70] Later Supreme Court cases have raised serious doubts about whether the Rehabilitation Act does in fact authorize disparate-impact liability. The Rehabilitation Act was patterned after title VI of the Civil Rights Act of 1964, which prohibits exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs ''on ground of'' race, color, or national origin.[71] In *Alexander* v. *Sandoval,* the Supreme Court held that title VI does not authorize disparate-impact liability, which raises serious questions about whether the Rehabilitation Act—and title II of the ADA—should be construed to authorize disparate-impact liability.[72] Moreover, even if the Rehabilitation Act, and by extension, title II of the ADA, were construed to authorize disparate-impact liability, title II of the ADA specifically provides in its statutory text that its remedies, procedures, and rights are the same as those of the Rehabilitation Act.[73] By contrast, the statutory text of ECOA does not provide that it should be construed similarly to another statute (like title VII of the Civil Rights Act of 1964) that authorizes disparate-impact liability. Finally, as noted above, the ADA features multiple examples of effects-based language in other provisions, while ECOA does not have any such language.

Claims that the EPA supports finding that ECOA authorizes disparate-impact liability are similarly unpersuasive. The EPA has a very different statutory structure from ECOA. The EPA specifies precisely what it means under the statute to discriminate ''on the basis of sex,'' *i.e.,* paying wages at a rate less than those paid to employees of the opposite sex for equal work on jobs which require equal skill, effort and responsibility, and which are performed under similar working conditions, unless one of the specific exceptions applies.[74]

The Bureau also concludes that the difference in language between section 701(a)(1) and 701(a)(2) and (3) (''on the basis of'' compared to ''because'') does not support interpreting section 701(a) to authorize disparate-impact liability. While differences in statutory language may suggest congressional intent that those provisions have different meanings, the use of ''on the basis of'' as opposed to ''because'' in section 701 appears more likely to be based on grammatical reasons rather than an intent to convey different meanings about the scope of liability under ECOA.[75] Moreover, in *Griggs,* which preceded ECOA's drafting, the Supreme Court found that language prohibiting discrimination ''because of'' certain characteristics authorized disparate impact, using the phrases ''on the basis of'' and ''because of'' without apparent distinction. Thus, the argument that section 701(a)(1) of ECOA should be interpreted to authorize disparate-impact liability because it uses ''on the basis of'' rather than ''because'' (as in section 701(a)(2) and (3)) is not persuasive. As discussed above, the Bureau concludes that the key consideration, emphasized by the Supreme Court, is whether the statute includes effects-based language. The Bureau concludes that, in the absence of effects-based language, ECOA's prohibition on discrimination on the basis of protected classes does not authorize disparate-impact liability.

Some commenters stated that the absence of effects-based language in section 701(a) is not dispositive and maintained that ECOA should be interpreted to reach disparate impact. Conversely, one industry commenter noted that certain statutes containing language like that found in section 701(a) have been construed by courts as reaching only disparate treatment.

As the Bureau recognized in the proposed rule, the Supreme Court in *Inclusive Communities* held that, like section 804(a), section 805(a) of the FHA also authorizes disparate-impact claims, even though section 805(a) itself does not include any effects-based language.[76] In the proposed rule, the Bureau noted that the Supreme Court provided limited explanation for concluding that section 805(a) authorizes disparate-impact claims, noting only that it has construed statutory language like section 805(a) to include disparate-impact liability, citing

[66] *See* 42 U.S.C. 12112(b)(3)(A).

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

[68] 42 U.S.C. 12132.

[69] 42 U.S.C. 12133.

[70] *Alexander* v. *Choate,* 469 U.S. 287, 299 (1985).

[71] 42 U.S.C. 2000d.

[72] 532 U.S. 275, 280–81 (2001). Lower courts have reached different conclusions about what *Sandoval* means for disparate-impact liability under the Rehabilitation Act and title II of the ADA. *Compare Doe* v. *BlueCross BlueShield of Tenn., Inc.,* 926 F.3d 235, 241–242 (6th Cir. 2019) (holding that section 504 of Rehabilitation Act does not authorize disparate-impact liability), *with Payan* v. *L.A. Cmty. Coll. Dist.,* 11 F.4th 729, 738 (9th Cir. 2021) (holding that title II of the ADA authorizes disparate-impact liability).

[73] *See* 42 U.S.C. 12133.

[74] *See* 29 U.S.C. 206(d)(1).

[75] In particular, it would be awkward grammatically to use ''on the basis of'' in section 701(a)(2) and (a)(3) to describe discrimination arising because the applicant's income derives from any public assistance program or because the applicant has in good faith exercised rights under ECOA.

[76] Section 805(a) provides that it is unlawful ''for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.'' 42 U.S.C. 3605(a).

Board of Education of City School District of New York v. *Harris,* 444 U.S. 130 (1979). The Bureau explained that because the Court provided no meaningful analysis of the statutory language of section 805(a) in *Inclusive Communities,* the case provides little insight into how that holding should apply to ECOA, if at all. The Bureau therefore determined that in the absence of such guidance it was necessary to rely on the analysis in *Harris* to inform the Bureau's interpretation of ECOA, consistent with the Court's approach in *Inclusive Communities.*

The statute in *Harris,* section 706(d)(1) of the Emergency School Aid Act (ESAA), made an agency ineligible for assistance if it ''had in effect any practice, policy or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees.'' [77] The Supreme Court noted that the first portion of the statute ''clearly speaks in term of effect or impact'' but that the second portion (otherwise engaged in discrimination) ''might be said to possess an overtone of intent.'' [78] The Court noted, however, that the use of the word ''otherwise'' in the second portion suggests that the disparate-impact standard should also apply to that provision. The Court noted that absent a good reason, ''one would expect that for such closely connected statutory phrases, a similar standard'' would apply. The Supreme Court noted that ESAA's language ''suffers from imprecision of expression and less than careful draftsmanship'' and therefore found it necessary to consider other factors to interpret the statutory language.[79] The Court looked to the structure, context, and legislative history of the statute to conclude that disparate-impact liability also applied to the second portion of the provision.

As the Bureau explained in the proposed rule, in contrast to the statute at issue in *Harris,* section 701(a) of ECOA does not suffer from ESAA's less than careful draftsmanship that would render it similarly ambiguous and therefore require additional consideration of the Act's structure, history, and purpose to interpret its meaning. ECOA does not include any effects-based language supporting disparate-impact liability, nor any ''otherwise'' language, as in ESAA, that may cloud the directness of its prohibition. ECOA section 701(a) is a straightforward, plainly stated prohibition against discrimination based on certain characteristics. As a result, the Bureau has determined that section 701(a) does not authorize disparate-impact claims.

The Bureau explained in the proposed rule that even if it were necessary to resort to other considerations to interpret section 701(a), the wording (discussed above), structure, and context all differ from the statutory provisions at issue in *Harris* and *Inclusive Communities* in ways that counsel reaching a different conclusion. (As discussed below, the Bureau does not find the legislative history to be a sufficient basis to override the conclusions drawn from the other factors.) After balancing these factors, giving the most weight to the language of the statute, the Bureau preliminarily determined that the best interpretation of ECOA is that section 701(a) does not authorize disparate-impact claims. In terms of its structure, ECOA differs from both ESAA and FHA. As noted above, the Supreme Court in *Inclusive Communities* carefully analyzed the statutory language of section 804(a), along with other factors, to determine that section 804(a) authorized disparate-impact liability; however, the Supreme Court provided no meaningful analysis of the statutory language of section 805(a) and cited to *Harris* to support the principle that the Court had found similar language to support disparate-impact liability. The Bureau preliminarily determined that when read together, *Harris* and *Inclusive Communities* suggest that a statutory provision without effects-based language may be ambiguous as to whether it authorizes disparate-impact liability when there is closely connected statutory language that provides for such liability.

A policy group commenter opposed to the proposed rule stated that the Bureau's preliminary conclusion rests on a misreading of *Harris* and that the case is inapposite for interpreting ECOA. The Bureau does not agree with this commenter for the reasons explained above, and more generally does not agree with commenters who argued that because the Court in *Inclusive Communities* held that FHA section 805(a) gives rise to disparate-impact claims, it follows that ECOA section 701(a) must as well. The Supreme Court has carefully evaluated whether antidiscrimination laws encompass disparate-impact liability on a case-by-case basis; the Court has never pronounced that every antidiscrimination statute containing certain terminology authorizes disparate-impact liability. While some commenters asserted that section 701(a) of ECOA and section 805(a) of the FHA feature similar language, the Court in *Inclusive Communities* noted only that it has previously construed (in *Harris*) statutory language like that found in section 805(a) to include disparate-impact liability. The Court in *Harris,* of course, did not analyze ESAA in a vacuum; after finding the language ambiguous, it evaluated additional factors such as structure and context to inform its analysis of the pertinent language. And the Bureau has determined that section 805, like ESAA, also contains closely connected language suggesting disparate-impact liability lies under that section—and this type of language is wholly absent from ECOA.

When analyzing the relevance of exemptions to liability under the FHA, the Court in *Inclusive Communities* noted a specific exemption for real-estate appraisers—section 805(c) of the FHA. Earlier, in *Smith* v. *City of Jackson,* a plurality of the Supreme Court had determined that section 4(a)(2) of the ADEA [80] also authorized disparate-impact claims based in part on the presence of the ADEA's reasonable-factor-other-than-age (RFOA) provision—section 4(f)(1) of the ADEA—which the plurality explained ''plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' '' [81] *Inclusive Communities* noted that in *Smith* ''the RFOA provision would be simply unnecessary to avoid liability under the ADEA if liability were limited to disparate-treatment claims,'' [82] and explained that ''[a] similar logic applies [to section 805]. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding [805](c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either.'' [83] As the Court explained, ''the exemption from liability for real-estate appraisers is *in the same section* as

[77] Emergency School Aid Act, Pub. L. 89–10, sec. 706(d)(1)(B), 86 Stat. 354, 358 (1972) (emphasis added) (original version at 20 U.S.C. 1606(d)(1)(B) (1976)), *repealed by and reenacted* by Pub. L. 95–561, tit. VI, sec. 601(b)(2), Nov. 1, 1978, 92 Stat. 2268 (1978); *see also Bd. of Educ. of City Sch. Dist. of New York* v. *Harris,* 444 U.S. 130, 130 (1979).

[78] Harris, 444 U.S. at 138–39.

[79] *Id.* at 138.

[80] 29 U.S.C. 623(a)(2).

[81] 544 U.S. 228, 239 (2005).

[82] 576 U.S. 519, 539 (2015) (internal quotation marks omitted).

[83] Id.

§ 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose *under § 805(a).*'' [84]

As explained above and as several commenters noted, section 701(a) of ECOA lacks any effects-based language. In *Inclusive Communities* the Court explained that the presence of this kind of language in the FHA was of ''central importance'' to its analysis of that statute.[85] Although section 805(a) of the FHA lacks such effects-based language, the Court determined that both *Harris* and the presence of section 805(c) suggested that disparate impact should nevertheless apply under section 805(a). Unlike the FHA, ECOA does not contain any effects-based language nor any exemptions from liability for conduct that would otherwise constitute disparate impact. Absent effects-based language or any textual signal in section 701 suggesting that Congress contemplated disparate-impact liability under ECOA, the Bureau has determined that the reasons for the Court's construction of section 805(a) of the FHA as authorizing disparate-impact liability are wholly absent here.

To be sure, section 701 contains several exemptions from liability. But none of these exemptions, unlike the exemption in section 805 of the FHA, support interpreting ECOA to authorize disparate-impact liability. Section 701(b)'s exemptions protect a creditor from liability for conduct that would otherwise constitute disparate treatment (or, at most, possible evidence of disparate treatment). And section 701(c)'s exemptions have been interpreted by the relevant agencies in a manner consistent with a construction of ECOA that prohibits only disparate treatment.

Section 701(b) of ECOA provides that it ''shall not constitute discrimination'' for a creditor to engage in certain specified acts. Section 701(b)(3), for instance, permits creditors ''to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound . . . .'' [86] Age is a prohibited basis under ECOA, so if a creditor refuses to extend credit based on an applicant's age, then there is disparate-treatment liability (provided the applicant has the capacity to contract). Other provisions permit creditors to make certain inquiries about an applicant's prohibited basis characteristics without running afoul of ECOA. For instance, section 701(b)(1) allows a creditor ''to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness.'' [87] Marital status is also a prohibited basis under ECOA, so if a creditor discriminates against an applicant based on the applicant's marital status then there is disparate-treatment liability.

The exceptions in section 701(b) of ECOA shield creditors from liability for intentional discrimination. Section 701(b) of ECOA is thus unlike section 805(c) of the FHA, which provides that it is not a violation of the FHA if a person engaged in the business of furnishing appraisals of real property takes into consideration factors *other than* race, color, religion, national origin, sex, handicap, or familial status. If such a person were to take into consideration anything other than a prohibited basis under the FHA, that could lead to liability only if the statute allowed disparate-impact claims in the first place.[88] Thus, section 805(c) shields persons from liability for conduct that could otherwise give rise to disparate-impact liability under the FHA. If disparate-impact claims were not cognizable under the FHA, section 805(c) would be meaningless. Section 701(b) of ECOA is different. Section 701(b) provides, essentially, that a creditor may consider or inquire about a prohibited basis under limited circumstances. Without section 701(b), such conduct could give rise to disparate-treatment liability only—not disparate impact. Even under an interpretation of section 701(a) that provides for disparate-treatment liability only, section 701(b) still plays a meaningful role.

One policy group commenter argued that section 701(b)(1) and (2) of ECOA are only consistent with an interpretation of section 701(a) that allows for cognizability of both disparate-treatment and disparate-impact claims. The commenter noted these provisions allow a creditor to inquire about an applicant's marital status, age, or income, but only for a specified purpose, without violating section 701(a). This commenter stated that the provision forbids collecting this information for any non-specified but ''neutral purposes'' and that the only reason section 701(b) forbids such an inquiry is because it may result in a discriminatory effect. This argument appears to rest on a misunderstanding of how the exemptions in section 701(b) relate to evidence of disparate treatment and evidence of disparate impact. A policy or practice is considered facially neutral for purposes of disparate-impact analysis because it does *not* involve treating applicants differently on a prohibited basis—*e.g.,* age—but it nevertheless results in a disproportionately adverse impact on a prohibited basis group (like the elderly). But if a creditor makes an inquiry about an applicant's marital status, age, or income—even for a non-specified purpose—then that is direct evidence the creditor may have considered a prohibited basis.[89] Typically, direct consideration of a prohibited basis as part of evaluating a credit application would violate section 701(a) as disparate treatment. Inquiring about and considering marital status, age, or the receipt of public assistance income is not facially neutral as to prohibited bases. But as section 701(b)(1) and (2) makes clear, there may be legitimate, non-discriminatory reasons for creditors to collect and consider such information. Thus, in order to ensure that creditors remain able to gather and use certain information that directly implicates prohibited bases, section 701(b)(1) and (2) expressly shields creditors from disparate-treatment liability for doing so.

Section 701(c) provides that a creditor does not violate ECOA by refusing to extend credit pursuant to certain kinds of credit programs. For instance, section 701(c)(1) provides that ''[i]t is not a violation of [section 701] for a creditor to refuse to extend credit offered pursuant to'' ''any credit assistance program expressly authorized by law for an economically disadvantaged class of persons.'' [90] Section 701(c)(2) provides that ''[i]t is not a violation of [section 701] for a creditor to refuse to extend credit offered pursuant to'' ''any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons.'' [91] And section 701(c)(3) provides that ''[i]t is not a violation of [section 701] for a creditor to refuse to

[84] Id. at 538 (emphases added).

[85] *Id.* at 534.

[86] 15 U.S.C. 1691(b)(3).

[87] 15 U.S.C. 1691(b)(1).

[88] To be sure, the exemption was added well after Congress originally enacted section 805.

[89] *Cf. Venters* v. *City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997) (''[R]emarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality. Proof of this nature supports the inference that a statutorily proscribed factor—race, sex, age, or in this case, religion—was at least a motivating factor in the adverse employment action at issue.'') (citations omitted).

[90] 15 U.S.C. 1691(c)(1).

[91] 15 U.S.C. 1691(c)(2).

extend credit offered pursuant to'' ''any special purpose credit program offered by a profit-making organization to meet special social needs . . . .'' [92]

While the provisions in section 701(c) do not use prohibited basis language themselves, both the Board and the Bureau have interpreted this language in a manner consistent with disparate treatment. From the start, the Board interpreted section 701(c) as ''allow[ing] a creditor offering certain special credit assistance programs to refuse to extend credit *on a prohibited basis* without violating'' ECOA.[93] Refusing to extend credit on a prohibited basis would, absent section 701(c), be disparate treatment. The Bureau's rules under Regulation B have long reflected this, expressly stating that ''program participants may be required to share one or more common characteristics'' that are otherwise prohibited bases under 701(a).[94] Programs along those lines would, absent an exemption, result in disparate-treatment liability. Accordingly, section 701(c) is entirely consistent with interpreting ECOA as authorizing only disparate-treatment claims and not disparate-impact claims.

None of the exceptions in section 701(b) or (c) play any role in shielding creditors from disparate-impact liability, so they do not suggest that ECOA authorizes such liability in the first place. Given that none of the exemptions in section 701 signal that disparate impact should be available under the Act, the Bureau has determined that *Inclusive Communities* and *Harris* do not suggest that ECOA must be interpreted to reach disparate impact.

One commenter noted that section 701(a) of ECOA makes it unlawful for a creditor to discriminate against any applicant on a prohibited basis; this commenter stated that because similar language has been found by the Supreme Court to give rise to disparate-impact liability, the Bureau must conclude section 701(a) does as well. A policy group commenter stated that the term ''discriminate'' is broad enough to be understood as being compatible with both disparate treatment as well as disparate impact. If the mere presence of the term ''discriminate'' in an antidiscrimination statute, without more, suffices to authorize disparate-impact claims, then virtually every antidiscrimination statute would authorize disparate-impact liability and would not require individualized review by the courts to determine whether disparate impact is cognizable under a particular antidiscrimination law. This would transform the legal landscape from one where Congress deliberately and cautiously—using specific language—authorizes disparate-impact liability under certain statutory regimes, to one where disparate impact lies under virtually all antidiscrimination statutes. *Inclusive Communities* demonstrates that, at least in some contexts, an antidiscrimination statute lacking effects-based language may be susceptible to a more capacious interpretation, such as where either textual signals or closely related effects-based language indicates the provision should be construed in such a fashion, and where that construction is consistent with statutory purpose. But the Bureau has determined that with respect to ECOA—which lacks any such signals or closely related language—the best reading is that the Act does not permit a disparate-impact claim. This interpretation, as explained below, is also consistent with ECOA's purpose.

Some commenters noted that section 706(b) of ECOA specifically provides that one factor in calculating punitive damages under the Act is ''the extent to which the creditor's failure of compliance was intentional.'' [95] Commenters stated that this language could be read as contemplating scenarios in which a creditor's noncompliance with ECOA is unintentional. One commenter stated that if ECOA is interpreted as reaching only disparate treatment then section 706(b) would be superfluous. The Bureau does not agree with the commenters who stated that section 706(b) requires interpreting ECOA to permit disparate-impact liability. This language is entirely consistent with an interpretation of ECOA that encompasses only a disparate-treatment cause of action. The ''extent to which the creditor's failure of compliance was intentional'' might simply cover varying degrees of intentional conduct (*e.g.,* purposeful, knowing). Indeed, courts have interpreted section 706(b) as allowing for punitive damages ''if the creditor's conduct is adjudged wanton, malicious or oppressive, or if it is deemed to have acted in reckless disregard of the applicable law.'' [96] But even reckless disregard for the law is a form of intentional behavior.[97] The Bureau has determined that the best interpretation of ECOA is that it does not authorize disparate-impact claims, and the Bureau now determines that this interpretation is entirely consonant with the Act's punitive damages provision.

As noted above, several commenters stated that even if ECOA does not contain effects-based language, other factors, including the statutory purpose, the legislative history, and longstanding judicial and agency interpretations all support the conclusion that ECOA authorizes disparate-impact liability. Some commenters maintained that the Supreme Court has never held that effects-based language is necessary to authorize disparate-impact liability and that the Supreme Court has considered other factors, including the statutory purpose and legislative history, to determine that antidiscrimination statutes authorize disparate-impact liability. Other commenters, however, argued that the Bureau need not consider the statutory purpose or legislative history because ECOA does not contain effects-based language and therefore does not authorize disparate-impact liability.

The Bureau concludes that the text is crucial for interpreting the statute and, in the absence of effects-based language or other textual signals indicating that disparate-impact liability is cognizable, the Bureau determines that the best reading is that ECOA does not authorize disparate-impact liability. As the Supreme Court found in *Inclusive Communities,* effects-based language like ''otherwise make available'' in the FHA, is of ''central importance'' in analyzing whether disparate-impact liability is authorized under a particular antidiscrimination statute.[98] ECOA does not contain any such language.

Although the Bureau has determined that, in light of the statutory language, it is not necessary to consider other factors, including the statutory purpose of ECOA, the Bureau also concludes that interpreting ECOA as not authorizing disparate-impact claims is consistent with the statutory purposes of ECOA. As noted above in part II.A, ECOA was adopted to ensure that various financial institutions and other firms engaged in the extension of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of prohibited characteristics. One

[92] 15 U.S.C. 1691(c)(3). The Bureau is finalizing as proposed changes to the Regulation B provisions implementing section 701(c)(3). *See* part III.D.

[93] 41 FR 29870, 29875 (July 20, 1976) (emphasis added).

[94] 12 CFR 1002.8(b)(2).

[95] 15 U.S.C. 1691e(b).

[96] *Fischl* v. *Gen. Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983).

[97] Disregard, *Black's Law Dictionary* (9th ed. 2009) (''Conscious indifference to the consequences of an act.'').

[98] 576 U.S. at 534.

commenter stated that this language indicates that Congress was concerned with the effects of creditors' actions. Several commenters maintained that the Supreme Court relied in part on the broad remedial purposes of title VII and the FHA to find that those statutes authorized disparate-impact liability, and they argued that ECOA has a similarly broad remedial purpose that supports the conclusion that ECOA authorizes disparate-impact liability. Other commenters, however, argued that disparate-impact liability is not consistent with the purposes of ECOA, maintaining that disparate-impact liability incentivizes overly conservative credit policies and may cause some creditors to consider prohibited basis characteristics in developing policies and procedures in order to avoid potential disparate-impact liability. The Bureau, in exercising its expertise, is concerned that disparate-impact liability may lead some creditors to consider how potential policies and procedures could affect protected classes and avoid adopting certain policies and procedures, even if they may generally expand access to credit because of prohibited characteristics, because of concerns about potential disparate-impact liability. Indeed, several commenters indicated that Regulation B's current framework, which based on legislative history concludes that ECOA authorizes disparate-impact liability, may deter creditors from developing innovative policies because of concerns about how those policies may affect protected classes.

As noted above, several commenters stated that the legislative history of ECOA provides strong evidence that Congress intended ECOA to authorize disparate-impact liability. The Board, when initially promulgating Regulation B, solely relied on the legislative history of ECOA for evidence of congressional intent that disparate-impact claims may be cognizable under ECOA. As the Bureau noted in the proposed rule, if ECOA contained effects-based language or if the statutory language were ambiguous—as with the FHA and the since-repealed ESAA—then the legislative history would provide stronger evidence to support an interpretation that disparate-impact liability is permitted under ECOA. However, consistent with Supreme Court precedent, the most important consideration is the statutory language.[99] The Bureau determines, therefore, that the evidence from the legislative history is insufficient to support interpreting ECOA to authorize disparate-impact liability, given the statutory language and the absence of effects-based language in section 701 or anywhere else in ECOA.

Several commenters also stated that the Board, the Bureau, other Federal agencies, and lower Federal courts have long interpreted ECOA to authorize disparate-impact liability and that these longstanding interpretations support construing ECOA as authorizing disparate-impact claims. As noted above, the interpretations of the agencies with primary authority to administer ECOA are based solely on the legislative history of ECOA. The Supreme Court has never determined that an anti-discrimination statute authorizes disparate-impact liability based solely on the legislative history. Two Courts of Appeals have assumed without deciding that ECOA authorizes disparate-impact liability;[100] two others have found that ECOA authorizes disparate-impact liability, but the decisions provide only limited discussion and do not analyze the statutory text.[101] To the extent they include any analysis, the district court decisions finding that ECOA authorizes disparate-impact liability do not closely analyze the text of the statute and do not fully consider Supreme Court decisions emphasizing the importance of the presence or absence in the statute of effects-based language or other textual signals indicating that disparate-impact liability is authorized.[102] In light of the statutory language of ECOA, the Bureau concludes that these interpretations are not sufficient to support construing ECOA as authorizing disparate-impact liability, given the statutory language and the absence of effects-based language in ECOA or other textual signals indicating that ECOA authorizes disparate-impact liability.

Several commenters also claimed that Congress was aware of judicial interpretations that ECOA authorized disparate-impact liability when it later amended ECOA and that, by electing not to amend ECOA to alter that understanding, Congress effectively ratified judicial interpretations that ECOA authorizes disparate-impact liability. In *Inclusive Communities,* the Supreme Court noted that the existence of disparate-impact liability under the FHA is supported by the fact that, at the time the FHA was amended, all nine Courts of Appeals to have addressed the question had concluded that the FHA authorized disparate-impact liability.[103] However, as noted above, with respect to ECOA, fewer Courts of Appeals have addressed the issue and those that have either assumed without deciding that ECOA authorized disparate-impact liability or provided only limited analysis. Moreover, subsequent amendments to ECOA provide little, if any, evidence that Congress's failure to amend ECOA to include a provision specifically stating that it does not authorize disparate-impact liability means that Congress approves of lower courts' statutory interpretation.[104] The Bureau concludes that the statutory language should be the primary basis for interpreting the statute. Arguments about how a later Congress may have viewed the statutory meaning in light of lower court decisions are insufficient to overcome the best reading of the statutory language.

The Bureau concludes that any reliance interests in the existing regulatory interpretation permitting disparate-impact liability do not outweigh revising Regulation B to bring it into alignment with the statutory text. Several commenters argued that the

[99] *See Bostock* v. *Clayton Cnty., Georgia,* 590 U.S. 644, 673–74 (2020) (''This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.''). Some are critical of using legislative history to interpret statutory language. ''The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.' '' *Conroy* v. *Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting *Aldridge* v. *Williams,* 44 U.S. (3 How.) 9, 24 (1844)); *see also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation,* 17 Harv. J. L. & Pub. Pol'y 61, 68 (1994) (''Intent is elusive for a natural person, fictive for a collective body.'').

[100] *See Garcia* v. *Johanns,* 444 F.3d 625, 633 n.9 (D.C. Cir. 2006); *Midkiff* v. *Adams Cnty. Reg'l Water Dist.,* 409 F.3d 758, 771–72 (6th Cir. 2005). Notably, the D.C. Circuit underscored the absence of effects-based language in ECOA. *See Garcia,* 444 F.3d at 633 n.9. The Sixth Circuit noted that it was not attempting to ''resolve complex statutory questions'' presented by construing whether ECOA authorized disparate-impact liability. *See Midkiff,* 409 F.3d at 772.

[101] *See Bhandari* v. *First Nat'l Bank of Com.,* 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds,* 492 U.S. 901 (1989); *Miller* v. *Am. Express Co.,* 688 F.2d 1235, 1239–40 (9th Cir. 1982).

[102] *See, e.g., Ramirez* v. *GreenPoint Mortg. Funding, Inc.,* 633 F.Supp.2d 922, 926–27 (N.D. Cal. 2008) (finding that *Smith* does not itself bar disparate impact claims under ECOA).

[103] 576 U.S. at 536–37.

[104] *See AMG Cap. Mgmt.* v. *Fed. Trade Comm'n,* 593 U.S. 67, 81 (2021) (noting that ''when Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of a court's statutory interpretation'') (citation and internal quotation marks omitted).

Bureau did not adequately consider the reliance interests in Regulation B's current interpretation authorizing disparate-impact claims. They maintained that consumers have reliance interests in a regime that deters facially neutral policies that have disparate effects and that creditors have reliance interests in their compliance systems and policies and procedures, which have been adopted consistent with longstanding regulatory interpretations. State Attorneys General commenters also stated that State and local governments have reliance interests in a strong Federal enforcement mechanism to address discrimination in credit markets. Another commenter, however, stated that any reliance interests in the existing interpretation of Regulation B are outweighed by the need to revise the rule to make it consistent with the statutory text of ECOA. The Bureau concludes that the need to align Regulation B with ECOA's statutory language is paramount and that any reliance interests in the Regulation B interpretation of ECOA—-impact claims are insufficient compared with the importance of conforming Regulation B to the statutory language. Consumers will remain protected under ECOA from disparate treatment, including facially neutral policies and procedures that creditors adopt as proxies for intentional discrimination. State and local governments will continue to be able to rely on ECOA's disparate treatment protections and other antidiscrimination protections. Although creditors may have to revise their policies and procedures, they will have greater flexibility to adopt facially neutral policies and procedures.

Several commenters maintained that disparate-impact liability under ECOA is crucial for addressing discrimination in the credit markets. They stated that disparate-impact is particularly important in addressing discrimination in certain circumstances where establishing intentional discrimination is especially challenging, including for automated credit models (specifically AI-driven models), indirect auto lending, and mortgage lending. The Bureau notes that ECOA will continue to provide important protections against discrimination in the credit markets and that, under disparate-treatment claims, facially neutral policies may still violate the law if they are proxies or pretexts for discrimination on a prohibited basis. In addition, the Bureau notes that disparate-impact liability may have the effect of increasing the burdens on AI developers and users, which could impair the use of AI-driven models to expand credit access. Nevertheless, to the extent that the best reading of the statutory language means that ECOA does not authorize disparate-impact liability, the fact that neutral policies and procedures resulting in a disparate impact on a prohibited basis will not give rise to liability under the Act is a choice of Congress and a necessary result of aligning Regulation B with the language of the statute.

In the proposed rule, the Bureau noted concerns about the constitutionality of disparate-impact liability as to certain ECOA-protected classes. Several consumer advocate commenters and State Attorneys General commenters stated that interpreting ECOA to authorize disparate-impact liability does not raise constitutional concerns. These commenters noted that the Supreme Court has found that several antidiscrimination statutes authorize disparate-impact liability and do not present constitutional issues. Some of these commenters noted that the case cited by the Bureau, *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College,* 600 U.S. 181 (2023), involves race-based university admissions and does not address disparate-impact liability. Some of these commenters stated that credit application is not a zero-sum situation and that disparate-impact liability does not require creditors to prefer certain members of protected classes over other applicants. However, other commenters, including some policy group and industry commenters, maintained that disparate-impact liability pressures creditors to consider race and other factors in their decision-making. They maintained that concerns about disparate-impact liability incentivize creditors to engage in balancing of race and other factors to minimize disparities, raising equal protection concerns.

The Bureau remains concerned that disparate-impact liability raises constitutional concerns to the extent it requires creditors to engage in balancing of race and other constitutionally suspect factors in order to minimize the risk of disparate-impact liability. As a general matter, members of the Supreme Court, as well as other commentators, have identified serious infirmities in the very assumptions upon which disparate-impact theory rests.[105] The Supreme Court recently emphasized that ''the Equal Protection Clause . . . applies without regard to any differences of race, of color, or of nationality—it is universal in its application'' and the ''guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another].'' [106] But where a facially neutral, even-handedly applied policy ''would have a disparate impact, a decision-maker is often compelled to act intentionally on the basis of [protected class status] to avoid the disparate impact, thus disparate impact regulations require decision makers 'to evaluate the [ ] outcomes of their policies, and to make decisions based on (because of) those [ ] outcomes.' '' [107] With respect to ECOA, creditors looking to avoid the risk of disparate-impact liability are compelled to conduct fair lending analyses with respect to their policies, underwriting, pricing, and marketing to consider an applicant's protected class status and potentially change unintended disparate outcomes. Disparate-impact liability encourages and, in some cases, may require covered entities to engage in the intentional use of balancing to eliminate disparate outcomes by treating individuals based on constitutionally implicated characteristics (such as race, national origin, or sex) differently from others similarly situated—the exact conduct the Equal Protection Clause forbids.[108] The Bureau's finding that the statutory language of ECOA does not encompass disparate-impact liability appropriately avoids such constitutional concerns.

The Bureau is finalizing as proposed changes to Regulation B reflecting its determination that, pursuant to the best reading of section 701(a) of ECOA, disparate-impact claims are not cognizable under the Act. Several commenters supported the proposed rule but requested that the Bureau provide clarification on certain issues. A few commenters requested that the Bureau, if it finalized the proposed

[105] *E.g., Ricci* v. *DeStefano,* 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring) (''Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.''); *Inclusive Communities,* 576 U.S. at 554 (Thomas, J., dissenting) (''We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.''); Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question,* 2024 Harvard J. Pub. Pol'y Per Curium 18.

[106] *Students for Fair Admissions, Inc.,* 600 U.S. at 206 (internal quotation marks omitted) (first quoting *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886); and then quoting *Regents of the Univ. of Cal.* v. *Bakke,* 438 U.S. 265, 289–90 (1978) (Powell, J.)).

[107] *Louisiana* v. *EPA,* 712 F. Supp. 3d 820, 843 (W.D. La. 2024) (quoting *Ricci,* 557 U.S. at 595–96 (Scalia, J., concurring)) (citation omitted).

[108] *Students for Fair Admissions, Inc.,* 600 U.S. at 206.

rule's changes to Regulation B regarding disparate impact, also clarify that creditors may continue to use proxy analysis to assess the demographic makeup of their applicant pool to evaluate their compliance with ECOA. Other commenters requested that the Bureau, if it finalized the proposed rule, clarify that creditors will retain flexibility to evaluate the demographic impact of their policies and procedures, both to help inform business and community reinvestment strategies and because of other Federal and State laws that impose disparate-impact liability.

The Bureau has determined that the commenters' requests for clarification do not warrant making modifications to the proposed rule's amendments to Regulation B. First, several of the requests for clarification speak to creditors' processes and procedures for ensuring compliance with either ECOA or other Federal and State laws imposing disparate-impact liability. The Bureau has determined that, with respect to addressing concerns related to ECOA compliance, the level of guidance that would be required to respond to these concerns would likely be too nuanced and detailed to be appropriate for inclusion in a regulation. In any event, the Bureau has primary authority for administering ECOA, but not other Federal or State laws that include a disparate-impact component. Thus, the Bureau has neither the authority nor expertise to instruct regulated entities on how to comply with those other laws.

An industry commenter urged the Bureau, if it finalized the proposed rule, to prevent circumventions of the regulation by clarifying that statistical imbalances alone are not a sufficient basis for establishing disparate treatment under ECOA. Similarly, an industry commenter requested that the Bureau, if it finalized the proposed rule, clarify that statistical evidence that a creditor lags peers in applications or originations does not, standing alone, support a disparate-treatment claim. Finally, an individual commenter urged the Bureau, if it finalized the proposed rule, to clarify that while ECOA does not give rise to a standalone disparate-impact cause of action, the Bureau may still prohibit practices that are intentionally designed or applied as proxies for prohibited characteristics.

With respect to these commenters' requests, the Bureau has determined that it is not necessary to modify the proposed rule's amendments to Regulation B. These commenters are essentially requesting that the Bureau opine on the legal sufficiency of a prima facie case of discrimination under ECOA. Courts are best positioned to render an opinion on whether certain evidence suffices to establish a prima facie case of discrimination. Finally, changes to the commentary that the Bureau is finalizing will make clear that practices that are intentionally designed or applied as proxies for prohibited characteristics will remain subject to disparate-treatment liability. The Bureau has determined that the commenters' various requests for clarification do not require modifying the proposed amendments to Regulation B, which the Bureau is now finalizing in this rule.

Finally, one commenter that supported deleting the ''effects test'' language from the existing regulation argued that the Bureau should not replace it with new text clarifying that section 701(a) does not support an interpretation of ECOA allowing for disparate-impact liability. The Bureau disagrees with this commenter with respect to the need to add new text to Regulation B clarifying that ECOA does not permit recovery under a disparate-impact theory. While courts are the ultimate arbiters of statutory interpretation, particularly as to whether a statute like ECOA authorizes disparate-impact claims, the Bureau has been charged by Congress with responsibility for prescribing regulations to carry out the purposes of the Act. Moreover, because Regulation B contained a contrary interpretation, the Bureau believes that it is necessary and appropriate to now clarify in Regulation B that under the best reading of ECOA disparate-impact claims are not available.

The specific changes to the rule with respect to disparate-impact liability are discussed below.

Section 1002.6(a)—General Rule Concerning Use of Information

Current § 1002.6(a) provides in the first sentence that, except as otherwise provided in the Act and this part, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis. The second sentence provides that the legislative history of the Act indicates that the Congress intended an ''effects test'' (disparate impact) to apply to a creditor's determination of creditworthiness. For the reasons explained above, the Bureau is deleting the second sentence and adding a new sentence stating that the Act does not provide that the ''effects test'' applies for determining whether there is discrimination in violation of the Act.

Current comment 6(a)–2 explains the effects test and states that 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. The comment also provides an example. The Bureau is deleting the current text of comment 6(a)–2 for the reasons explained above and adding a new title ''Disparate treatment'' and new language providing as follows: The Act prohibits practices that discriminate on a prohibited basis regarding any aspect of a credit transaction. The Act does not provide for the prohibition of practices that are facially neutral as to prohibited bases, except to the extent that facially neutral criteria function as proxies for protected characteristics designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

Section 1002.2(p)—Definition of Empirically Derived and Other Credit Scoring Systems

Current comment 2(p)–4 to the definition of empirically derived and other credit scoring system is entitled ''Effects test and disparate treatment.'' The comment states that neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test and refers to comment 6(a)–2 for a discussion of the effects test. For the reasons discussed above, the Bureau is deleting ''effects test'' from the title and deleting the sentence discussing the effects test and the reference to comment 6(a)–2.

C. Discouragement

Proposed Rule

The Bureau proposed changes to § 1002.4(b) and its accompanying commentary. These Regulation B provisions proposed to prohibit creditors from making oral or written statements to applicants or prospective applicants that would discourage a reasonable person from applying for credit. As noted in part II, the Board first adopted a precursor to current § 1002.4(b) in its 1975 final rule implementing ECOA, as an exercise of its adjustment authority under ECOA section 703(a).

In its 1975 final rule, the Board determined that prohibiting discouragement was ''necessary to

protect applicants against discriminatory acts occurring before an application is initiated.'' [109] Indeed, ECOA section 701(a) prohibits creditors from discriminating on a prohibited basis against applicants for credit,[110] a term the statute defines as a ''person who *applies* to a creditor'' for credit.[111] In the absence of a discouragement provision, creditors could sidestep this prohibition entirely by discouraging prospective applicants from applying for credit in the first place. For example, in the absence of a discouragement provision, a creditor could post a sign outside its office stating, ''Credit available only to applicants under age 65,'' arguably without violating ECOA as to individuals who choose not to apply for credit because of the sign. A well-tailored discouragement provision that prohibits such practices protects ECOA's purpose of making credit available on a non-discriminatory basis.

However, as explained in the proposal, the Bureau preliminarily determined in its expertise that, in the years since the Board first adopted the discouragement provision, the provision has been interpreted to prohibit conduct that is not necessary or proper to prohibit in order to prevent the circumvention or evasion of ECOA's purposes. The Bureau is concerned that this, in turn, has had an unnecessarily chilling effect on creditors' business practices and exercise of their rights to speak about matters of public interest. Pursuant to its authority under ECOA section 703(a), and in consideration of what it finds is necessary and proper given the purposes of ECOA and facilitating compliance therewith, the Bureau proposed to revise § 1002.4(b) and its commentary as described below.[112]

Furthermore, and independent of the above, the Bureau was concerned that the overbroad coverage of the regulation and its potential interpretations may constrain free speech and commercial activity in ways that are unwarranted. The Bureau also preliminarily determined that, given this potential impact, and in consideration of its expertise as a regulator in the marketplace, the revisions would continue to prohibit illegal discouragement of potential applicants without exceeding that purpose in ways that would impose unnecessary constraints in the marketplace.

The Bureau's proposal addressed several different aspects of § 1002.4(b): (1) what constitutes an oral or written statement, (2) what constitutes a statement to an applicant or prospective applicant, and (3) the standard for showing prohibited discouragement. The Bureau requested comment on the merits of an alternative approach, such as revising only one or two of these three aspects of § 1002.4(b).

Oral or Written Statement

Section 1002.4(b) prohibits creditors from making ''any oral or written statement'' to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application for credit. The regulation text itself does not define ''oral or written statement.'' Current comment 4(b)–1, the substance of which the Board added to Regulation B in 1985 as comment 5(a)–1 without substantive explanation,[113] states, in part, that the discouragement prohibition covers ''acts or practices'' by creditors that could discourage on a prohibited basis a reasonable person from applying for credit.

The Bureau proposed to clarify, in § 1002.4(b), that ''oral or written statement'' means spoken or written words, or visual images such as symbols, photographs, or videos. That would include any visual images used in advertising or marketing campaigns. The Bureau also proposed to align the text of comment 4(b)–1 with the text of current § 1002.4(b) by replacing current references in the comment to ''acts or practices'' or ''practices'' with references to ''oral or written statements'' or ''statements,'' respectively. As a result, certain business practices, such as business decisions about where to locate branch offices, where to advertise, or where to engage with the community through open houses or similar events, would not constitute prohibited discouragement even if they had some communicative effect that some consumers could arguably find discouraging. The Bureau requested comment on the proposed revisions.

Statement to Applicants or Prospective Applicants

Section 1002.4(b) currently prohibits creditors from making any oral or written statement to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application for credit. Section 1002.4(b) has been interpreted to prohibit the selective encouragement of certain applicants or prospective applicants (for example, geographically targeted advertising) on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it.

The Bureau proposed to revise § 1002.4(b) to provide that prohibited discouragement occurs when a creditor makes any oral or written statement ''directed at'' applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from applying for credit. The Bureau proposed to revise comment 4(b)–1 to provide that encouraging statements directed at one group of consumers cannot discourage applicants or prospective applicants who were not the intended recipients of the statements. In addition, the example in current comment 4(b)–1.ii (which the Bureau proposed to redesignate as comment 4(b)–1.i.B) [114] would be narrowed to provide an example of a statement that would constitute prohibited discouragement under the limitation. As proposed, the revised example provided that prohibited discouragement includes statements directed at the public that express a discriminatory preference or policy of exclusion against consumers based on one or more prohibited basis characteristics.

The Bureau also proposed to add new comment 4(b)–1.ii.A to provide an example of a statement that would *not* constitute prohibited discouragement. The proposed example provided that statements directed at a particular group of consumers, encouraging that group of consumers to apply for credit, do not constitute prohibited discouragement.

Standard for Discouragement

The prohibition against discouragement was adopted to prevent creditors from circumventing ECOA's prohibition against discrimination by deterring prospective applicants from even applying for credit. While this is an appropriate goal, the Bureau preliminarily determined in the proposal that § 1002.4(b) had been

[109] 40 FR 49298 at 49299.

[110] 15 U.S.C. 1691(a).

[111] 15 U.S.C. 1691a(b) (emphasis added).

[112] In addition to the revisions discussed below, the Bureau proposed to make two non-substantive changes to comment 4(b)–1. The Bureau proposed to revise the heading of comment 4(b)–1 from ''prospective applicants'' to ''discouragement'' to conform with the current heading of § 1002.4(b) and to reflect the fact that the text of current comment 4(b)–1 refers to both applicants and prospective applicants. Similarly, the Bureau proposed to revise the introductory text of comment 4(b)–1 to provide that prohibited discouraging statements are those that ''would'' discourage (rather than ''could'' discourage) a reasonable person, on a prohibited basis, from applying for credit. Again, this change would conform commentary text to current text of § 1002.4(b).

[113] 50 FR 48018 at 48050.

[114] The Bureau also proposed to redesignate the other two examples in current comment 4(b)–1 as comments 4(b)–1.i.A and 4(b)–1.i.C, without substantive change.

interpreted to apply to scenarios that should not be characterized as prohibited discouragement under ECOA. These were scenarios that—though they may involve potentially controversial statements by creditors—do not involve statements that an objective creditor would know, or should know, would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms than other borrowers. The Bureau drew a distinction between a statement by a creditor that an applicant or potential applicant may not like or may disagree with, and a statement that would cause a reasonable person to be discouraged from applying for credit with that creditor.

The Bureau proposed to revise § 1002.4(b) and its accompanying commentary to provide that a statement is prohibited discouragement only if a creditor ''knows or should know'' that the statement would cause a reasonable person to be discouraged.

The Bureau also proposed to revise § 1002.4(b) and its accompanying commentary to clarify that the standard is not whether a creditor's statement ''would discourage on a prohibited basis a reasonable person,'' as provided in existing § 1002.4(b), but rather that discouragement occurs only if the creditor's statement ''would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristic(s).'' Under this proposed revision, prohibited discouragement would occur only when the creditor's statement was the proximate cause of the applicant's or prospective applicant's belief about their ability to obtain credit on non-discriminatory terms. The proposed revision thus would narrow the prohibition to cover only statements that *themselves* would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the applicant or prospective applicant's prohibited basis characteristic(s).

Consistent with that proposed revision, the Bureau also proposed to narrow current comment 4(b)–1.ii (proposed comment 4(b)–1.i.B) [115] to refer only to statements that express a discriminatory preference or policy of exclusion.[116]

To facilitate compliance, the Bureau also proposed to add three examples to the commentary, in new comments 4(b)–1.ii.B through D, of the types of statements that a creditor would not (or should not) know would cause a reasonable person to believe that the creditor would deny (or would grant on less favorable terms) credit to an applicant or prospective applicant based on their prohibited basis characteristic(s). These were illustrative examples of non-prohibited statements that a creditor may make, directed at an applicant or prospective applicant: (1) in support of local law enforcement; (2) recommending that, before buying a home in a particular neighborhood, consumers investigate, for example, the neighborhood's schools, its proximity to grocery stores, and its crime statistics; and (3) encouraging consumers to seek out resources to develop their financial literacy. The Bureau requested comment on the revisions, including on whether additional or different examples would be helpful in clarifying the types of statements that would be permissible under the final rule.

Comment 4(b)–2

Comment 4(b)–2 provides that creditors may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor. The Bureau proposed to strike this comment as unnecessary; no substantive change was intended. The Bureau requested comment on the revision.

Technical Revision Related to Prospective Applicants

Consistent with ECOA section 704A, § 1002.15 sets forth incentives for creditors to self-test for compliance with ECOA and Regulation B and to correct any issues found.[117] Section 1002.15(d)(1)(ii) currently states that the report or results of a privileged self-test may not be obtained or used ''[b]y a government agency or an applicant (including a prospective applicant who alleges a violation of § 1002.4(b)) in any proceeding or civil action in which a violation of the Act or this part is alleged.'' The Bureau proposed to strike from § 1002.15(d)(1)(ii) the previous reference to prospective applicants. This proposed revision would conform the language of § 1002.15(d)(1)(ii) with the statutory language of ECOA sections 704A(a)(2) and 706.[118] No substantive change was intended. The Bureau requested comment on the revision.

Comments Received

Generally. Many comments that addressed the proposed revisions to the definition of discouragement in § 1002.4(b) and its accompanying commentary, particularly from consumer advocates and Members of Congress, stated that the proposed revisions would permit discriminatory lender conduct. Commenters identified populations that may be most impacted by the amendments to the definition of discouragement, including minorities, low-income consumers, women, consumers with disabilities, small business owners, rural consumers, older adults, and so-called justice-involved individuals. Some commenters noted that the amendments will cause individuals to self-select out of applying for credit. Many comments raised concerns that the proposed revisions will remove tools to prevent and redress discrimination in particular industries, including mortgage lending, small business lending, credit cards, small dollar loans, and other forms of small dollar lending.

One commenter noted an interaction between the discouragement prohibition and the Home Mortgage Disclosure Act of 1975 (HMDA),[119] explaining that creditors who want to discriminate illegally will be incentivized to keep certain types of consumers from applying for credit because under HMDA, if individuals never apply for credit, the creditor is not required to report the individual as being denied credit. State Attorneys General commenters also asserted that the proposed changes would limit the power of States, which, under the Dodd-Frank Act, have authority to enforce ECOA and Regulation B.

As discussed in the proposal, the Bureau preliminarily determined in its expertise that, in the years since the Board first adopted the discouragement prohibition, the prohibition has been interpreted to prohibit conduct that it is not necessary or proper to prohibit in order to prevent the circumvention or evasion of ECOA's purposes.[120] The Bureau expressed concern that this, in turn, has had an unnecessarily chilling effect on creditors' business practices and exercise of their rights to speak

[115] The Bureau mistakenly referred to this as proposed comment 4(b)–1.i.A in the proposal. *See* 90 FR 50901 at 50908.

[116] The Bureau discusses other proposed changes to the text of current comment 4(b)–1.ii above in part III.C, *Statement to applicants or prospective applicants.*

[117] 15 U.S.C. 1691c–1 (Incentives for self-testing and self-correction).

[118] 15 U.S.C. 1691c–1(a)(2), 1691e.

[119] Public Law 94–200, tit. III, 89 Stat. 1125 (12 U.S.C. 2801 *et seq.*).

[120] 90 FR 50901 at 50907.

about matters of public interest.[121] The Bureau was also concerned that the overbroad coverage of the regulation and its potential interpretations may constrain free speech and commercial activity in ways that are unwarranted.[122]

Industry commenters agreed that the existing discouragement regulations are overbroad and have had a chilling effect on lawful expression by creditors. The comments supported the proposed revisions, stating that the amendments will achieve the statutory purposes without prohibiting lawful, non-discriminatory conduct. One commenter noted that the Bureau's proposed amendments substantially reduce the potential for the rule to violate creditors' First Amendment rights.

Consumer advocate and State Attorneys General commenters disagreed, stating that the Bureau's concern that the overly broad and improper application of the discouragement provision has had a chilling effect on creditors and may constrain free speech and commercial activity is unjustified.

Consumer advocate and State Attorneys General commenters stated that the proposed changes to the discouragement regulations are inconsistent with the text and purposes of ECOA, and contrary to congressional intent. One commenter stated that if creditors could discourage prospective applicants from applying, they could frustrate the statutory purpose of requiring that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy consumers without regard to prohibited characteristics. Some commenters pointed to the 1991 amendment of ECOA and its legislative history as evidence that Congress intended to prohibit the discouragement of applicants on a prohibited basis and advertising which implies a discriminatory preference.[123] The 1991 amendment requires agencies to refer matters to the Attorney General whenever the agencies have reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of 15 U.S.C. 1691(a).[124]

Individuals and consumer advocate commenters also asserted that the proposed revisions to § 1002.4(b) would not facilitate compliance with ECOA. Commenters stated that the changes would render ECOA unworkable and make it unreasonably difficult for anyone to pursue a claim of discouragement. Consumer advocate and State Attorneys General commenters claimed that the Bureau did not provide a reasoned analysis to justify the changes. They stated that the Bureau's preliminary determination in the proposal that the discouragement provision has been interpreted to prohibit conduct that it is not necessary or proper to prohibit is not supported by data, case law, statutory text, or other legal or factual evidence. One consumer advocate commenter claimed that the Bureau's use of rulemaking authority limited consumer rights under ECOA, exceeding the Bureau's statutory rulemaking authority. Some commenters claimed that the proposed rule was inconsistent with the Bureau's consumer protection mandate.

Consumer advocate and State Attorneys General commenters also stated that the proposed changes to the discouragement regulations are inconsistent with decades of precedent and enforcement history and cited to cases that found discouragement. Most discussed was the 2024 decision from the U.S. Court of Appeals for the Seventh Circuit in which the court held that Regulation B's prohibition against discouragement is consistent with the plain text of the ECOA.[125] One commenter referenced dozens of court-approved settlements to resolve allegations of redlining that relied in part on Regulation B's definition of discouragement. Some commenters claimed that the proposed changes to the discouragement provision would explicitly permit statements similar to those that were at issue in that case.

An individual commenter asked the Bureau to define ''prospective applicant'' and suggested the term should mean either a person who has made a substantive pre-application inquiry to the creditor or a person who is an intended recipient of a targeted communication based on the creditor's distribution or targeting settings.

Oral or written statements. Several industry commenters supported the Bureau's proposal to clarify that certain acts or practices do not reflect the circumvention or evasion of ECOA's prohibition against discrimination. Industry commenters agreed that the proposal would tailor an overbroad reading of the statute. An industry trade commenter stated that banks have existing obligations under the CRA, and ECOA was not intended to impose similar obligations.

Many commenters, including consumer advocate and State Attorneys General commenters, stated that the Bureau failed to provide sufficient legal or factual data to support the proposed elimination of references to ''acts or practices'' in comment 4(b)–1. A few commenters stated that the proposal did not provide evidence that clarifying the Bureau's interpretation of discouragement would alleviate any purported chilling effect on creditors. Commenters also stated that the change is inconsistent with ECOA's remedial purpose and congressional intent to prevent discrimination before it occurs. In addition, many commenters stated that the proposed narrow definition of discouragement would create enforcement gaps.

Several consumer advocate commenters asserted that limiting discouragement to oral or written statements would permit pre-application discouragement conduct. Commenters were concerned that the proposal would allow creditors to deter protected groups from applying without making an explicitly discouraging statement. The commenters noted that the proposed changes focus only on explicit statements which they claim largely ignores how discrimination functions. Many consumer advocate commenters stated that the proposed amendments would allow geographic targeting. Commenters explained that, as a result of the amendments, financial institutions may locate or advertise in certain communities and avoid other communities. Commenters noted that pre-application interactions, marketing practices, and informal guidance influence whether a consumer applies for credit. These commenters stated that the proposal would allow creditors to comply formally with the rule while continuing to discourage applications through nonverbal, design or other practices.

Members of Congress, consumer advocate commenters, and policy group commenters raised concerns that the proposal would curtail efforts to address redlining. Some commenters stated that lender decisions, such as decisions on branch locations and communities to target for business, can demonstrate discouragement. Commenters noted the recent reliance by the DOJ, the Bureau, and other Federal financial regulators on the definition of discouragement in Regulation B to challenge redlining across the country. One commenter stated that the Bureau, through its exam manual, has adopted the Federal

[121] *Id.*

[122] *Id.*

[123] S. Rep. No. 102–167, at 86 (1991).

[124] FDIC Improvement Act of 1991, Public Law 102–242, sec.223, 105 Stat. 2236, 2306 (1991) (codified at 15 U.S.C. 1691e(g)).

[125] *Consumer Fin. Prot. Bureau* v. *Townstone Fin., Inc.,* 107 F.4th 768, 774, 777 (7th Cir. 2024).

Financial Institutions Examination Council (FFIEC) agencies' indicators of discriminatory redlining risk.

Industry commenters disagreed and stated that routine business decisions, including those about where to locate branch offices, where to advertise, or where to engage with the community through open houses or similar events, have been incorrectly construed to constitute discouragement. The commenters stated that these practices are routine business decisions. A credit union stated that branch location and outreach strategies are already constrained by statutory and charter requirements and that treating those location decisions as ''statements'' has generated substantial uncertainty and litigation risk without improving protection for consumers.

Statements to applicants or prospective applicants. Several industry commenters supported the proposal's approach to clarify that affirmatively encouraging one particular group of consumers to apply for credit does not constitute prohibited discouragement of another group. These commenters agreed that encouraging statements directed at one group do not discourage other consumer applicants, particularly where the other consumers are not the intended recipients. Industry commenters also supported the proposal's approach to targeted marketing, including geographic targeting, and asserted that targeted marketing is not intended to discourage non-targeted consumers. Commenters stated that using different marketing methods to reach different sets of audiences is not intended to discourage other consumers. One industry commenter explained that its members' efforts to encourage applications from traditionally underserved communities or use of targeted marketing to prospective applicants are routine lender practices to generate applications from creditworthy individuals or businesses.

Several consumer advocates and policy group commenters expressed concern that the proposal does not account for discouragement in current credit markets. These commenters asserted that discouragement in today's credit markets occurs through digital channels and that the proposal risks legitimizing digital redlining and algorithmic risk. The commenters were concerned that treating affirmative encouragement as non-discouragement overlooks how targeted marketing can exclude creditworthy prospective applicants. For example, the commenters claimed that tools for targeted marketing are largely exclusionary. The commenters also claimed that encouraging certain consumers to apply for credit, while excluding others, can be discouragement because it exposes certain consumers to credit opportunities while excluding others from awareness and therefore access. One commenter stated that the proposal would establish a safe harbor for creditors sending credit offers to a particular group of consumers, even if the creditor seeks to discriminatorily exclude others from such credit offers.

Consumer advocate commenters and State Attorneys General commenters stated that the proposal would create enforcement gaps by shielding exclusionary conduct framed as discouragement. These commenters noted that limiting discouragement to conduct directed at ''intended recipients'' would allow creditors to avoid liability by defining the audience narrowly. For example, commenters claimed that creditors could avoid discouragement liability by hanging signs such as ''Whites encouraged to apply,'' or ''We Love White People, Come Apply for a Mortgage!'' to communicate to prospective applicants who are not members of those groups that their business is not wanted. State Attorneys General commenters also stated that the Bureau did not provide a definition of ''intended recipients'' in the proposed regulation text or commentary itself and according to the commenters the narrative definition in the rule's preamble would arguably not cabin the proposed rule.

Several commenters, including several consumer advocates, rejected the idea that encouragement directed at one group can be evaluated separately from its effect to exclude another group. These commenters stated that encouraging certain commenters while excluding others is functionally the same as discouragement. A commenter noted that the proposal would eliminate pre-application comparative treatment because discouragement often involves a comparison of whether one group of prospective applicants receives better pre-application treatment than another based on their protected characteristics.

A few commenters, including consumer advocates and a trade group, asserted that the proposed amendments do not reflect the limitations applied to the rest of the housing market through the FHA. Commenters asserted that the proposed amendments would create inconsistencies regarding pre-application conduct. The trade group commenter stated that both the FHA and the commenter's code of ethics prohibit any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations, or discrimination. The commenter also stated that the best way to expand housing opportunities is to indicate in all statements related to buying property that no one is unwelcome. Another commenter asserted that the Bureau did not acknowledge or explain why it is creating a split between the FHA and ECOA considering the overlap between the FHA and ECOA regarding mortgage lending. The commenter noted that the Bureau's position on selective encouragement is at odds with HUD's regulations concerning discriminatory statements under the FHA.

Standard for discouragement. Several commenters, including State Attorneys General and consumer advocates, expressed concern that the Bureau's proposal would raise the standard to prove discouragement such that it would be unreasonably difficult to pursue a claim. These commenters also asserted that even applicants with legitimate discouragement claims would likely be deterred from pursuing them. A consumer advocate commenter stated that the standard is inconsistent with the standard of proof courts apply to similar claims and has not been applied by any court considering an ECOA discouragement claim. This commenter recommended that the Bureau adopt, similar to the FHA, a reasonable person test that would determine whether a reasonable person would perceive that a protected group would be disfavored in an application. A consumer advocate commenter stated that the Bureau did not explain why the new standard is needed or how to prove it.

Consumer advocate commenters and State Attorneys General commenters opposing the rule stated that the proposed reasonable person standard would allow creditors to make harmful statements that could discourage applicants. The State Attorneys General commenters stated that the rule would allow creditors to make statements mocking or mistreating prospective applicants based on a prohibited basis characteristic, or indicate that mistreatment would occur if the applicant applied as long as the statements did not specifically concern the credit decision or credit terms. A consumer advocate commenter stated that, in the housing context, courts have historically recognized that discriminatory preferences, rather than explicit bans, can form the basis for a discriminatory statement's violation. According to the commenter, a discriminatory statement only needs to indicate that a prospective applicant

would be disfavored on a prohibited basis.

Consumer advocate commenters stated that pre-application discouragement protections are necessary given the increased use of digital advertising and marketing. Commenters asserted that digital advertising and marketing, including algorithmic targeting, can allow lenders to target or steer certain groups towards specific products or discourage applications from protected classes. One consumer advocate commenter stated that discouragement occurs through selective steering, coded language, or marketing practices that systematically dissuade certain groups from applying.

A few industry commenters recommended that the Bureau eliminate any potential liability for statements that the creditor does not know would discourage an applicant or prospective applicant from applying for credit. These commenters recommended that the Bureau limit § 1002.4(b) to statements made with actual knowledge that would communicate discriminatory outcomes on a prohibited basis by deleting the proposed ''or should know'' language. The commenters asserted that the proposal would reach innocent conduct that is not undertaken on the basis of or because of a protected characteristic. An industry commenter was concerned that creditors would face unnecessary litigation based on disputes about whether a creditor should know how an innocent statement is interpreted by a prospective applicant. The commenter stated that the Bureau cannot reliably predict which statements made today without discriminatory intent, could later support that the creditor ''should know'' would discourage applications. Another commenter asserted extending Regulation B's discouragement prohibition to cover statements that a creditor did not intend to discourage applicants would exceed the Bureau's rulemaking authority under ECOA section 703(a).

Many consumer advocate commenters claimed that the proposed revision to narrow current comment 4(b)–1.ii (proposed comment 4(b)–1.i.B) to refer only to statements that ''express'' a discriminatory preference or policy of exclusion would limit discouragement liability to the most overt discriminatory statements. Commenters asserted that discouragement often occurs though implication or suggestion and therefore context is relevant in determining whether a statement is discouraging. A commenter stated that the Bureau failed to explain how the standard is consistent with the legislative history, which notes that ''advertising which implies a discriminatory preference [is] also prohibited'' under ECOA.[126]

Industry commenters expressed support for the Bureau's proposal to clarify the standard for discouragement claims. Commenters were supportive of the proposal to narrow comment 4(b)–1.ii to refer only to statements that express a discriminatory preference or policy of exclusion. Commenters stated that the proposed standard correctly prohibits only those statements that themselves would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the applicant or prospective applicant's prohibited basis characteristic(s). These commenters indicated that discouragement has been interpreted to capture speech that is not based on any explicit exclusionary message, but on how certain listeners might respond. One commenter stated that the language is undefined and has been used in ways that do not align with the intent and purpose of ECOA. Another commenter recommended that the Bureau also update examination and enforcement guidance to reflect that evidence of discriminatory purpose is required for discouragement liability.

Industry commenters stated that the proposal would reduce unnecessary compliance burdens and ultimately mortgage costs and fees for borrowers. An industry commenter supported a bright line interpretation of the prohibition.

Some commenters supported the Bureau's proposal to add examples of statements that would not constitute prohibited discouragement under the rule. An industry commenter stated that examples were helpful towards providing creditors regulatory certainty. Another commenter encouraged the Bureau to include illustrative examples confirming that statements of moral or religious belief do not violate ECOA. Other commenters expressed concern with the Bureau's proposal to add examples of statements that would not constitute prohibited discouragement under the proposed rule. An industry commenter stated that examples of permitted speech were unnecessary and may confuse rather than elucidate the test. The commenter also recommended that if the Bureau proceeds with the examples, the Bureau should make it clear that the examples are not the complete list of permissible statements and note the statements may raise risks under other antidiscrimination laws. Another commenter stated that the Bureau should not adopt examples because context matters and even messages framed as encouragement can in some circumstances convey exclusionary messaging or discourage borrowers.

A nonprofit consumer advocate recommended that the Bureau not adopt its proposed examples of practices that would not constitute discouragement. The commenter expressed that a statement supporting law enforcement, combined with a ''police lives matter'' flag, 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, could convey exclusion or discouragement to a potential credit applicant of color. Another commenter stated that references to certain language in the proposed rule's examples of non-discriminatory statements may, depending on the facts, provide evidence of discrimination.

A few commenters noted that the categories of ''non-prohibited statements'' under the proposed rule closely track the statements made by a mortgage lender that were ultimately cited in an ECOA enforcement action. These commenters stated that the proposal explicitly contradicts circuit court precedent arising out of that enforcement action. Another commenter noted that the Bureau's proposal does not explain why, instead of taking measures to prevent evasions as affirmed by the Seventh Circuit, it proposes to restrict ECOA's coverage.

Comment 4(b)–2. Several commenters, including consumer advocates and trade organizations, supported retaining the existing comment 4(b)–2, which provides that creditors may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit. Commenters stated that comment 4(b)–2 clarifies targeted outreach to certain communities is permissible; will not be flagged as discouragement; and allows creditors to expand their applicant pools. Some commenters asserted that retaining the comment would encourage creditors to purposefully expand their outreach to communities they may not have previously reached. A credit union trade group stated that the comment is important for credit unions that serve military communities. According to the commenter, credit unions often engage in outreach to populations that may be reluctant to seek credit. State Attorneys General commenters expressed concern that, read together with the Bureau's proposal to permit encouraging statements, the proposal to delete

[126] *See* S. Rep. No. 102–167, at 86 (1991).

comment 4(b)–2 would allow discriminatory practices and harm consumers and creditors.

Commenters also stated that comment 4(b)–2 provides regulatory clarity. These commenters asserted that removing the comment without providing a replacement would introduce regulatory uncertainty and increase compliance costs to creditors seeking to expand their applicant pools. For example, one industry commenter expressed concern that without comment 4(b)–2 creditors could face significant regulatory risks if they expressly consider prohibited-basis related information or proxies in developing and deploying marketing strategies. This commenter requested that if the Bureau moved forward with the proposal, the Bureau also provide guidance explaining when such affirmative marketing might become prohibited disparate treatment based on protected characteristics. Another commenter requested that the comment be retained as an example of a statement that the Bureau would not consider discouragement of a potential applicant.

Technical revision related to prospective applicants. A few commenters opposed the technical correction to strike from § 1002.15(d)(1)(ii) the current reference to prospective applicants. In the proposal, the Bureau explained that this revision would conform the language of § 1002.15(d)(1)(ii) with the statutory language of ECOA sections 704A(a)(2) and 706,[127] and no substantive change was intended. State Attorneys General commenters stated that the revision would disincentivize creditors from self-testing for Regulation B violations against prospective applicants, as creditors would know that the results of such a test now could be used against them. The commenters also said that the proposal does not explain why this change is needed.

An industry trade commenter expressed concern that eliminating the existing reference to prospective applicants could be interpreted as a change in the regulation. The commenter was concerned that the proposed revision could trigger private litigants to make requests for protected self-tests in ECOA lawsuits and the resulting discovery disputes over production would needlessly increase the costs of defense.

Alternatives. The Bureau requested comment on the merits of an alternative approach in which the Bureau would revise only one or two aspects of § 1002.4(b), instead of the proposed three, and, if such an approach were adopted, which aspects of § 1002.4(b) should be revised.[128] Commenters did not appear to directly address this request. Yet at least one commenter claimed the Bureau has not considered alternatives to accomplish ECOA's objectives.

An industry commenter recommended expanding the discouragement amendments to include lender fraud prevention efforts. The commenter requested that the Bureau allow lenders to identify and target geographical regions that warrant increased due diligence requirements for loan applicants and protect these lenders from discrimination claims when engaging in legitimate fraud protection efforts. The commenter also requested that the Bureau review related vulnerabilities with respect to the Fair Credit Reporting Act (FCRA) to ensure that financial institutions are provided clear regulatory protection to implement fraud prevention programs that may result in increased scrutiny of applications from certain geographic regions.

An academic research organization recommended the creation of a Federal agency, the U.S. Department of Valuation, to ensure administrative conformity across valuation activities, considering the proposed narrowing of the protections provided by the discouragement prohibition.

Final Rule

The Bureau is finalizing, as proposed, the amendments to § 1002.4(b) and its accompanying commentary. ECOA section 703(a) authorizes the Bureau to make adjustments in Regulation B that, in its judgment, are necessary or proper to effectuate ECOA's purposes.[129] Specifically, ECOA section 703(a) provides that the Bureau ''shall prescribe regulations to carry out the purposes of [ECOA],'' and that such regulations:

> [M]ay contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.[130]

When the discouragement provision was promulgated in 1975, the Board, using its adjustment authority under ECOA section 703(a), determined in its judgment that prohibiting discouragement was ''necessary to protect applicants against discriminatory acts occurring before an application is initiated.'' [131] The U.S. Court of Appeals for the Seventh Circuit, in 2024, affirmed the Bureau's broad, discretionary authority over the discouragement prohibition. The court observed that the discouragement provision had been adopted pursuant to the Board's (now the Bureau's) broad authority to ''prescribe regulations to carry out the purposes of [ECOA],'' and to ''provide for such adjustments and exceptions'' that, ''in the judgment of the Bureau are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.'' [132]

Pursuant to its adjustment authority under ECOA section 703(a),[133] and in consideration of what the Bureau, using its expertise and experience as a regulator in the marketplace, finds necessary and proper given the purposes of ECOA and facilitating compliance therewith, the Bureau has reconsidered various aspects of the discouragement provision. The finalized revisions address several different aspects of § 1002.4(b): (1) what constitutes an oral or written statement, (2) what constitutes a statement to an applicant or prospective applicant, and (3) the standard for showing prohibited discouragement. These revisions continue to prohibit illegal discouragement of applicants and prospective applicants but no longer exceed that purpose in ways that may impose unnecessary constraints in the marketplace.

In the 50 years since the discouragement prohibition was first implemented at the Board's discretion, the provision has been interpreted to prohibit conduct that, in the Bureau's judgment, is not necessary or proper to prohibit or to prevent the circumvention or evasion of ECOA's purposes. For example, the inclusion of the phrase ''acts or practices'' in current comment 4(b)–1 has resulted in § 1002.4(b) being interpreted overly broadly to apply to business practices that, though they may have some communicative effect, do not reflect the circumvention or evasion of ECOA's prohibition against discrimination that the discouragement provision was designed to address. Such practices include, for example, business decisions about where to locate branch offices, where to advertise, or where to

[127] 15 U.S.C. 1691c–1(a)(2), 1691e.

[128] 90 FR 50901 at 50907.

[129] 15 U.S.C. 1691b(a).

[130] *Id.*

[131] 40 FR 49298 at 49299.

[132] *Consumer Fin. Prot. Bureau* v. *Townstone Fin., Inc.*, 107 F.4th 768, 774, 777 (7th Cir. 2024).

[133] 15 U.S.C. 1691b(a).

engage with the community through open houses or similar events. In the Bureau's view, such practices do not constitute ''oral or written statements'' to applicants or prospective applicants within the meaning of § 1002.4(b) and do not, in and of themselves, demonstrate prohibited discouragement.

In addition, current § 1002.4(b) has been interpreted to prohibit the selective encouragement of certain applicants or prospective applicants (for example, geographically targeted advertising) on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it. This interpretation, too, is overbroad relative to the intended purposes of the discouragement prohibition. The purpose of ECOA is to make credit available to all applicants on a non-discriminatory basis, and § 1002.4(b) helps to achieve that purpose by prohibiting creditors from *discouraging* applicants or prospective applicants. Encouraging statements are not intended to (or even likely to) discourage *other* applicants or prospective applicants, who did not receive the statements and might, in fact, have been entirely unaware of them, from applying for credit. Such conduct is not typically an evasion of ECOA's prohibitions, nor is prohibiting it necessary or proper to achieve the purposes of ECOA.

Current § 1002.4(b) has also been interpreted to apply to scenarios that should not be characterized as prohibited discouragement under ECOA. These are scenarios that—though they may involve potentially controversial statements by creditors—do not involve statements that an objective creditor would know, or should know, would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms than other borrowers. There is a difference between a statement by a creditor that an applicant or potential applicant may not like or may disagree with, and a statement that would cause a reasonable person to be discouraged from applying for credit with that creditor.

Constraints on these types of business practices and statements, as currently exist, harm the marketplace by unnecessarily regulating business practices and limiting expression. Industry commenters confirmed that their ability to make important business decisions and speak freely has been constrained by broad interpretations of the existing discouragement provision. The Bureau concludes that § 1002.4(b), as amended, will not infringe on anyone's First Amendment rights.

The revisions to the discouragement prohibition, as finalized, are not inconsistent with the Bureau's consumer protection mandate, as alleged by at least one commenter. The Bureau is an agency that implements and enforces consumer financial law and ensures that markets for consumer financial products are transparent, fair, and competitive.[134] The current discouragement provision has been interpreted to prohibit conduct that it is not necessary or proper to prohibit in order to prevent the circumvention or evasion of ECOA's purposes. This, in turn, has had an unnecessarily chilling effect on creditors' business practices and exercise of their rights to speak about matters of public interest. The finalized revisions are intended to ensure that the Bureau implements and enforces consumer financial law without imposing additional, unnecessary constraints on the marketplace.

The APA permits the Bureau to amend its regulations, including those related to discouragement, through the notice and comment process, regardless of how long the prior policy has been in place.[135] Under that standard, it is not arbitrary and capricious for an agency to change its position if, among other things, the agency acknowledges the change and provides good reasons supporting that change.[136] Federal agencies amend policies for myriad reasons, including in response to observing how its policies operate in practice, changes in circumstance, and shifting priorities. The finalized amendments will be applied prospectively, taking effect 90 days after publication in the **Federal Register**, and will not affect statements or actions that have already occurred, or cases that have already been decided.

The Bureau acknowledges that the revisions, as finalized, may impact certain groups of consumers more than others. As discussed in the proposal, the amendments to the definition of discouragement may result in consumers not applying for credit and facing greater barriers to accessing credit than they otherwise would have under the existing rule. Certain groups of consumers may be excluded from advertising campaigns or lenders may choose to engage less with certain groups of consumers. As a result, some consumers may not be aware of credit products from all available lenders. Moreover, some consumers may lose convenient access to financial services if lenders alter their branch location decisions. In particular, elderly, minority, and low-income consumers are more likely to rely on brick-and-mortar branch services instead of online or mobile banking. If lenders alter their branch location decisions, then these customers may no longer be able to easily access financial services and products. However, narrowing the overbroad interpretation of the discouragement provision also benefits these very consumers, and may mitigate such impacts, by explicitly permitting lenders to make encouraging statements directed at any group of consumers. As finalized, § 1002.4(b) will no longer be interpreted to prohibit the selective encouragement of certain applicants or prospective applicants on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it, thus enabling access to credit for all consumers.

While it is also true that the revisions, as finalized, will reduce legal liability for lenders under ECOA from what it is today, the revisions restore the proper scope of prohibited discouragement behavior. States are not prohibited from enforcing the anti-discouragement provisions of Regulation B, as amended. In addition, other statutes, including HMDA and State laws, remain unchanged.

Finally, the Bureau determines it is unnecessary to provide a definition of ''prospective applicant'' in the regulatory text as requested by at least one commenter. The term ''applicant'' is already defined in current § 1002.2(e). An applicant generally is any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. The term ''prospective'' is an adjective commonly understood to mean ''relating to or effective in the future.'' [137] Thus, a prospective applicant has generally been understood to be any person who may, in the future, request or receive an extension of credit from a creditor. The Bureau is not altering its meaning in this rulemaking.

For these reasons, and for the reasons stated below, the Bureau has, in its

[134] 12 U.S.C. 5511.

[135] The APA defines ''rule making'' as the ''agency process for formulating, amending, or repealing a rule.'' 5 U.S.C. 551(5). The APA ''makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'' *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[136] *Id.* at 515–16.

[137] *Prospective, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/prospective* (last visited Mar. 13, 2026).

discretion and using its expertise and experience as a regulator in the marketplace, reevaluated various aspects of the discouragement prohibition in light how those provisions have been so broadly interpreted over the course of the last 50 years. The specific amendments are discussed below, as are more fulsome justifications for finalizing the amendments as proposed.

Oral or Written Statement

For the reasons discussed above and stated herein, the Bureau is finalizing § 1002.4(b) as proposed. Specifically, the Bureau is finalizing language added to § 1002.4(b) clarifying that ''oral or written statement'' means spoken or written words, or visual images such as symbols, photographs, or videos. This includes any visual images used in advertising or marketing campaigns. The Bureau is also aligning the text of comment 4(b)–1 with the text of current § 1002.4(b), as proposed, by replacing current references in the comment to ''acts or practices'' or ''practices'' with references to ''oral or written statements'' or ''statements,'' respectively.

Final § 1002.4(b) provides clear guidelines on the conduct that constitutes discouragement. The revisions are not inconsistent with congressional intent to prevent discrimination and the circumvention of ECOA's purposes, as alleged by some consumer advocates. The Bureau has determined that the inclusion of the phrase ''acts or practices'' in comment 4(b)–1 has resulted in § 1002.4(b) being interpreted overly broadly to apply to business practices that, though they may have some communicative effect, do not reflect the circumvention or evasion of ECOA's prohibition against discrimination that the discouragement provision was designed to address. Such practices include, for example, business decisions about where to locate branch offices, where to advertise, or where to engage with the community through open houses or similar events. In the Bureau's view, such practices do not constitute ''oral or written statements'' to applicants or prospective applicants within the meaning of § 1002.4(b) and do not, in and of themselves, demonstrate prohibited discouragement. As finalized, the business practices noted above would not constitute prohibited discouragement even if they had some communicative effect that some consumers could arguably find discouraging.

Regarding consumer advocate comments on redlining, § 1002.4(b), as finalized, does not permit redlining. ECOA and Regulation B prohibit a creditor from denying an application or providing an applicant less advantageous credit terms because of a prohibited basis characteristic. The Bureau is not eliminating the prohibition against discouragement of applicants and prospective applicants. Preapplication discrimination remains addressable under Regulation B and other discriminatory conduct remains addressable under ECOA's antidiscrimination mandate.

Consumer advocate commenters alleged that comment 4(b)–1, as proposed, would contradict circuit court precedent. This is not the case. As previously discussed above, the Seventh Circuit recognized that the Bureau has the broad authority to prohibit the discouragement of prospective applicants in order to prevent circumvention or evasion of ECOA. Proposed comment 4(b)–1 does not contradict that finding and, indeed, relies on that authority to accomplish that very task. The Bureau has determined, however, that the existing prohibition against discouragement sweeps in substantially more speech and conduct than is necessary, in its judgment, to accomplish those goals. Because the Bureau has broad authority to ''provide for such adjustments and exceptions'' that, ''in the judgment of the Bureau are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith,'' [138] the Bureau is exercising its adjustment authority to align more closely the discouragement provision with those purposes.

Regarding comments that the Bureau failed to provide sufficient legal or factual data to support the proposed elimination of references to ''acts or practices'' in comment 4(b)–1, the Bureau explained that it has observed how references to acts or practices have expanded the discouragement provision beyond its original scope. In 1985, the Board added comment 5(a)–1 (precursor to the Bureau's comment 4(b)–1), which states, in part, that § 202.5(a) (precursor to the Bureau's § 1002.4(b)) covers ''acts or practices'' by creditors that could discourage on a prohibited basis a reasonable person from applying for credit; the Board added this to Regulation B without explaining the reasoning for expanding the scope.[139] Comment 5(a)–1 stated that ''[i]n keeping with the purpose of the act—to promote the availability of credit on a nondiscriminatory basis § 202.5(a) covers acts or practices directed at potential applicants.'' [140] The comment provided three examples of prohibited practices, including ''[t]he use of words, symbols, models or other forms of communication in advertising that express, imply, or suggest a discriminatory preference or a policy of exclusion in violation of the Act.'' [141] In the Bureau's view, ''acts or practices'' do not constitute ''oral or written statements'' to applicants or prospective applicants within the meaning of § 1002.4(b) and do not, in and of themselves, demonstrate prohibited discouragement. As finalized, the discouragement provision only covers actual oral or written statements by creditors to applicants or prospective applicants. The Bureau has determined that clarifying the discouragement provision as described would facilitate compliance with ECOA and Regulation B and result in more targeted and effective enforcement of the prohibition against discouragement to prevent conduct designed to circumvent the statute's prohibition against discrimination.

With respect to commenters' assertion that limiting discouragement to oral or written statements would permit pre-application discouragement conduct, final comment 4(b)–1 does not eliminate protections against pre-application discrimination. Final comment 4(b)–1 provides creditors with clear guidance about the types of communications that are permitted. Creditors can engage in routine business decisions without fear that these business practices will be treated as discouragement. As explained by one commenter, branch location and outreach strategies have generated substantial uncertainty and litigation risk without improving protection for consumers. Along those same lines, industry commenters agree that the current discouragement regulations are overbroad and have had a chilling effect on lawful expression by creditors. Creditors have responded to the overbroad interpretation of ''acts or practices'' by limiting communications to avoid liability, thus chilling lawful speech. One credit union trade group noted the decision to define oral or written statement as the most important aspect of the proposal.

[138] 15 U.S.C. 1691b(a).

[139] 50 FR 48018 at 48021. The Board later renumbered comment 5(a)–1 as comment 4(b)–1 and made minor revisions. *See* 68 FR 13144 (Mar. 18, 2003).

[140] 50 FR 48018 at 48050.

[141] *Id.*

Statement to Applicants or Prospective Applicants

As noted, § 1002.4(b) currently prohibits creditors from making any oral or written statement to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application for credit. Section 1002.4(b) has been interpreted to prohibit the selective encouragement of certain applicants or prospective applicants (for example, geographically targeted advertising) on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it. For the reasons discussed above and stated herein, the Bureau has determined that this interpretation is overbroad relative to the intended purposes of the discouragement prohibition and the Bureau is finalizing as proposed § 1002.4(b) and its accompanying commentary.

Some commenters raised concerns that the rule does not reflect the limitations applied to the rest of the housing market through the FHA. However, the FHA and ECOA are distinct statutes that Congress intended to be implemented and enforced by different agencies. The purpose of ECOA is to make credit available to all applicants on a non-discriminatory basis, and § 1002.4(b) helps to achieve that purpose by prohibiting creditors from *discouraging* applicants or prospective applicants. This final rule states that, when a creditor directs *encouraging* statements to certain applicants or prospective applicants, this is not an action intended to (or even likely to) discourage *other* applicants or prospective applicants, who did not receive the statements and might, in fact, have been entirely unaware of them, from applying for credit.

In response to the proposed amendments to permit creditors to make encouraging statements to certain applicants or prospective applicants, some commenters concocted hypothetical examples of signs they purport the proposed amendments to allow. Although final comment 4(b)–1 states that encouraging statements directed at one group of consumers cannot discourage other consumers who were not the intended recipients of the statements, final § 1002.4(b) and its commentary do not permit a lender to hang signs that express a discriminatory preference or policy of exclusion. Final comment 4(b)–1.i.B provides that prohibited discouragement includes statements directed at the public that express a discriminatory preference or policy of exclusion against consumers based on one or more prohibited basis characteristics. Statements that express a discriminatory policy or preference include spoken or written words, or visual images such as symbols, photographs, or videos that indicate a bias that excludes individuals based on one or more protected basis characteristics. Statements made in contexts in which a creditor knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s), are prohibited by § 1002.4(b). As such, the final rule will allow for targeted outreach and business communications without chilling free speech or expanding discouragement liability but will not allow creditors to disguise statements that indicate a discriminatory preference or policy as permissible encouraging statements.

As stated in the proposal, an intended recipient includes any person whom a creditor could reasonably expect to receive a particular statement. Factors that could help determine a statement's intended recipients include the method or mechanism used to communicate it. For example, the intended recipients of a directly mailed advertisement would be the addressed recipients of that mailer, whereas a statement made by a creditor on a public television or radio broadcast, or posted on a window sign, would presumably be to the general public. As to a commenter's assertion that a definition of ''intended recipient'' does not appear in the proposed regulation text or commentary, ''intended recipient'' is objective and the Bureau provides examples in the rule's preamble that sufficiently allow a creditor to understand the term.

Together, final § 1002.4(b) and comment 4(b)–1 clarify that affirmatively encouraging one group of consumers to apply for credit does not discourage others who were not the intended recipients of the message. Targeted advertising and outreach to underserved populations can improve access to credit and advance the purpose of ECOA by generating applications from qualified consumers who otherwise would not have known about the product or service being offered. An industry trade commenter expressed this viewpoint noting that its members' efforts to encourage applications from traditionally underserved communities or use of targeted marketing to prospective applicants, are routine creditor practices to generate applications from creditworthy individuals or businesses. Further, evaluating encouragement based on any asserted effect on other potential audiences would broaden discouragement beyond what is necessary or proper to achieve the purposes of ECOA. Current § 1002.4(b) created an overly broad restriction on speech causing creditors to limit communications.

Affirmative encouragement directed at one group of consumers does not automatically convey that other consumers will be treated unfavorably or are disfavored from applying, as asserted by opponents of the proposal. For example, while a creditor may affirmatively encourage one group of consumers to apply for credit, a creditor may not make statements that it knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s).

As such, the Bureau determines that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements, and statements directed at one group of consumers, encouraging that group of consumers to apply for credit, are generally not prohibited by § 1002.4(b). Such conduct is not typically an evasion of ECOA's prohibitions, nor is prohibiting it necessary or proper to achieve the purposes of ECOA. Applying limiting principles to the reach of Regulation B will help render the scope of the regulation more consistent with Congress' stated intent in ECOA's framework and will also permit creditors to have clear rules and guidelines they can follow to comply with the law.

Standard for Discouragement

For the reasons discussed above and stated herein, the Bureau is finalizing as proposed § 1002.4(b) and its accompanying commentary with respect to the standard for discouragement. As noted, the prohibition against discouragement was adopted to prevent creditors from circumventing ECOA's prohibition against discrimination by deterring prospective applicants from even applying for credit. While this is an appropriate goal, the Bureau concludes that § 1002.4(b) has been interpreted to apply to scenarios that should not be characterized as prohibited discouragement under ECOA. These are scenarios that—though they may involve potentially controversial statements by creditors—do not involve statements that an

objective creditor would know, or should know, would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms than other borrowers.

The Bureau does not believe that the ''knows or should know'' standard would be unreasonably difficult to prove as asserted by consumer advocates. The ''knows or should know'' standard sets an appropriate standard for discouragement claims. It provides a workable test that results in more targeted enforcement. Additionally, it is an appropriate exercise of the Bureau's rulemaking authority that permits the Bureau to adopt regulations necessary or appropriate to prevent circumvention or evasion of ECOA's purposes. In response to comments asserting that the Bureau has not demonstrated how to prove the knows or should know standard, the Bureau has considered these comments but does not find it necessary to provide additional clarification. The term ''knows or should know'' is a common term and the Bureau uses the term consistent with its ordinary meaning, which it believes creditors can readily understand. Ultimately, whether a creditor knows or should know that its statement would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms on a prohibited basis is a situationally specific question of fact, and any dispute would be appropriately resolved by a fact finder.

Some commenters asserted that under the proposal, lenders may circumvent ECOA's protections via targeted digital advertising, steering, and other pre-application conduct. While digital advertising and marketing technologies that allow lenders to target consumers may present new risks for consumers, the ''knows or should know'' standard sufficiently addresses the risk.

The Bureau declines to modify the standard provided in § 1002.4(b) to include only statements made with actual knowledge, as requested by some industry commenters. A statement is prohibited discouragement only if a creditor ''knows or should know'' that the statement would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s). A creditor should have known that its statement would cause a reasonable person to believe that the creditor would discriminate against them in their application for credit and the creditor cannot feign ignorance of the statement's effect. This standard does not exceed the Bureau's rulemaking authority as asserted by an industry commenter. As previously stated, the Bureau maintains authority under ECOA section 703(a) to make adjustments in Regulation B that, in its judgement, are necessary or proper to effectuate ECOA's purposes. The adjustments provided in final § 1002.4(b) are consistent with ECOA section 701(a), which makes it ''unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act].'' [142] The standard does not exceed ECOA's purpose as asserted by an industry commenter. Instead, it furthers ECOA's purpose of prohibiting credit discrimination by preventing evasion or circumvention of the statute.

While a creditor may be permitted to make a statement that an applicant or potential applicant may not like or may disagree with, a creditor is not permitted to make a statement that it knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s). The Bureau believes that there is a difference between a statement by a creditor that an applicant or potential applicant may not like or may disagree with, and a statement that would cause a reasonable person to believe that the creditor will discriminate against them in the credit transaction. As noted in the proposal, the Bureau believes that difference should be better reflected in Regulation B. Applying the limiting principle would more closely align the regulation with the task of preventing circumvention or evasion of Congress' intent in ECOA. Statements that are controversial or unpopular are not the type of statements that Congress intended to be prohibited under ECOA. Instead, the discouragement prohibition prevents statements that would discourage prospective applicants from even applying for credit.

Final § 1002.4(b) and accompanying commentary do not limit discouragement liability only to the most overtly discriminatory statements as suggested by commenters. It narrows discouragement liability to statements that themselves would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the consumer's prohibited basis characteristic. In the Bureau's view, these are statements that *themselves* would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the applicant or prospective applicant's prohibited basis characteristic(s).

Section 1002.4(b) and accompanying commentary do not authorize creditors to make statements mocking or mistreating prospective applicants on a prohibited basis as long as the statements did not specifically concern the credit decision or credit terms, as suggested by one commenter. As discussed above, final comment 4(b)–1.i.B provides that prohibited discouraging statements include statements directed at the general public that express a discriminatory preference or policy of exclusion in violation of ECOA. The focus on what a creditor expresses is consistent with ECOA's purpose of prohibiting credit discrimination. The Bureau believes it is appropriate to focus the discouragement analysis on whether a reasonable person would believe they would be denied or treated less favorably because of a prohibited basis characteristic.

Thus, the revision would narrow prohibited discouragement to cover only statements that *themselves* would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the applicant or prospective applicant's prohibited basis characteristic(s). Prohibited discouragement does not include every statement a creditor makes. As indicated by a commenter, discouragement has been interpreted in the past to capture generalized public-facing speech that is not based on any explicit exclusionary message, but on how certain listeners might react. Focusing on the connection between the credit transaction and the applicant's prohibited basis characteristic provides a clear workable standard.

In addition, final § 1002.4(b) and accompanying commentary reflect a valid policy judgment made within the Bureau's delegated adjustment authority under ECOA section 703(a). Under ECOA section 703(a), the Bureau has authority to make adjustments in Regulation B that, in its judgment, are necessary or proper to effectuate

[142] 15 U.S.C. 1691(a).

ECOA's purposes. The Bureau is prioritizing a narrower interpretation of discouragement, rather than an overbroad policy that unnecessarily constrains speech and prohibits behavior that is not a circumvention or evasion of ECOA's purposes. Final § 1002.4(b) and accompanying commentary modify the framework used to determine whether conduct is discouraging without eliminating the underlying prohibition and will provide lenders with clear rules and guidelines to comply with. An industry commenter affirmed this, stating that the proposed changes to § 1002.4(b) and the commentary would decrease the regulatory burden for credit unions because the revised provisions are less ambiguous and more straightforward for compliance and examination purposes.

In comments 4(b)–1.ii.B through D, which the Bureau is finalizing, the Bureau provided examples of the types of statements that a creditor would not (or should not) know would cause a reasonable person to believe that the creditor would deny (or would grant on less favorable terms) credit to an applicant or prospective applicant based on their prohibited basis characteristic(s). Some commenters expressed concerns that these examples do not account for the context in which the statements are made. One commenter provided a fact pattern that the commenter believed should be prohibited but would fall within the examples of non-prohibited statements listed in comment 4(b)–1.ii. The Bureau has concluded that the examples of statements in comment 4(b)–1.ii are not, themselves, statements that a creditor would (or should) know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s), and are therefore not prohibited by § 1002.4(b). However, creditors should be mindful of what influences how a reasonable person would understand a statement, and that the context in which oral or written statements are made may illustrate the creditor's intended meaning of the statement. Section 1002.4(b) prohibits statements directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s). Creditors also remain subject to other obligations under applicable State and Federal laws.

Comment 4(b)–2

For the reasons discussed above and stated herein, the Bureau is finalizing its proposed removal of comment 4(b)–2. Currently, comment 4(b)–2 provides that creditors may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor. As discussed in the proposal, removing current comment 4(b)–2 does not represent a substantive change. The Bureau is merely removing the comment because it is unnecessary. Creditors' Regulation B compliance requirements remain unchanged. Further, final comment 4(b)–1 provides that affirmatively encouraging one particular group of customers to apply for credit does not constitute prohibited discouragement of another group. The final rule addresses the duplicative nature of current comment 4(b)–2 and final comment 4(b)–1 by removing current comment 4(b)–2.

In response to commenters' request that the Bureau also provide guidance explaining when affirmative marketing might become prohibited disparate treatment based on protected characteristics, removing the comment does not change the underlying discrimination standard. Because no substantive change is intended, additional guidance is unnecessary.

In response to commenters' assertion that the deletion will hinder creditors' outreach to underserved communities, expanding outreach to communities that creditors may have avoided or not have previously reached is consistent with and supports Regulation B's objective of ''promot[ing] the availability of credit to all creditworthy applicants without regard'' to prohibited basis characteristics.[143] Additionally, final comment 4(b)–1 makes clear that creditors are permitted to engage in targeted advertising. Specifically, it provides that selective encouragement directed at one audience would not be treated as discouraging to other audiences who were not the intended recipients of the message. Additionally, final comment 4(b)–1.ii.A provides that statements directed at one group of consumers, encouraging that group of consumers to apply for credit, are not prohibited by § 1002.4(b). Final comments 4(b)–1 and 4(b)–1.ii.A are clear that lawful outreach is permitted. Removing comment 4(b)–2 should not introduce regulatory uncertainty nor increase creditors' compliance costs, as asserted by some commenters.

The Bureau therefore strikes comment 4(b)–2 as unnecessary; no substantive change is intended.

Technical Revision Related to Prospective Applicants

For the reasons discussed above and stated herein, the Bureau is finalizing the technical revision related to prospective applicants in § 1002.15(d)(1)(ii) as proposed. Current § 1002.15(d)(1)(ii) states that the report or results of a privileged self-test may not be obtained or used ''[b]y a government agency or an applicant (including a prospective applicant who alleges a violation of § 1002.4(b)) in any proceeding or civil action in which a violation of the Act or this part is alleged.'' The final rule strikes from § 1002.15(d)(1)(ii) the reference to prospective applicants.

Some commenters expressed concern with the proposed amendment and requested that the Bureau maintain current § 1002.15(d)(1)(ii). As discussed in the proposal, this is a technical correction, and no substantive change is intended. Only an ''aggrieved applicant'' has standing under ECOA to bring a private cause of action.[144] To the extent a prospective applicant qualifies as an ''aggrieved applicant'' for the purposes of section 706(a), that plaintiff would similarly be an ''applicant'' for the purposes of § 1002.15(d)(1)(ii). A person who is not an aggrieved applicant under 706(a) would not have a private cause of action, and, thus, there would be no civil action to which § 1002.15(d)(1)(ii) could apply. The revision merely conforms the language of § 1002.15(d)(1)(ii) with the statutory language of ECOA sections 704A(a)(2) and 706.[145] Any government agency or applicant who currently can allege a violation of ECOA or Regulation B in a civil action will still be able to do so, and the privilege protections of § 1002.15(d)(1)(ii) would apply just as they currently do.

Alternatives

The Bureau considered, but is not adopting, alternatives to proposed § 1002.4(b). The Bureau requested comment on the merits of an alternative approach in which the Bureau would revise only one or two aspects of § 1002.4(b), instead of the proposed three, and, if such an approach were adopted, which aspects of § 1002.4(b) should be revised,[146] but commenters

[143] *See* § 1002.1(b).

[144] 15 U.S.C. 1691e.

[145] 15 U.S.C. 1691c–1(a)(2), 1691e.

[146] 90 FR 50901 at 50907.

did not appear to directly address this request.

With respect to the request to address lender fraud protection efforts, the Bureau does not believe amendments to Regulation B specific to lender fraud prevention efforts are necessary in this rulemaking. The proposed amendments, as finalized, do not prohibit creditors from engaging in non-discriminatory fraud prevention activities. Additionally, amendments to Regulation V, implementing the FCRA, are beyond the scope of this rulemaking. The Bureau is also unable to establish a new Federal agency, as requested by a commenter.

D. Special Purpose Credit Programs

Proposed Rule

The Bureau proposed prohibiting an SPCP offered or participated in by a for-profit organization from using the prohibited basis of race, color, national origin, or sex, or any combination thereof, of the applicant, as the common characteristic in determining eligibility for the SPCP. *See* proposed § 1002.8(b)(3). In addition, the Bureau also proposed in § 1002.8(a) and (b) several new conditions (discussed in more detail below) on such an SPCP that uses any permissible common characteristic that would otherwise be a prohibited basis as eligibility criteria. Under the proposal, an SPCP offered or participated in by a for-profit organization would be subject to (1) *prohibitions* on using race, color, national origin, or sex as eligibility criteria and (2) *conditions,* as discussed below, in using religion, marital status, age, or income derived from a public assistance program as eligibility criteria. The Bureau proposed the conditions independently of and in addition to the prohibitions. That is, under the proposal, if the Bureau's prohibitions were to become inoperative, the proposed conditions would then be operative with respect to an SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility criteria, and would continue to be operative with respect to such an SPCP that uses religion, marital status, age, or income derived from a public assistance program as eligibility criteria.

Under current § 1002.8(a)(3)(i), a for-profit organization must establish and administer an SPCP pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program. The Bureau proposed separating this provision into § 1002.8(a)(3)(i)(A) and (B), such that § 1002.8(a)(3)(i)(A) would retain the current requirement that the written plan identify the class of persons that the program is designed to benefit and § 1002.8(a)(3)(i)(B) would retain the current requirement that the written plan set forth the procedures and standards for extending credit pursuant to the program. The Bureau proposed new § 1002.8(a)(3)(i)(C) to require the SPCP's written plan to provide evidence of the need for the SPCP. The Bureau proposed new § 1002.8(a)(3)(i)(D) to require the SPCP's written plan to explain why, under the for-profit organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program. The Bureau proposed new § 1002.8(a)(3)(i)(E) to apply, in addition to § 1002.8(a)(3)(i)(A), (B), (C), and (D), to SPCPs that require the persons in the class served by the program to share one or more common characteristics that would otherwise be a prohibited basis. The Bureau proposed the provision's new conditions to require the written plan of such an SPCP to explain why meeting the special social needs addressed by the program necessitates that its participants share the specific common characteristic that would otherwise be a prohibited basis and cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria.

Current § 1002.8(a)(3)(ii) requires that a for-profit organization offering an SPCP establish and administer the program to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit. This current provision applies irrespective of whether the SPCP requires its participants to share a common characteristic that would otherwise be a prohibited basis. The Bureau proposed that a for-profit organization offering an SPCP must establish and administer the program to extend credit to a class of persons who would otherwise not receive the type and amount of credit, as opposed to those who would receive it on less favorable terms. The Bureau also proposed that a for-profit organization offering an SPCP must establish and administer the program to extend credit to a class of persons who *actually* (in lieu of ''probably'') would not receive such credit under the organization's *actual* (in lieu of ''customary'') credit standards. The Bureau preliminarily determined that each of the conditions, and the conditions in combination, more closely align the regulatory standards for an SPCP offered by a for-profit organization with ECOA's purposes and with the congressional intent expressed in the legislative history: that without the SPCP ''the consumers involved would effectively be denied credit.'' [147]

Current comment 8(a)–5 addresses SPCPs offered by for-profit organizations. The Bureau proposed that the comment would continue to clarify that a for-profit organization's determination of the need for an SPCP ''can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies.'' [148] The Bureau proposed changes to comment 8(a)–5 to conform the comment's text to the changes to the regulatory text of § 1002.8(a)(3).

Current § 1002.8(b)(2) provides that a credit program qualifies as an SPCP only if the program was established and administered so as not to discriminate against an applicant on any prohibited basis. It also provides that all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program is not established and is not administered with the purpose of evading the requirements of ECOA or Regulation B. The Bureau proposed amending § 1002.8(b)(2) to make it subordinate to the new proposed prohibitions and conditions in § 1002.8(b)(3) and (4). For clarity, the Bureau also proposed to strike the parenthetical in § 1002.8(b)(2)—''(for example, race, national origin, or sex)''—and replace it with the text ''that would otherwise be a prohibited basis.'' The Bureau proposed new comment 8(b)–2 to clarify that § 1002.8(b)(2)—subject to the prohibitions and conditions in § 1002.8(b)(3) and (4), as well as the other requirements of 12 CFR part 1002—permits a creditor to determine eligibility for an SPCP using one or more common characteristics that would otherwise be a prohibited basis and, once the characteristics of the program's class of participants are established, the creditor is prohibited from discriminating among potential participants on a prohibited basis.

The Bureau proposed new § 1002.8(b)(3) to prohibit an SPCP

[147] Joint Explanatory Statement of the Committee of the Conference, Cong. Rec. H5493 (daily ed. Mar. 4, 1976).

[148] Regulation B comment 8(a)–5.

offered or participated in by a for-profit organization from using the common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the program. For characteristics not prohibited under new § 1002.8(b)(3), the Bureau proposed new § 1002.8(b)(4) to apply when an SPCP offered or participated in by a for-profit organization requires its participants to share one or more common characteristics that would otherwise be a prohibited basis and to require the organization to provide evidence for each participant who receives credit through the program that, in the absence of the program, the participant would not receive such credit as a result of those specific characteristics. In § 1002.8(c) and the commentary thereto, the Bureau proposed nonsubstantive changes for clarity.

For the reasons discussed below, the Bureau is adopting the amendments related to SPCPs as proposed.

Comments Received

The Bureau received approximately 90 unique comments specifically addressing SPCPs. Several policy group commenters supported the proposed rule's limiting of SPCPs to meet demonstrable credit needs rather than creating programs that give preferential treatment that risks discriminating against applicants outside of the preferred class. These commenters stressed the importance of well-written plans for SPCPs to ensure they are financially justified. They also asked for clear guidance on when SPCPs were justified to reduce regulatory fragmentation. One commenter asserted that the proposal would increase confidence among lenders seeking to design programs that meet actual market needs, while also increasing accountability for programs that involve elevated underwriting risks. This commenter stated that SPCPs should remain optional compliance tools rather than implied mandates.

Several industry and policy group commenters supported curtailing SPCPs. One commenter called SPCPs pernicious, asserting that they discriminate against millions of Americans every day. This commenter stated that this rule will address this problem, while also requesting that the Bureau withdraw all SPCP advisory opinions and guidance documents that exist on Federal websites. Another commenter asserted that ECOA's purpose is to ensure equal access to credit, not to authorize credit discrimination in reverse. This commenter further stated that the new rule will both curtail harmful SPCPs while aligning Regulation B with the Supreme Court's recent rejection of race-conscious decision-making in other contexts. Another commenter commended the Bureau for writing a rule that provides clarity while maintaining flexibility to meet special needs and ensuring Regulation B does not run afoul of constitutional guarantees of equal protection.

A policy group commenter asserted that, while ECOA bars all discrimination in any aspect of a credit transaction, in practice the current regulation results in the denial of equally favorable terms to those outside of the special program's covered demography. The commenter underscored that no agency has the administrative authority to overturn statutory provisions while asserting that the current regulation has not properly implemented the statute. Furthermore, the commenter stated that the proposed rule correctly reflects the strict-scrutiny requirements that a governmental agency's consideration of race must be narrowly tailored to a compelling governmental interest.

Several consumer advocate commenters opposing the proposed rule asserted that ECOA expressly established the protected groups that benefit from SPCPs and that the Bureau has no authority to contradict the statute by proposing § 1002.8(b)(3) to prohibit SPCPs from using race, color, national origin, or sex as eligibility criteria. A commenter stated that Congress understood that prohibiting discrimination was not sufficient to expand meaningful access to credit and, thus, Congress expressly permitted SPCPs to consider race, color, national origin, and sex. Another consumer advocate commenter asserted that a decision whether SPCPs are no longer needed is Congress' alone to make. An individual commenter stated that the Bureau should not strike the parenthetical in § 1002.8(b)(2)—''(for example, race, national origin, or sex)''—and replace it with the text ''that would otherwise be a prohibited basis'' because prohibited basis is a vague concept and the current text provides clear protection for consumers effectively denied credit because of their race, national origin, or sex.

An industry commenter stated that the Bureau should not adopt the proposed prohibition on race, color, national origin, and sex as SPCP eligibility criteria and asserted that the proposed amendments, taken together, would fundamentally undermine ECOA's purpose by shifting from a proactive duty to include historically excluded populations to a purely reactive prohibition on overt statements of exclusion. The commenter listed the following alternatives to consider if the Bureau is concerned about abuse of SPCPs: (i) require documentation at program design, not per applicant, that the target population experiences barriers to credit access; (ii) require that once eligibility criteria are established, creditors do not discriminate among eligible applicants on prohibited bases; (iii) require periodic review every three years of SPCPs' continued necessity and demonstration that the program is effectively serving its intended population; (iv) require that lenders report SPCP originations and outcomes data by race, color, national origin, and sex to show the program is not being used as a pretext for discrimination; and (v) adopt safe harbor language explicitly permitting race, color, national origin, and sex-conscious programs designed to remedy documented disparities in credit access.

Several commenters, including consumer advocate commenters, industry commenters, and Members of Congress, asserted that the proposed SPCP conditions in § 1002.8(a) and (b) are so burdensome that they would result in the elimination of these SPCPs, contrary to ECOA's intent and purpose. For example, consumer advocate commenters asserted that, as a condition of establishing an SPCP, the Bureau's proposal would require a creditor to attest that—outside of the SPCP—the creditor would violate ECOA by denying every SPCP applicant credit due to the applicant's protected group membership. The commenters stated that no creditor would make such an attestation of violating ECOA. An industry commenter similarly stated its concern that, as a condition of establishing an SPCP, the Bureau's proposal effectively requires the creditor to determine that the participant was the subject of discriminatory treatment. The commenter further asserted that requiring a creditor to provide evidence for each participant imposes a significant burden of proof and obligations that can functionally nullify the ability to provide an SPCP due to the substantial regulatory burdens. An individual commenter stated that the Bureau should clarify and give examples of the evidentiary standards and should limit data collection and retention for SPCPs. An industry commenter asserted that the conditions proposed would substantially limit SPCPs and stated its concern that, contrary to E.O. 14219, the proposal

would impose significant burden and costs upon private parties that are not outweighed by public benefits.

Consumer advocate commenters stated that the linchpin of the Bureau's proposed conditions is a fundamentally flawed assertion that SPCPs should only be available if consumers otherwise would ''effectively be denied credit'' due to their membership in a protected group. The commenters stated that the Bureau appears to attribute to the same Congress that took the trouble of enacting ECOA's for-profit organization SPCP provision the intention of creating such a stringent standard that these SPCPs could not actually be created, either then or now. The commenters asserted that the Bureau's deployment of the phrase ''effectively be denied credit'' is internally inconsistent, incoherent, and based on a misreading of ECOA's historical background. The commenters stated that, consistent with legislators' awareness of instances of discrimination against racial minorities and the strong probability of race discrimination in mortgage credit, the phrase ''effectively be denied credit'' should instead be used to justify the continuation of SPCPs and not the Bureau's proposed elimination. Another consumer advocate commenter stated that the phrase ''effectively be denied credit'' is effects language demonstrating that Congress did not intend SPCPs to be limited to only remediating disparate treatment.

An industry commenter stated that there is no basis for the Bureau's entirely novel ''effectively denied credit'' standard and that the Bureau does not try to define that standard or explain how it could be established. The commenter asserted that the Bureau's citations to legislative history do not support the Bureau's proposed standard, in that the legislative history does not demonstrate that certain communities were not receiving any credit, but rather identified obstacles, including neutral policies that had a disparate impact on communities of color. The commenter further stated that the Bureau's citations to legislative history are internally contradictory given the Bureau's dismissal of the importance of legislative history earlier in the proposed rule with respect to disparate impact.

Several consumer advocate commenters asserted that ECOA's legislative history directly undermines the proposed changes. Commenters stated that the sections of both congressional reports from which the Bureau quotes are entitled Affirmative Action Programs and that the Senate Report broadly acknowledged the utility and desirability of affirmative action type credit programs, whether offered under governmental auspices or by private credit grantors. Another commenter pointed to the proposal's citation of Congressman Wylie's statements supporting an SPCP serving minority enterprises.

Several consumer advocate commenters and Members of Congress highlighted facts, reports, and studies that they asserted are ample evidence of persistent credit discrimination supporting the continued need for SPCPs. An industry commenter stated that while ECOA and subsequent reforms in the legal landscape and credit market have contributed to increased homeownership rates among all racial groups, significant gaps in homeownership rates persist between these groups and, thus, the special social needs SPCPs are meant to address remain. Several consumer advocate commenters and Members of Congress asserted that the Bureau's proposal fails to provide any factual basis for its conclusion that SPCPs no longer serve the particular social needs envisioned in the 1976 Act or that the prevalence of SPCPs is low.

Several commenters, including consumer advocate, industry, and individual commenters, as well as Members of Congress, stated that SPCPs are meant to serve as a corrective mechanism for addressing broader market failures and persistent wealth disparities that are a legacy of historical discrimination and are unaddressed by facially neutral policies. A consumer advocate commenter stated that Black consumers were for decades denied home-ownership and wealth-building opportunities because of racially restrictive deed covenants and being excluded from government-sponsored loan programs. The commenter asserted that Black families have never been able to catch up with the descendants of White families who benefitted from government-insured loans, were able to freely choose among homes in any neighborhood they could afford, and whose homes have multiplied in value many times over. An individual commenter stated that, beginning in the 1930s, the Federal Home Owners' Loan Corporation and Federal Housing Administration discriminated against Black consumers. The commenter stated that only 2 percent of $120 billion in new housing subsidized by the Federal government between 1934 and 1962 went to non-White Americans and that only 0.7 percent of the 1.3 million Black Americans who served in World War II successfully obtained home loans under the GI Bill. The commenter asserted that these policies created a $10.4 trillion racial wealth gap that persists today and that typical White families hold approximately $300,000 in median net worth compared to $45,000 for Black families. A consumer advocate commenter stated that while the special social needs that Congress intended SPCPs to address persist, until recently, few for-profit SPCPs existed in large part because Federal regulators failed to clearly communicate the scope of ECOA and the ability of lenders to lawfully establish such programs. The commenter asserted that programs designed to increase Black homeownership are most effective when they directly target the populations facing structural barriers to credit access. An industry commenter similarly asserted that the Bureau should continue to allow SPCPs to identify communities that are persistently underserved, including Black and female small business owners, and serve those communities efficiently by targeting them directly. Several commenters, including consumer advocate, industry, and individual commenters, stated that SPCPs allow lenders to provide more credit and that the proposed SPCP changes will create a chilling effect, stopping private market participants from innovating to offer the broadest possible services.

Several consumer advocate commenters stated that SPCPs do not raise constitutional concerns. Commenters asserted that the for-profit organization SPCPs expressly permitted by ECOA do not concern government action and that constitutional equal protection erects no shield against merely private conduct. The commenters stated that ECOA and Regulation B merely specify the circumstances in which creditors can consider protected class status without running afoul of ECOA and that both the statute and the regulation do not identify any particular racial group that should be benefited by non-governmental programs. Another consumer advocate commenter asserted that the Bureau's proposal seems to be motivated in part by an incorrect reading of the Supreme Court's decision in *Students for Fair Admission, Inc.* v. *President & Fellows of Harvard College,*[149] but that nothing in the decision indicates that it was meant to apply beyond the context of college admissions. The commenter stated that SPCPs are completely different than college admissions criteria because SPCPs' impact can be easily measured

[149] 600 U.S. 181 (2023).

by charting the rise in the number of applicants in specific prohibited-basis groups who receive credit and SPCPs do not use negative stereotypes against credit applicants. The commenter asserted that while the proposal also cites the Supreme Court's decision *in Ames* v. *Ohio Department of Youth Services,*[150] the decision is inapposite because the Bureau has not established how SPCPs discriminate against a majority group.

Consumer advocate commenters asserted that neither the Bureau's adjustment nor its exception authority supports the effective elimination of for-profit organization SPCPs because the plain meaning of neither term would allow the Bureau to alter fundamental features of the statute and the Bureau has failed to provide any justification to contravene the plain text of the statute. The commenters further asserted that the Bureau's authority to prescribe standards for profit-making organization SPCPs does not include license to eliminate these programs by imposing standards that no profit-making organization could meet and the proposal does not allow commenters to examine the Bureau's reasoning regarding which authority the Bureau relies on for each of its proposed changes.

An industry commenter asserted that the proposed SPCP amendments implicate fair lending and CRA examination and enforcement actions undertaken by other Federal agencies. The commenter stated that the Bureau should carefully consider ECOA's role within this broader framework and provide the necessary information to clearly articulate regulated parties' obligations under those related frameworks. Another industry commenter stated that community banks use SPCPs to be more responsive to the needs of their communities, which will likely have a positive impact on community banks' fair lending and CRA performance, and urged the Bureau to exempt community banks from any proposed limitations concerning SPCPs.

Several industry commenters requested clarification that the proposed rule would continue to permit programs targeting specific geographies, such as majority-minority and low-to-moderate income census tract designations that numerous Federal agencies use, so long as the programs are available to applicants of every race, color, national origin, or sex in that geographic area. A commenter similarly urged the Bureau to expressly permit programs that are designed to serve specific geographies or income levels, even if those geographies or income bands disproportionately consist of members of a protected class. Another commenter stated that programs focused on geography or income levels can support rural or persistently underserved communities and can be an effective alternative to the compliance uncertainty and legal risk associated with an SPCP that requires its participants to share a common characteristic that would otherwise be a prohibited basis.

Several consumer advocate commenters asserted that the only SPCP example the Bureau proposes as passing muster under the proposed rule is of an energy conservation program to assist the elderly, for which the creditor must consider the applicant's age. The commenters questioned why an SPCP would be necessary in this example given that ECOA separately allows a creditor to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant. Industry commenters similarly noted that both ECOA and Regulation B already permit the favorable treatment of elderly applicants; they specifically pointed to § 1002.6(b)(2)(iv), which provides that in any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant when such age is used to favor the elderly applicant in extending credit. The commenters requested confirmation that credit products which favorably consider age, such as reverse mortgage programs or forward mortgages designed to help borrowers in retirement, need not comply with the current or proposed SPCP requirements of § 1002.8. An industry commenter stated that reverse mortgages are intrinsically linked to the applicant's age and allow older homeowners to access the equity in their homes to supplement their retirement income without being forced to make monthly mortgage payments. A consumer advocate commenter asserted that older adults require targeted support because, as people age, financial circumstances change, incomes become fixed, debt may rise to cover urgent needs, and medical or caregiving expenses increase. The commenter stated that these factors can block older adults, even those with strong financial histories, from affordable credit.

Final Rule

Pursuant to its authority under ECOA sections 701(c)(3) and 703(a),[151] the Bureau is adopting as proposed changes to the Regulation B provisions governing SPCPs offered by for-profit organizations. As noted above, the statute permits ''any special purpose credit program offered by a profit-making organization to meet special social needs *which meets standards prescribed in regulations by the Bureau.*'' [152] Further, as noted above, ECOA authorizes the Bureau to write regulations to carry out ECOA's purposes and also provides the Bureau with adjustment authority to effectuate those purposes.[153] ECOA's express purpose is ''to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to [prohibited bases].'' [154] In sum, just as ECOA authorized the Board's initial regulatory promulgation setting the standards for permissible SPCPs offered or participated in by for-profit organizations, the Bureau has determined that it also authorizes the revision of those standards to carry out and more closely align them with the statutory purpose, including appropriate, necessary, or proper additional prohibitions and conditions in the standards for such SPCPs to prevent unlawful discrimination. The Bureau is now adopting revised standards consistent with that authority.

Overview of SPCP Prohibitions

For the reasons discussed below, the Bureau is adopting § 1002.8(b)(3) as proposed. With respect to commenters stating that the Bureau should not adopt the proposed prohibition on race, color, national origin, and sex as SPCP eligibility criteria, the Bureau has concluded that an SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility criteria is beyond what is presently necessary to meet the expressly limited congressional intent for such SPCPs. As discussed below, because an SPCP that bases eligibility on protected class membership inherently discriminates against ineligible individuals, the Bureau has determined that it is inconsistent with ECOA's purpose (preventing discrimination) for an SPCP to use an otherwise prohibited basis

[150] 605 U.S. 303 (2025).

[151] 15 U.S.C. 1691(c)(3) and 1691b(a).

[152] 15 U.S.C. 1691(c)(3) (emphasis added).

[153] 15 U.S.C. 1691b(a).

[154] Public Law 93–495, tit. V, sec. 502, 88 Stat. 1521 (1974).

(and thereby discriminate against ineligible individuals) unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics. The Bureau finds that race, color, national origin, or sex—whether alone or in combination—are not a permissible basis for denying credit under ECOA. The Bureau finds there is no evidence (submitted by commenters or otherwise) that, in the absence of an SPCP, ECOA would allow a program participant to not receive credit as a result of the program participant's race, color, national origin, or sex, or any combination thereof. An SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility criteria is beyond what is necessary to meet the expressly limited congressional intent for such SPCPs.

With respect to commenters stating that ECOA contradicts the § 1002.8(b)(3) prohibition on using race, color, national origin, or sex as eligibility criteria, such assertions are not supported by ECOA. The final rule is consistent with ECOA's provision for SPCPs and the Bureau's statutory authority under ECOA sections 701(c)(3) and 703(a).[155]

SPCPs offered or participated in by for-profit organizations are addressed in ECOA section 701(c)(3), which states that it is not a violation of ECOA section 701 for a creditor to refuse to extend credit offered pursuant to any SPCP offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau. ECOA section 701(c)(3) does not expressly list race, color, national origin, or sex. Rather, ECOA section 701(c)(3) references ''this section,'' *i.e.,* ECOA section 701, which consists of various subsections. The first subsection, ECOA section 701(a), states that it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[156] As noted above, section 701(c)(3) permits ''any special purpose credit program offered by a profit-making organization to meet special social needs *which meets standards prescribed in regulations by the Bureau.*'' (emphasis added). Thus, ECOA section 701(c)(3) authorizes the Bureau to prescribe these SPCP standards, including standards regarding which of the prohibited bases in ECOA section 701(a) (*e.g.,* religion, marital status, age, or income derived from a public assistance program) may be used as eligibility criteria for these SPCPs. The Bureau is prescribing standards that permit these SPCPs' use of religion, marital status, age, or income derived from a public assistance program as eligibility criteria (subject to the requirements of § 1002.8(b)(4) as discussed below)—but the standards prohibit these SPCPs' use of race, color, national origin, or sex as eligibility criteria. The Bureau has concluded that such use of race, color, national origin, or sex as eligibility criteria is beyond what is necessary to meet the expressly limited congressional intent for such SPCPs.

Regarding the commenter's assertion that the proposed SPCP amendments implicate remedial agreements pertaining to fair lending and CRA examination and enforcement actions, the Bureau notes that ECOA section 701(c)(1) states that it is not a violation of ECOA section 701 for a creditor to refuse to extend credit offered pursuant to any credit assistance program expressly authorized by law for an economically disadvantaged class of persons.[157] Regulation B comment 8(a)–3 provides that credit programs authorized by Federal or State law include programs offered pursuant to Federal, State, or local statute, regulation or ordinance, or pursuant to judicial or administrative order.

With respect to commenters requesting clarification that the proposed rule would continue to permit programs targeting specific geographies or income levels for CRA or other purposes—such as majority-minority and low-to-moderate income census tract designations that numerous Federal agencies use—even if such programs lead to a disparate impact along prohibited bases, the Bureau is finalizing proposed changes to Regulation B to clarify that ECOA does not authorize disparate-impact liability (as discussed above). The Bureau confirms that programs do not require the protection from liability that compliance with § 1002.8 SPCP requirements provides, when the programs are available to applicants without regard to prohibited basis characteristics (including race, color, national origin, or sex) and the eligibility criteria are not proxies or pretexts for a prohibited basis. Moreover, as noted above, it is not a violation of ECOA section 701 for a creditor to refuse to extend credit offered pursuant to any credit assistance program expressly authorized by law for an economically disadvantaged class of persons.[158]

While the Bureau declines in this final rule to reach a conclusion about whether ECOA's SPCP provision permitting discrimination in favor of groups with special social needs is unconstitutional, the Bureau is mindful of recent Supreme Court decisions highlighting the legal infirmity, under the Fifth and Fourteenth Amendments to the Constitution, of laws that enable such discrimination.[159] The constitutional guarantee of equal protection generally prohibits the government from discriminatory treatment on the bases of race, color, national origin, or sex; where those categories are implicated, it requires a thorough examination of the purported need for such discrimination and whether it is appropriately limited. Consistent with that precedent and the purposes of ECOA, and pursuant to its authority provided by ECOA section 701(c)(3) to set standards for SPCPs offered or participated in by for-profit organizations to meet special social needs,[160] the Bureau has reexamined the provisions of Regulation B that allow such SPCPs to use a prohibited basis—including but not limited to race, color, national origin, or sex—as common characteristics.

The Bureau finds that there have been significant changes in the legal landscape and in credit markets since the 1976 Act. When Congress enacted ECOA, the legal framework and the market environment as to credit discrimination were rapidly evolving. The FHA was enacted in 1968. The Home Mortgage Disclosure Act (HMDA) was enacted in 1975 to enable data collection on mortgage lending in order to address then-current concerns about redlining and credit shortages in certain neighborhoods. The CRA had not yet

[155] 15 U.S.C. 1691(c)(3) and 1691b(a).

[156] 15 U.S.C. 1691(a).

[157] 15 U.S.C. 1691(c)(1).

[158] *Id.*

[159] *See, e.g., Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.,* 600 U.S. 181 (2023). *Cf. Ames* v. *Ohio Dep't of Youth Servs.,* 605 U.S. 303 (2025) (affirming that there is no exception to civil rights laws (*e.g.,* title VII) that allows for discrimination against majority groups). *See also Nuziard* v. *Minority Bus. Dev. Agency,* 721 F. Supp. 3d 431, 465 (N.D. Tex. 2024), *appeal dismissed,* No. 24–10603, 2024 WL 5279784 (5th Cir. July 22, 2024); *Strickland* v. *United States Dep't of Agric.,* 736 F. Supp. 3d 469, 480 (N.D. Tex. 2024).

[160] 15 U.S.C. 1691(c)(3).

been enacted, but it was enacted in 1977 to promote the availability of financial services in areas that had been underserved. State laws addressing credit discrimination, for the limited number of states that had enacted them, were typically only a few years old.[161] In general, the legal framework was in the course of transforming from one in which credit discrimination was overlooked, and was sometimes official policy, to one in which it was—and remains—prohibited.

Robust data regarding the nature and extent of credit discrimination at the time of ECOA's passage are sparse. HMDA data were not yet available. Assessing the prevalence and effect of credit discrimination was typically done through individual academic, government, or nonprofit research projects, or personal narratives, all with limited scope. Nonetheless, it is clear that, at that time, market-wide intentional credit discrimination was a fact of the then-recent past and a matter of ongoing concern.[162]

Further, the congressional record accompanying ECOA's adoption reflects the problems Congress sought to address. A National Commission's report on credit availability that informed ECOA's drafting found widespread sex discrimination in credit.[163] The Senate Committee Report accompanying the 1976 Act noted that the legislative record included ''instances of discrimination against racial minorities'' and that ''studies conducted by federal agencies have indicated the strong probability of race discrimination in mortgage credit.'' [164] Another report at the time recounts the experiences of Black businessmen being effectively shut out from small business lending.[165] ECOA's purpose was to prevent and prohibit such discrimination.

But also at that time, some organizations sought to fill the gap by making credit available especially to individuals who had been otherwise excluded from the credit marketplace.[166] Through ECOA's provision for SPCPs in section 701(c),[167] Congress sought to enable these programs that served then-extant special social needs to continue.[168] To accomplish this objective, at the same time that Congress broadly prohibited credit discrimination, Congress added provisions allowing the continued operation of credit assistance programs ''expressly authorized by law for an economically disadvantaged class of persons'' [169] or ''administered by a nonprofit organization for its members or an economically disadvantaged class of persons.'' [170] Congress additionally ''authorize[d] the Board to prescribe standards [by which] profit-making organizations (commercial creditors)'' could offer programs, with the expectation that they be ''designed to increase access to the credit market by persons previously foreclosed from it'' [171] and that, ''without such exemption the consumers involved would effectively be denied credit.'' [172]

In its reexamination of the use of race, color, national origin, and sex as participant eligibility criteria for SPCPs offered or participated in by for-profit organizations, the Bureau has determined that, to the extent the current Regulation B standards for such SPCPs authorize credit programs beyond what is presently necessary to meet the expressly limited congressional intent for such SPCPs, the standards are working counter to ECOA's purpose of preventing discrimination and are potentially inconsistent with constitutional guarantees of equal protection. The Bureau finds that 50 years of legal prohibitions against credit discrimination—at the Federal and State level and across multiple laws working in concert—have substantially reshaped credit markets relative to what Congress, the Board, and consumers would have encountered in 1976. Regardless of whether instances of credit discrimination continue to occur in the marketplace, the Bureau finds there is no evidence (submitted by commenters or otherwise) of any credit markets in which consumers ''would effectively be denied credit'' because of their race, color, national origin, or sex in the absence of SPCPs offered or participated in by for-profit organizations.

As discussed below, the Bureau finds that the consumers involved would *effectively* be denied credit if in the absence of the SPCP they would not receive such or similar credit, irrespective of whether the consumers had actually applied for such credit or actually been denied such credit by a creditor. With respect to commenters highlighting facts, reports, and studies that they asserted are ample evidence of persistent credit discrimination, the Bureau finds that race, color, national origin, or sex—whether alone or in combination—are no longer permissible bases for denying credit under ECOA. Notwithstanding instances of unlawful credit discrimination by some creditors, the Bureau finds there is no evidence (submitted by commenters or otherwise) of any credit markets in which consumers could not receive credit because of their race, color, national origin, or sex in the absence of SPCPs offered or participated in by for-profit organizations. Moreover, while consumers might effectively be denied credit because of considerations other than race, color, national origin, or sex, an SPCP's use of those prohibited characteristics as eligibility criteria is, in such circumstances, not necessary to address the consumers' inability to access to the credit market. As discussed above, the Bureau has concluded that an SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility

[161] *See Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency,* 93d Cong. at 509 (reprinting Sylva L. Beckey, *Woman and Credit: Available Legal Remedies Against Discriminatory Practices,* Cong. Rsch. Serv. (Mar. 13, 1974)) (surveying State credit antidiscrimination laws). The report, included in the congressional record, finds that 14 states and the District of Columbia had statutes prohibiting credit discrimination against women (and, in some cases, on other bases). Of those 15 laws, 12 are identified as having been enacted in 1973, and six appear to have provisions covering race, color, or national origin.

[162] *See, e.g.,* Linda Charlton, *2-to-1 Turndown of Minorities For Mortgage Loans is Found,* N.Y. Times (July 26, 1975) (describing the results of a government survey of 185 lenders across six metropolitan areas in 1974).

[163] *See, e.g.,* Senate Comm. on Banking, Housing and Urban Affairs, Truth in Lending Act Amendments, S. Rep. No. 93–278, at 16–18 (1973) (citing the National Commission on Consumer Finance's 1972 report, which found widespread barriers to credit access for women).

[164] S. Rep. No. 94–589, at 3 (1976). *See also* Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency, 93d Cong. 5, 63 (1974) (describing a lending institution that assigned point values for race and national origin).

[165] Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency, 93d Cong., at 150–51 (reprinting Obstacles to Financing Minority Enterprises, D.C. Advisory Committee to the U.S. Comm'n on Civil Rights, Feb. 1974).

[166] Among other examples, this included municipal programs for minority business lending, *see* 121 Cong. Rec. 16743 (1975) (statements of Congressman Wylie) (describing a City of Columbus program for minority business lending), banks establishing minority-focused urban affairs lending divisions, *see* U.S. Comm'n on Civil Rights, *Greater Baltimore Commitment: A Study of Urban Minority Economic Development,* at 31 (Apr. 1983), as well as the establishment of Feminist Federal Credit Unions, *see* Michael Knight, *Feminists Open Own Credit Union,* N.Y. Times (Aug. 27, 1974); Anne Sinila, *Feminist Federal: Economic Self-Help,* Ann Arbor Sun (July 15, 1976).

[167] 15 U.S.C. 1691(c).

[168] H. Rep. No. 94–879, at 8 (1976). *See also* 121 Cong. Rec. 16743 (1975) (statements of Congressman Wylie).

[169] 15 U.S.C. 1691(c)(1).

[170] 15 U.S.C. 1691(c)(2).

[171] S. Rep. No. 94–589, at 7 (1976).

[172] H. Rep. No. 94–879, at 8 (1976).

criteria is beyond what is necessary to meet the expressly limited congressional intent for such SPCPs. As discussed below, because an SPCP that bases eligibility on protected class membership inherently discriminates against ineligible individuals, the Bureau has determined that it is inconsistent with ECOA's purpose (preventing discrimination) for an SPCP to use an otherwise prohibited basis (and thereby discriminate against ineligible individuals) unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics. ECOA section 701(a)(1) provides, in part, that it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, national origin, or sex,[173] and the Bureau finds there is no evidence that, in the absence of an SPCP, ECOA would allow a program participant to not receive credit as a result of the program participant's race, color, national origin, or sex, or any combination thereof. An SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility criteria is no longer necessary to meet the expressly limited congressional intent for such SPCPs. Prohibiting the use of race, color, national origin, or sex as eligibility criteria will appropriately bring the regulation into closer alignment with ECOA's purpose of preventing discrimination and with congressional intent by appropriately increasing the likelihood that such SPCPs provide credit to consumers who would otherwise be denied the credit.

For these reasons, the Bureau has determined that it is no longer appropriate (in light of ECOA's purpose of preventing discrimination) or necessary or proper (in light of changed circumstances and ECOA's purposes) for the SPCP standards in Regulation B to permit such SPCPs to use the common characteristics of race, color, national origin, or sex as eligibility criteria. Accordingly, pursuant to the Bureau's authority provided by ECOA, including its authority to set standards,[174] and as applicable its adjustment and exception authority,[175] the Bureau is prohibiting such SPCPs from doing so. As noted, the Bureau sets forth these prohibitions in new § 1002.8(b)(3), which prohibits an SPCP offered or participated in by a for-profit organization from using the common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the program.

Overview of SPCP Conditions

For the reasons discussed below, the Bureau is adopting the conditions in § 1002.8(a) and (b) as proposed. With respect to commenters asserting that the proposed conditions are too burdensome and the commenter's request to exempt community banks, the Bureau has determined that because an SPCP that bases eligibility on protected class membership inherently discriminates against ineligible individuals, it is inconsistent with ECOA's purpose (preventing discrimination) for an SPCP to use an otherwise prohibited basis (and thereby discriminate against ineligible individuals) unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics. Subject to § 1002.8(b)(3), the Bureau is adopting the proposed conditions on when an SPCP offered or participated in by a for-profit organization requires its participants to share one or more common characteristics that would otherwise be a prohibited basis. The conditions require such an organization to provide evidence for each participant who receives credit through the program that, in the absence of the program, the participant would not receive such credit as a result of those specific characteristics. An SPCP offered or participated in by a for-profit organization that requires its participants to share one or more common characteristics that would otherwise be a prohibited basis is beyond what is presently necessary to meet the expressly limited congressional intent for such SPCPs if the participant would nonetheless receive such credit in the absence of the program. Exempting community banks from the SPCP standards applicable to other for-profit organizations would create inequalities and be counter to ECOA's purpose of making credit equally available.

With respect to commenters asserting that no profit-making organization could comply with the proposed SPCP conditions and asserting that the proposal does not explain how they could comply, the Bureau notes that an SPCP could comply if there is evidence that each participant who receives credit through the program would not, in the absence of the program, receive such credit as a result of the specific common characteristics. In response to commenters asserting that the rule requires creditors to attest that, in the absence of the SPCP, they would essentially intend to violate ECOA by denying applicants credit because of their prohibited basis characteristics, the Bureau notes the SPCP provision provides the ability for creditors to engage in practices that would otherwise be within ECOA's central prohibition. Given ECOA's clear purpose to eliminate such discrimination and for the reasons discussed elsewhere, the Bureau has determined that the best reading of ECOA is that it generally prohibits discrimination on a prohibited basis, with limited statutory exceptions where truly necessary to ensure credit access. The Bureau therefore thinks it fully appropriate to require any creditor that wishes to circumvent ECOA's central prohibition to explain why the applicant's prohibited basis characteristics would make credit otherwise unavailable, including from that creditor, and therefore why it would be necessary for those characteristics to form the basis of an SPCP. To the extent factors other than the applicant's prohibited characteristics have caused credit to be unavailable, the Bureau encourages creditors to base programs on those non-prohibited factors, consistent with the purpose of ECOA.

Regarding commenters questioning why comment 8(c)–2 lists a program assisting the elderly as an example of a permissible SPCP given that both ECOA and Regulation B already permit the favorable treatment of elderly applicants,[176] the Bureau notes that the Board adopted that example in comment 8(c)–2 as part of the Board's 1985 final rule, which did not elaborate on why the example was included.[177] ECOA and Regulation B already permit the favorable treatment of elderly applicants; nonetheless the Bureau is not deleting the example of a program assisting the elderly from comment 8(c)–2 because doing so is unnecessary and could introduce confusion.

The Bureau confirms that credit products such as reverse mortgages that favorably consider the age of an elderly applicant need not comply with § 1002.8 SPCP requirements. ECOA section 701(b)(4) states that it shall not constitute discrimination for purposes of ECOA (*i.e.,* title VII of the Consumer Credit Protection Act) for a creditor to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the

[173] 15 U.S.C. 1691(a).
[174] 15 U.S.C. 1691(c)(3).
[175] 15 U.S.C. 1691b(a).
[176] 15 U.S.C. 1691(b)(4); 12 CFR 1002.6(b)(2)(iv).
[177] 50 FR 48018.

creditor in the extension of credit in favor of such applicant.[178] Regulation B § 1002.6(b)(2)(iv) states that in any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant when such age is used to favor the elderly applicant in extending credit.[179] Comment 6(b)(2)–4 provides that a reverse mortgage program that requires borrowers to be age 62 or older is permissible under § 1002.6(b)(2)(iv). Comment 6(b)(2)–4 further provides that, under § 1002.6(b)(2)(iii), a creditor may consider a borrower's age to evaluate a pertinent element of creditworthiness, such as the amount of the credit or monthly payments that the borrower will receive, or the estimated repayment date.

Independent of and in addition to the above-described prohibitions in proposed § 1002.8(b)(3), the Bureau also has determined that additional conditions in § 1002.8(a) and (b) for SPCPs offered or participated in by for-profit organizations are necessary and appropriate; these conditions are also discussed in the section-by-section analysis below. As part of its basis for the conditions, the Bureau incorporates by reference here the justifications set forth above in this part III.D, including but not limited to the Bureau's concerns regarding recent Supreme Court decisions highlighting the constitutional infirmity of laws that enable discrimination and, independently, the Bureau's finding that 50 years of legal prohibitions against credit discrimination have reshaped credit markets relative to 1976.

More specifically, the Bureau determines as a matter of its policy discretion provided by ECOA section 703(a) [180] to adopt regulations proper to effectuate the purposes of ECOA that the additional conditions—independent of the prohibitions described above—appropriately bring the regulation's standards for such SPCPs—as expressly authorized by ECOA section 701(c)(3) [181]—into closer alignment with congressional intent, as indicated in the legislative history discussed above. That is, the Bureau determines that the additional conditions will appropriately increase the likelihood that such SPCPs provide credit to consumers who would otherwise be denied the credit and that the for-profit organizations that offer or participate in such SPCPs will have and provide evidence that supports the need for the SPCPs. The Bureau also determines that this increase in likelihood appropriately helps ensure that such SPCPs are not inconsistent with ECOA's purpose of preventing credit discrimination.

In light of changed market circumstances (discussed in more detail above), the Bureau finds that the current Regulation B SPCP standards applicable to for-profit organizations have become inappropriately permissive. The current standards permitted for-profit organizations to offer or participate in SPCPs even when there had been no showing that discrimination based on protected class membership was causing program participants to be unable to obtain credit. That is, the regulation's SPCP standards may have been appropriate when the Board promulgated them, given societal circumstances at that time. But in light of changed circumstances, and because an SPCP that bases eligibility on protected class membership inherently discriminates against excluded individuals, the Bureau has determined that the regulation's standards should be amended to require any such SPCP to be predicated on formal (and regulatorily required) evidence and documentation by the creditor that it is the fact of protected class membership that is causing program participants to be unable to obtain credit. If considerations *other* than that fact are what is causing the inability to obtain credit, then an SPCP based on protected class membership is not necessary to address the inability. Further, the Bureau finds that in such cases it also is not appropriate to use an SPCP to address the inability and doing so would be counter to the purposes of ECOA. Any protected-class SPCP that is not necessary—and which unavoidably discriminates against ineligible individuals—is inconsistent with ECOA's purpose of making credit equally available to all without regard to prohibited bases.

The following section-by-section analysis discusses in more detail the Bureau's prohibitions and conditions in the Regulation B standards for SPCPs in § 1002.8.[182]

Section 1002.8(a)(3)—Special Purpose Credit Programs Offered by For-Profit Organizations

Section 1002.8(a)(3) governs any SPCP offered by a for-profit organization, or in which such an organization participates, to meet special social needs.[183] The Bureau observes, as an initial matter, that the provisions of § 1002.8(a)—*i.e.,* the provisions discussed immediately below—are subordinate to the provisions of § 1002.8(b) (discussed farther below).[184] As noted, the prohibitions described above are set forth in new § 1002.8(b)(3). Thus, all of the following conditions in § 1002.8(a)(3) are subordinate to the prohibitions in § 1002.8(b)(3).

SPCPs Offered by For-Profit Organizations, Written Plan (§ 1002.8(a)(3)(i))

Under current § 1002.8(a)(3)(i), a for-profit organization must establish and administer an SPCP pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.[185] The Bureau is separating this provision into § 1002.8(a)(3)(i)(A) and (B). Section 1002.8(a)(3)(i)(A) will retain the current requirement that the written plan identify the class of persons that the program is designed to benefit; § 1002.8(a)(3)(i)(B) will retain the current requirement that the written plan set forth the procedures and standards for extending credit pursuant to the program. The Bureau also adopts new requirements for the written plan in § 1002.8(a)(3)(i)(C), (D), and (E) as follows.

New § 1002.8(a)(3)(i)(C) requires the SPCP's written plan to provide evidence of the need for the SPCP. The Bureau has determined that this new condition will more closely align the regulation's written-plan standard with ECOA's purposes and the congressional intent expressed in the legislative history. As noted above in part III.B regarding disparate impact, legislative history is limited in its value when statutory text, context, and purpose provide sufficient meaning and the Bureau has determined that ECOA's statutory language does not authorize disparate-impact liability. However, the statutory language of the SPCP provision in ECOA as to for-profit entities is open-ended, referring to "special social needs" and expressly grants the Bureau discretion to set relevant standards. The Bureau

[178] 15 U.S.C. 1691(b)(4).

[179] 12 CFR 1002.6(b)(2)(iv).

[180] 15 U.S.C. 1691b(a).

[181] 15 U.S.C. 1691(c)(3).

[182] A few Regulation B provisions outside § 1002.8 refer to the SPCP provisions in § 1002.8. The Bureau has determined that no changes are necessary to these cross references. *See* § 1002.11(b)(1)(v) and comments 5(a)(2)–3, 6(b)(1)–1, 6(b)(2)–1, and 11(a)–1 and (a)–2.

[183] 12 CFR 1002.8(a)(3).

[184] *See* § 1002.8(a) introductory text (emphasis added): "(a) Standards for programs. *Subject to the provisions of paragraph (b) of this section,* the Act and this part permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under the following types of credit programs:").

[185] 12 CFR 1002.8(a)(3)(i).

therefore finds it appropriate to look to Congress' stated goals, as a means of ensuring that this exercise of discretion is appropriately cabined and directionally consistent with the statute. In enacting the SPCP provision, Congress indicated its expectation that the exemption for SPCPs by for-profit organizations would allow for lending where ''it has been clearly demonstrated on the public record that without such exemption the consumers involved would effectively be denied credit.'' [186] The Bureau interprets *effectively* in the legislative history to mean ''in effect.'' [187] Pursuant to that interpretation, the Bureau finds that the consumers involved would *effectively* be denied credit if in the absence of the SPCP they ''would not receive'' such or similar credit, irrespective of whether the consumers had actually applied for such credit or actually been denied such credit by a creditor.

New § 1002.8(a)(3)(i)(D) requires the SPCP's written plan to explain why, under the for-profit organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program. As with § 1002.8(a)(3)(i)(C), this new condition for the written plan will apply irrespective of whether the SPCP requires its participants to share a common characteristic that would otherwise be a prohibited basis. The Bureau has determined that this new condition will more closely align the regulation's written-plan standard with ECOA's purposes and the congressional intent expressed in the legislative history.

New § 1002.8(a)(3)(i)(E) applies, in addition to § 1002.8(a)(3)(i)(A), (B), (C), and (D), to SPCPs that require the persons in the class served by the program to share one or more common characteristics that would otherwise be a prohibited basis. The provision's new conditions require the written plan of such an SPCP to explain why meeting the special social needs addressed by the program necessitates that its participants share the specific common characteristic that would otherwise be a prohibited basis and cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria. As is discussed in more detail above, the Bureau has determined that these new conditions in the standards for SPCPs would more closely align the regulation with the statutory purpose of ''mak[ing] . . . credit equally available to all credit-worthy customers without regard to [prohibited bases].'' Specifically, the Bureau has determined that it is inconsistent with ECOA's purpose—preventing discrimination—for an SPCP that uses an otherwise prohibited basis to discriminate against ineligible individuals, unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics.

SPCPs Offered by For-Profit Organizations, Class of Persons (§ 1002.8(a)(3)(ii))

Current § 1002.8(a)(3)(ii) requires that a for-profit organization offering an SPCP establish and administer the program to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit. This provision applies irrespective of whether the SPCP requires its participants to share a common characteristic that would otherwise be a prohibited basis. The Bureau adopts three changes to this standard, as follows.

First, the Bureau strikes the clause that begins with ''or would receive it on less favorable terms . . . .'' SPCPs offered by a for-profit organization must be established and administered to extend credit to a class of persons who would otherwise not receive the type and amount of credit, as opposed to those who would receive it on less favorable terms. Second, the Bureau strikes the term ''customary;'' and, third, the Bureau strikes the term ''probably.'' SPCPs offered by a for-profit organization must be established and administered to extend credit to a class of persons who *actually* (in lieu of ''probably'') would not receive such credit under the organization's *actual* (in lieu of ''customary'') credit standards. In sum, a for-profit organization offering an SPCP must establish and administer the program to extend credit to a class of persons to whom, under the organization's actual credit standards, the organization would actually deny credit in the absence of the SPCP.[188]

The Bureau has determined that each of the three conditions, and the three conditions in combination, more closely align the regulatory standards for an SPCP offered by a for-profit organization with ECOA's purposes and with the congressional intent expressed in the legislative history: that without the SPCP ''the consumers involved would effectively be denied credit.'' [189] Furthermore these conditions are appropriate, necessary, and proper to carry out the purposes of ECOA, for the reasons above.

SPCPs Offered by For-Profit Organizations, Determining Need (Comment 8(a)–5)

Current comment 8(a)–5 addresses SPCPs offered by for-profit organizations. Under the Bureau's final rule, the comment continues to clarify that a for-profit organization's determination of the need for an SPCP ''can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies.'' [190]

For the reasons set forth above, the Bureau adopts changes to comment 8(a)–5 to conform the comment's text to the changes to the regulatory text of § 1002.8(a)(3), as follows. For precision, and because the comment addresses only SPCPs provided by for-profit organizations, the Bureau changes the comment's citation to the regulatory text from ''§ 1002.8(a)'' to ''§ 1002.8(a)(3),'' which is the paragraph that addresses such SPCPs. The Bureau also strikes the phrase ''or would receive it [credit] on less favorable terms,'' for the same reasons that the Bureau is striking the corresponding phrase from the regulatory text of § 1002.8(a)(3)(ii), discussed above.

The third and fourth sentences of comment 8(a)–5 set forth two examples of the types of research or data that a for-profit organization may use for the analysis on which it bases its determination of the need for the SPCP. The Bureau adopts edits to the examples' text to conform to the regulatory changes discussed above. The edits neither intend nor effect any change to the types of research or data that a for-profit organization may use.

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[186] Joint Explanatory Statement of the Committee of the Conference, Cong. Rec. H5493 (daily ed. Mar. 4, 1976).

[187] Effectively, *Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/effectively* (defining ''effectively'' as ''in effect: virtually'' ''by withholding further funds they effectively killed the project.'') (last visited Aug. 19, 2025).

[188] In combination, textually, the three changes revise § 1002.8(a)(3)(ii) to require that a for-profit organization offering an SPCP establish and administer the program to extend credit to a class of persons who, under the organization's standards of creditworthiness, would not receive such credit.

[189] Joint Explanatory Statement of the Committee of the Conference, Cong. Rec. H5493 (daily ed. Mar. 4, 1976).

[190] Regulation B comment 8(a)–5.

Section 1002.8(b)(2)—Common Characteristics

Current § 1002.8(b)(2) provides that a credit program qualifies as an SPCP only if the program was established and administered so as not to discriminate against an applicant on any prohibited basis. It also provides that all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program is not established and is not administered with the purpose of evading the requirements of ECOA or Regulation B. The Bureau is amending the section to make it subordinate to the new prohibitions and conditions in § 1002.8(b)(3) and (4), which are discussed below.

For clarity, the Bureau strikes the parenthetical in § 1002.8(b)(2)—''(for example, race, national origin, or sex)''—and replaces it with the text ''that would otherwise be a prohibited basis.'' The Bureau neither intends nor effects any change in substance with this change, because § 1002.2(z) defines ''prohibited basis'' to include race, national origin, and sex. Also for clarity, the Bureau adopts new comment 8(b)–2 to explain the § 1002.8(b)(2) regulatory text. In 1977, when the Board promulgated what was then § 202.8(b)(2) to implement the 1976 Act, the Board's section-by-section analysis of the regulatory text stated:

> Section 202.8(b)(2) provides that a creditor may determine eligibility for a special purpose credit program using one or more of the prohibited bases; but, once the characteristics of the class of beneficiaries are established, a creditor may not discriminate among potential beneficiaries on a prohibited basis. For example, a creditor might establish a credit program for impoverished American Indians. If the program met the requirements of § 202.8(a), the creditor could refuse credit to non-Indians but could not discriminate among Indian applicants on the basis of sex or marital status.[191]

The Bureau adopts the substance of the Board's section-by-section analysis in new comment 8(b)–2. Specifically, the comment clarifies that § 1002.8(b)(2)—subject to the prohibitions and conditions in § 1002.8(b)(3) and (4), as well as the other requirements of 12 CFR part 1002—permits a creditor to determine eligibility for an SPCP using one or more common characteristics that would otherwise be a prohibited basis. The comment also clarifies that under § 1002.8(b)(2), once the characteristics of the program's class of participants are established, the creditor is prohibited from discriminating among potential participants on a prohibited basis.

New § 1002.8(b)(3)—Prohibited Common Characteristics

The Bureau adopts new § 1002.8(b)(3), which prohibits an SPCP offered or participated in by a for-profit organization from using the common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the program. For the reasons discussed above, the Bureau has determined that it is no longer necessary (in light of changed circumstances) or appropriate (in light of ECOA's purpose of preventing discrimination) for the SPCP standards in Regulation B to permit such SPCPs to use the common characteristics of race, color, national origin, or sex as eligibility criteria.

New § 1002.8(b)(4)—Otherwise Prohibited Bases in For-Profit Programs

The Bureau adopts new § 1002.8(b)(4), which, for characteristics not prohibited under new § 1002.8(b)(3), applies when an SPCP offered or participated in by a for-profit organization requires its participants to share one or more common characteristics that would otherwise be a prohibited basis. The new section (subject to § 1002.8(b)(3)) requires the organization to provide evidence for each participant who receives credit through the program that, in the absence of the program, the participant would not receive such credit as a result of those specific characteristics.

As is discussed in more detail above, the Bureau has determined that these new conditions in the standards for SPCPs more closely align the regulation with the statutory purpose of ''mak[ing] . . . credit equally available to all credit-worthy customers without regard to [prohibited bases].'' Specifically, because an SPCP that bases eligibility on protected class membership inherently discriminates against ineligible individuals, the Bureau has determined that it is inconsistent with ECOA's purpose (preventing discrimination) for an SPCP to use an otherwise prohibited basis (and thereby discriminate against ineligible individuals) unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics.

Section 1002.8(c)—Special Rule Concerning Requests and Use of Information

In § 1002.8(c) and the commentary thereto, the Bureau adopts nonsubstantive changes for clarity. The Bureau strikes the section's parenthetical—''(for example, race, national origin, or sex)''—and replaces it with the text ''that would otherwise be a prohibited basis.'' This change neither intends nor effects any change in substance, because § 1002.2(z) defines ''prohibited basis'' to include race, national origin, and sex. The Bureau is also making explicit that § 1002.8(c) is subordinate to § 1002.8(b), including its newly adopted prohibitions and conditions, discussed above. This change neither intends nor effects any change in substance because current § 1002.8(c) is expressly subordinate to § 1002.8(a) and current § 1002.8(a) is expressly subordinate to § 1002.8(b); thus, § 1002.8(c) is subordinate to § 1002.8(b). Finally, the Bureau is deleting one of the examples from comment 8(c)–2 regarding programs under a Minority Enterprise Small Business Investment Corporation to avoid confusion. This deletion neither intends nor effects any change in substance because § 1002.8(c) is subordinate to § 1002.8(b).

IV. Effective Date

The Bureau proposed an effective date of 90 days after publication in the **Federal Register**. This effective date was proposed to provide creditors sufficient time to evaluate existing SPCPs to ensure compliance with the final rule for extensions of credit on or after the effective date. Where creditors have already extended credit prior to the effective date under existing SPCPs, those credit extensions would be grandfathered and their programs must qualify as SPCPs under the rule in effect at the time of the credit extensions. Not much time, if any, would be needed for creditors to comply with the final rule relating to disparate impact and discouragement.

Some industry commenters requested a longer effective date, especially as it relates to the proposed rule for SPCPs. One commenter requested an effective date of at least four months after publication in the **Federal Register** while several other commenters requested an effective date of at least 12 months after publication in the **Federal Register**. Industry commenters also asked for a safe harbor for SPCPs created before the effective date, or a safe harbor for SPCP loans where the loan applications are received before the effective date. The commenters explained that this length of time and expanded safe harbor provide the time and clarity needed by for-profit institutions with SPCPs to wind down existing programs that no longer

[191] 42 FR 1242 at 1248.

conform to Regulation B. In some cases, these are SPCPs that are part of fair lending or CRA compliance plans or in fair lending remediations or settlements. The commenters stated that the wind-down includes clearing the pipeline of prospective borrowers who will have received advertising for products that will no longer be available if they are unexpectedly pulled from the market, which could raise other compliance risks, and clearing the pipeline based on rate lock dates and rate lock extensions otherwise permitted under standard guidelines. The commenters asserted that, for SPCPs that are permitted under the final rule, this longer length of time is needed to complete legal analyses of the new requirements for documents and implementing SPCPs, revise existing processes, and discuss with prudential regulators how the new SPCPs will be evaluated under CRA.

After consideration of the comments, the Bureau has determined that the effective date for the final rule is 90 days after publication in the **Federal Register**. As discussed in the sections above, the final rule more closely aligns with ECOA, including preventing unlawful discrimination in the offering of SPCPs. This effective date will ensure that creditors quickly align with ECOA and not engage in unlawful discrimination. Not much time, if any, would be needed for creditors to comply with the final rule relating to disparate impact and discouragement. For SPCPs, as this is a prospective rule, SPCP credit extended on or after the effective date must comply with this final rule while SPCP credit extended before the effective date must comply with the SPCP rule in place at the time the SPCP was established and SPCP credit was extended. As discussed above in part III.D, if SPCPs implicate remedial agreements pertaining to fair lending and CRA examination and enforcement actions, the Bureau notes that ECOA section 701(c)(1) states that it is not a violation of ECOA section 701 for a creditor to refuse to extend credit offered pursuant to any credit assistance program expressly authorized by law for an economically disadvantaged class of persons.[192] Regulation B comment 8(a)–3 provides that credit programs authorized by Federal or State law include programs offered pursuant to Federal, State, or local statute, regulation or ordinance, or pursuant to judicial or administrative order. For these reasons, the effective date of the final rule is 90 days after publication in the **Federal Register**.

[192] 15 U.S.C. 1691(c)(1).

V. CFPA Section 1022(b) Analysis

A. Overview

The Bureau has considered the potential benefits, costs, and impacts of the final rule.[193] As discussed in greater detail elsewhere in this final rule, the Bureau is amending provisions related to disparate impact, discouragement, and SPCPs under Regulation B, which implements ECOA.

The Bureau believes that the amendment to the provisions related to disparate impact and discouragement are largely deregulatory in nature and therefore are expected to reduce burden for the covered persons. The Bureau also has reason to believe that the current number of SPCPs is small and therefore changes to SPCPs as part of this final rule will have limited impacts. The discussion below further considers the benefits, costs, and impacts of the provisions to consumers and covered persons in detail.

B. Statement of Purpose

The purpose of Regulation B is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[194] The Bureau is amending the regulation as follows: (1) provide that ECOA does not authorize disparate-impact claims; (2) amend the prohibition on discouraging applicants or prospective applications to clarify that it prohibits statements of intent to discriminate in violation of ECOA and is not triggered merely by negative consumer impressions, and to clarify that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements; and (3) amend the standards for SPCPs offered or participated in by for-profit organizations to include new standards and related conditions.

[193] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[194] *See* § 1002.1(b).

C. Baseline for Consideration of Analysis

The Bureau has discretion in any rulemaking to choose an appropriate scope of consideration with respect to potential benefits and costs and an appropriate baseline. Accordingly, this analysis considers the benefits, costs, and impacts of the provisions against Regulation B prior to its amendment as a baseline, *i.e.,* the current state of the world before the Bureau's provisions are implemented. Under this baseline, the Bureau assumes that institutions are complying with regulations that they are currently subject to. The Bureau believes that such a baseline will provide the public with better information about the benefits and costs of the amendment.

D. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on data that the Bureau has obtained from publicly available sources. However, limitations on what data are available restrict the Bureau's ability to quantify the potential costs, benefits, and impacts of the final rule. Therefore, the discussion below generally provides a qualitative consideration of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data available, provide insights into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the available data.

Benefits to Covered Persons

As discussed further below, most provisions will benefit covered persons. Quantifying and monetizing the benefits to covered institutions requires identifying costs of compliance under the baseline and quantifying the magnitude of the covered persons' cost savings arising from the provisions. For example, the Bureau believes that the provisions on disparate impact and discouragement are deregulatory in nature and hence will benefit covered persons in the long run by reducing compliance burden. The Bureau anticipates these cost savings will vary with the covered person's size and the complexity of operations. However, the Bureau is unaware of any data that enable reliable quantitative estimation of these benefits.

Costs to Covered Persons

Certain costs to covered persons are difficult to quantify. For example, the Bureau anticipates that covered persons will incur costs associated with implementing changes to their internal processes that result from the

provisions. The Bureau categorizes costs required to comply with the provision into ''one-time'' and ''ongoing'' costs. ''One-time'' costs refer to expenses that the covered persons incur only once to implement operational changes arising from the final rule. On the other hand, ''ongoing'' costs refer to expenses incurred as a result of the ongoing compliance with the rule. The Bureau also expects both of these types of costs to vary with a covered person's size and complexity of operations.

Benefits to Consumers

Covered persons can potentially pass on the saved compliance costs to consumers by offering lower prices or better products. However, the Bureau is unable to quantify these potential benefits because it lacks relevant data.

Costs to Consumers

According to economic theory, in a perfectly competitive market where covered persons are profit maximizers, increases in the marginal cost of operation are passed on to consumers, and firms absorb one-time fixed costs of compliance. However, covered persons' response likely varies with supply, demand, and competitive conditions.[195] Moreover, in addition to any costs that covered persons pass onto consumers, the provisions may potentially limit legal protections for consumers and affect some consumers' access to credit.

The Dodd-Frank Act defines the term ''consumer'' as an individual or someone acting on behalf of an individual. It defines a ''covered person'' as one who engages in offering or providing a ''consumer financial product or service,'' which means a financial product or service that is provided to consumers primarily for ''personal, family, or household purposes.'' Several commenters pointed out the potential impact on small businesses as consumers of credit. For example, female-, Hispanic-, and minority-owned small businesses seeking business loans or mortgages may be affected by the rule. However, the Bureau has elected not to separately assess small business applicants as ''consumers'' because (1) it is not required under section 1022, and (2) the Bureau does not believe that specific analysis would be especially helpful in understanding the effects of the rule since the analysis for consumers would apply similarly to the small business applicants.

E. Potential Benefits and Costs of the Final Rule to Consumers and Covered Persons

Covered Persons Under the Rule

The three categories of changes to Regulation B will apply to all covered persons that meet the definition of creditor under Regulation B. To estimate the total number of persons covered by the changes, the Bureau relies on the total number of entities subject to Regulation B as estimated in the approved Paperwork Reduction Act supporting statement (OMB Control Number 3170–0013) last updated in 2024.[196] The Bureau estimates that there are about 12,000 depository institutions and 482,000 non-depository institutions that are subject to Regulation B.

Provisions Concerning Disparate Impact

Benefits to Covered Persons

The provisions will likely allow covered persons to save on ongoing compliance costs. For example, covered persons may save time and resources presently spent on creating, testing, validating, and auditing models for potential disparate-impact risks in their lending strategy or portfolio. Resources dedicated to statistical testing, documenting business necessities of policies, and evaluating alternative lending strategies may be saved or redirected to other uses. Covered persons may also save costs by reducing spending associated with fair lending exams and training loan officers, compliance staff, contractors, and modelers of disparate-impact risks. Lastly, the change will likely reduce the litigation risks to the extent lenders will have otherwise had to defend against lawsuits under a disparate-impact theory of discrimination. Fewer enforcement actions and private claims premised on disparate-impact theories as a result of the provisions will reduce defense burden and any financial costs related to remediation. The compliance cost saving from the provisions likely varies by the size and complexity of the operational structure of the institutions.

Covered persons' profitability could increase as a result of the provisions by improving operational flexibility and spurring innovation in the credit application process. For example, covered persons can experiment more with risk-based pricing and automated underwriting with reduced risk of facially neutral policies with disproportionate effects triggering liability without intent. The provisions may result in an adoption of new modeling techniques that use additional data sources. These benefits, however, are bounded by the ongoing need to comply with other State and Federal fair lending laws.

Costs to Covered Persons

Covered persons likely will incur one-time adjustment costs resulting from these provisions. These one-time costs include updating policies, practices, procedures, and control systems; verifying, updating, and reviewing compliance; and training staff and third parties. In addition, covered persons already incur ongoing compliance costs associated with the current Regulation B. Therefore, the Bureau expects the one-time cost and any ongoing costs that arise from the provisions to be small.

The Bureau does not have the data to provide quantitative estimates of the one-time costs that covered persons will incur but provides a rough estimate based on one-time costs estimated for other rules. For example, the Bureau recently estimated a one-time cost of each covered small non-depository entity for implementing the Automated Valuation Models (AVM) Rule to be $23,000 in the first year: $7,000 for drafting and developing policies, practices, procedures, and control systems, $10,000 for verifying compliance, and $6,000 for training.[197] Furthermore, the Bureau estimated the ongoing annual costs to be one-third of the one-time first-year costs (*i.e.,* $7,667). Since the provisions involve updating existing policies rather than implementing new policies, the Bureau expects the cost of the provisions to be closer to the AVM Rule's total ongoing cost of $7,667.

The one-time costs of updating policies and procedures and training personnel likely vary with the size and the type of covered person. For example, the Bureau recently estimated in the Small Business Lending (1071) Rule that the one-time cost of developing policies and procedures to range between $2,500 and $4,300 while the cost of training staff and third parties to range between $3,100 and $5,300 depending on the size and the type of institutions.[198] Given that these estimates are for implementing a new rule, whereas these provisions only update an existing rule, the Bureau expects the total one-time cost associated with the provisions to be

[195] For example, there are situations where firms might optimally include fixed costs in their pricing strategies as demonstrated in Korok Ray & Jacob Gramlich, *Reconciling Full-Cost and Marginal-Cost Pricing,* 28 J. Mgmt. Acct. Res. 27 (2016), *https://publications.aaahq.org/jmar/article-abstract/28/1/27/607/Reconciling-Full-Cost-and-Marginal-Cost-Pricing.*

[196] *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202402-3170-001.*

[197] 89 FR 64538, 64569 (Aug. 7, 2024).

[198] 88 FR 35150, 35507–10 (May 31, 2023).

smaller than the estimated one-time costs for implementing the 1071 Rule. In other words, the Bureau expects the upper bound of the one-time cost to vary between $5,600 and $9,600, which is consistent with what was estimated in the AVM Rule.

Some policy group, consumer advocate, and individual commenters have pointed out that the covered persons' legal risk may increase because of uncertainty rising from conflicting legal landscapes. Commenters stated that the covered persons either comply with the rule but risk lawsuits by private parties and states or comply with the law and risk lawsuits by Federal agencies. Furthermore, a commenter argued that risk aversion driven by regulatory uncertainty and complexity can result in a reduction in lending and lower revenue, especially for rural and small community banks.

The Bureau included a discussion on the conflicting and uncertain legal landscape resulting from the rule in the proposal. More specifically, the Bureau noted that the rule may have limited impact on covered persons since they are still subject to other antidiscrimination statutes such as the FHA and State laws similar to ECOA. The Bureau also agrees that the rule may have a greater impact on smaller lenders who have fewer resources for legal and compliance risk.

A policy group commenter argued that there are materially new or expanded compliance obligations for covered creditors including changes to adverse action notices, recordkeeping and retention for application data, systems changes to underwriting and compliance controls, and reporting or disclosure refinement. Another commenter stated that the compliance burdens associated with the rule, such as additional reporting, data collection, and documentation requirements increase operational costs and may lead to increased denial rates.

The Bureau disagrees that there will be new or expanded compliance obligations since the rule is deregulatory in nature and will most likely reduce the compliance burden of lenders especially related to reporting, data collection, and documentation requirements. Further, lenders are not required to make changes as a result of the disparate-impact provision in the final rule. However, the Bureau acknowledges that there will likely be a one-time adjustment cost for covered persons who choose to make changes which the Bureau documented in the proposal.

Several consumer advocate commenters argued that disparate-impact analysis is beneficial to covered persons and removing disparate-impact protections increases the costs to covered persons. They claimed that disparate-impact analysis benefits covered persons by (1) allowing lenders to identify opportunities to expand product markets and obtain data to increase lending volume and (2) potentially saving liability and compliance costs by preventing unintentional discrimination.

The Bureau believes that the existence of disparate-impact liability under ECOA and Regulation B is not necessary to achieve these goals and that covered persons will continue to evaluate their lending policies and practices in order to identify profitable opportunities for expansion and to facilitate compliance with ECOA and other fair lending laws. As stated above, the Bureau expects that its changes to the disparate-impact provision will reduce Regulation B compliance costs overall.

Benefits to Consumers

Consumers will benefit from lower compliance costs to the extent that covered persons pass on compliance cost savings to consumers. According to standard economic theory, the degree to which consumers will benefit from lower prices depends on competitive market conditions and the shapes of market demand and supply, as well as firm characteristics. In addition, some consumers may experience a faster credit application process and greater product variety as some covered persons reallocate cost savings arising from the provisions to improving operational efficiency and developing new products and services.

Costs to Consumers

To the extent that legal liability discourages covered persons from implementing facially neutral policies that lead to disparate impact, removing such liability may have a negative impact on some consumers. Some consumers who are adversely affected by neutral policies will lose legal options and opportunities for redress. They may be more likely to be denied credit or to pay higher prices without effects-based legal protection. However, such costs to consumers may be severely limited; covered persons are still liable under other antidiscrimination statutes such as the FHA and State laws similar to ECOA, so the incentives for covered persons to implement policies or engage in practices that lead to disparate impact may be restricted.

The Bureau has also considered the possibility of one-time costs that covered persons incur because of the rule being passed on to consumers in the form of higher prices. The Bureau believes that this is unlikely to occur since economic theory generally views changes in fixed costs as unrelated, all other things equal, to changes in prices.

A consumer advocate commenter argued that the Bureau's assertion that the rule may not lead to changes in lender practices because of other laws in place is inconsistent with the discussion of the benefits to covered persons. The Bureau disagrees that the discussion on the benefits to covered persons is inconsistent. As noted in the proposal, the Bureau argued that the rule would allow lenders to save on costs, but the rule may not necessarily result in cost savings because lenders are still subject to other laws and may not make any changes. Additionally, covered persons likely accrue some of the benefits, such as reduced exam costs, regardless of whether they are subject to other laws.

Provisions Concerning Discouragement

Benefits to Covered Persons

The provisions will limit legal liability for covered persons and likely will reduce compliance burden as a result. For example, covered persons may reduce spending related to limiting liability as to prospective applicants by decreasing the amount of time and resources spent monitoring marketing strategies and materials, and by adjusting marketing to focus on areas where they expect the greatest return on investment. In addition, covered persons may spend less on training loan officers, compliance staff, contractors, and other employees on legal and compliance risks related to prospective applicants. Lastly, the change will limit potential litigation risks from enforcement actions based on allegations of discouragement of prospective applicants. The change will reduce legal exposure to the extent lenders have had to defend against lawsuits under broader legal liability in the baseline. As a result, covered persons may save costs related to legal counsel.

The provisions likely will increase covered persons' profitability by allowing additional operational flexibility. For example, lenders who under the baseline choose not to focus on offering certain products to certain groups of consumers will be able to potentially increase their revenues by offering products that are better tailored to the demands of different groups of consumers. In other words, under this provision, some covered persons will be able to conduct more targeted

advertising campaigns and offer certain products to subsets of consumers (when they otherwise could not under the baseline). Covered persons may choose to relocate branch locations that are less profitable and reallocate resources that were previously spent on oversight of marketing materials and interactions with prospective applicants at call centers and branches to other uses. On the other hand, requirements to serve community credit needs under the CRA will still be in effect for banks and thrifts and could continue to deter such business decisions for some lenders. The benefits to covered persons that arise as a result of these provisions likely vary with the size and type of each covered person.

A policy group commenter suggested that the Bureau failed to consider the effects on expanded commercial speech. The Bureau acknowledges that covered persons may enjoy the benefits of expanded free speech with reduced legal risk. For example, as noted above, covered persons may have more freedom in their advertising and marketing efforts. On the other hand, because covered persons are still subject to other laws and regulations, it is unclear the extent to which the rule will impact lenders' behavior. As the commenter also noted, the benefits and costs of expanded free speech are difficult to quantify.

Costs to Covered Persons

Covered persons may incur adjustment costs associated with the change in liability for discrimination against prospective applicants. Covered persons may need to update their policies, procedures, and systems to accommodate changes resulting from the provisions. However, these adjustment costs will be incurred only once and will not have a significant long-term impact on covered entities. The one-time costs associated with these provisions will be similar in scope to the one-time costs associated with the change to the disparate-impact provisions above.

Consumer advocate commenters stated that the Bureau has not adequately considered the loss of potential benefits to covered persons from preventing and addressing redlining and other discouragement, including expansion of their market opportunities, enhancement of their reputation, and increased community trust.

The Bureau does not agree that this provision will result in a cost to covered persons from not being able to expand market opportunities because the Bureau believes that covered persons will continue to seek out profitable opportunities for expansion. The Bureau also notes that it only needs to consider the costs and benefits caused by the rule, and there is no loss of potential benefits to covered persons from avoiding discouragement as a result of this rule. That is, this rule does not require lenders to engage in discouragement, so the rule does not cause covered persons to lose benefits from no longer avoiding discouragement.

Benefits to Consumers

The provisions on discouragement limits result in ongoing cost savings for covered entities, which could be passed on to consumers through lower prices. The rate of pass through generally varies with demand and supply conditions, as well as firm characteristics. Moreover, consumers may benefit from decreased limits on marketing. For example, some consumers may learn about certain products that they may not otherwise have been aware of.

Costs to Consumers

The provisions may result in some consumers not applying for credit and facing greater barriers to accessing credit than they otherwise have under the existing rule. For example, some covered persons may exclude certain groups of consumers from advertising campaigns or may choose to engage less with them. As a result, some consumers may not be aware of certain credit products from some available covered persons. Moreover, some consumers may lose convenient access to financial services if covered persons alter their branch location decisions as a result of these provisions. In particular, some elderly, minority, and low-income consumers rely on brick-and-mortar branch services instead of online or mobile banking. If covered persons alter their branch location decisions, then these customers may no longer be able to access financial services and products in their preferred way. As before, though, requirements to serve community credit needs under the CRA may mitigate such impacts for banks and thrifts consumers.

The Bureau received several comments about potential data sources and information that can be used for an analysis on potential bank branch closures. A policy group commenter suggested using the FDIC BankFind data and Census demographic data to analyze ''a plausible range of likely branch closures and affected customers.'' While the Bureau acknowledges that these data sources provide information on the location of banks and whether they are located in majority-minority neighborhoods, they do not provide sufficient information to conduct an informative quantitative analysis because (1) the FDIC BankFind data only provide information on the locations of the banks that are FDIC-insured and there is not comparable location information for many non-depository institutions; and (2) the Bureau does not have enough information into the profit margin of each branch location or how lenders decide which branch locations to close. Furthermore, as the Bureau mentioned in the proposal, there is uncertainty in how lenders will respond to the rule since lenders are still subject to other laws and regulations, including those that affect branch location decisions like the CRA.

Consumers may have less protection against permissible but potentially deterring conduct at a pre-application stage under the provisions compared to the baseline, in which more discouraging conduct was impermissible. Under a narrower standard of liability, lenders are permitted to engage in more conduct that could deter or informally reject certain consumers, among other things, before credit is formally sought, which constitutes a cost to these consumers.[199]

While the provisions limit covered persons' liability on discouragement, it does not eliminate it. Covered persons will remain prohibited by the discouragement prohibition from expressing to applicants or prospective applicants an intention to discriminate against them on a prohibited basis. Moreover, covered persons will still be subject to other statutes such as the FHA and State laws similar to ECOA. While the provisions reduce legal liability for covered persons under ECOA, the legal risk under other statutes remains unchanged, and therefore the incentives for covered persons to significantly change their policies as a result of the provisions are limited. Thus, the costs to consumers are correspondingly limited.

Comments on Provisions Concerning Disparate Impact and Discouragement

Some consumer advocate and individual commenters argued that consumers will likely suffer from increased discrimination and unequal access to credit which eventually leads

[199] *See, e.g.,* Andrew Hanson et al., *Discrimination in mortgage lending: Evidence from a correspondence experiment,* 92 J. Urban Econ. 48–65 (2016); Neil Bhutta et al., *How much does racial bias affect mortgage lending? Evidence from human and algorithmic credit decisions,* 80(3) J. Fin. 1463–96 (2025).

to systematic inequality, inefficiency in credit markets, and overall adverse impact on the economy as a result of the provisions. For example, ending the disparate-impact doctrine and narrowing the prohibition on discouragement may increase taste-based or intentional discrimination [200] by allowing covered persons to target advertising only to certain groups thereby creating unequal access to credit. A consumer advocate commenter additionally stated that disparate impact worked as an important backstop in preventing some lenders from engaging in taste-based discrimination. The commenter also noted that provisions will allow statistical discrimination and pricing disparities based on price elasticities that may adversely affect consumers on the basis of certain protected characteristics.[201] As a result, members of protected classes may experience increased interest rates, denials of credit, and fewer product options with fewer legal options for redress.

As the Bureau acknowledged in the proposal, some consumers may be more likely to be denied credit or to pay higher prices without the effects-based legal protection provided for under the previous version of Regulation B. However, as also noted in the proposal, the extent to which this happens is difficult to estimate because (1) there are other laws and regulations in place which will limit the potential changes in lenders' behaviors, and (2) the Bureau lacks relevant data.

A consumer advocate commenter also pointed out that any adverse impact on consumers likely differs across consumer lending products. For example, the disparate impact and discouragement provisions likely have differing effects in the credit card and student lending markets where most of the lending decisions are automated compared to the auto loan market where many interactions occur in person.

As noted in the proposal, the Bureau acknowledges that the impact of the rule likely varies by the size, complexity, and competitiveness of firms which vary across product markets. The Bureau's analysis considers the effect of the rule across the overall consumer financial market, and potentially varying effects of the rule across product markets does not alter the analysis.

A policy group commenter also suggested using Bureau and other regulatory agencies' supervisory and enforcement data to estimate the effect of the disparate impact and discouragement provisions on covered persons and consumers. The commenter suggested using the number of exams and information on remedial actions taken to estimate the costs to covered persons. The Bureau does not agree that this information can be used to calculate on-going compliance cost savings because compliance costs are exam-specific and may also depend on the institution's size, complexity, and risk profile.

The commenter also suggested using the information on settlements and supervisory actions to estimate the rule's impact on consumers. The Bureau does not believe such analysis would be useful because the settlement amounts represent an unknown share of total possible cases, and, as a result, the Bureau cannot characterize the total impact on consumers. Furthermore, prior Bureau public enforcement actions that resolved allegations of violations of ECOA and Regulation B through settlement reflect only the agreement of the parties. Alleged creditors may neither confirm nor deny a statutory violation took place and there may not have been a finding of any harmed individual consumers. In addition, supervisory activity that found violations of ECOA and Regulation B may not have been agreed to by the company or validated by the company's independent compliance audit. Therefore, the Bureau does not believe that the information on settlements and supervisory actions can be used to estimate the impact on consumers.

Provisions Concerning Special Purpose Credit Programs

The Bureau also adopts changes to Regulation B's provisions regarding SPCPs. The changes can be grouped into two categories for the purposes of discussing their potential impacts. First, the Bureau prohibits an SPCP offered or participated in by a for-profit organization from using a common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the SPCP. Second, the Bureau also adopts several new conditions on such SPCPs that use *any* prohibited basis common characteristic as eligibility criteria. Among these new conditions are additional requirements that a for-profit organization establish the fact that applicants with common characteristics that will otherwise be a prohibited basis will not receive credit under the organization's current standards due to the common characteristic and that providing credit of the type and amount sought cannot be accomplished through a program that does not use an otherwise prohibited basis as eligibility criteria.

Compared to the baseline, the overall effect of these two categories of changes is to place additional conditions on the design of lenders' existing SPCPs and the development of new SPCPs. The Bureau considers the costs and benefits of these conditions below.

Benefits to Covered Persons

At baseline, Regulation B permits creditors to create SPCPs and prescribes the procedures for doing so but does not require any creditor to create an SPCP. The Bureau, consistent with standard economic theory, assumes that creditors only decide to create SPCPs if the incremental benefits from doing so outweigh the incremental costs from creating and administering the SPCP. Since the changes to Regulation B make it more difficult or costly to create an SPCP, the Bureau does not expect the changes to the SPCP provisions to generate benefits to covered persons from credit provided or not provided under the revised SPCP provisions.

Costs to Covered Persons

At baseline, Regulation B permits creditors to create SPCPs and prescribes the procedures for doing so but does not require any creditor to create an SPCP. Under standard economic theory, a creditor will only create an SPCP if the expected benefit of doing so is greater than the costs of creating and administering the program. Creditors may benefit, for example, from the public relations value that such a program provides. Owners of a for-profit credit provider may also derive some non-monetary benefit from the creation of an SPCP, such as addressing alleged racial gaps in lending. Setting up and operating an SPCP also involves costs, including the administrative costs to design the program and ensure that it is consistent with Regulation B. Many existing SPCPs also involve the creditor taking on additional risk because they involve providing credit to applicants the creditor would have otherwise denied or providing credit at terms that would have otherwise been more favorable to the creditor. The Bureau assumes that, if a creditor implements an SPCP, they do so because the public

[200] G.S. Becker, *The Economics of Discrimination,* U. Chi. Press (1957), *https://ia601403.us.archive.org/14/items/in.ernet.dli.2015.118727/2015.118727.The-Economics-Of-Discrimination_text.pdf.*

[201] *Nat'l Fair Hous. All.* v. *Facebook,* No. 1:18-cv-02689 (S.D.N.Y. 2018); *United States* v. *Meta Platforms Inc.,* No. 1:22 Civ. 5187 (S.D.N.Y. 2022); Edmund S. Phelps, *The statistical theory of racism and sexism,* 62:4 a.m. Econ. Review, at 659–61 (1972); Kenneth J. Arrow, *What has economics to say about racial discrimination?,* 12:2 J. Econ. Perspectives, at 91–100 (1998).

relations or other benefits outweigh the costs.

The effects of the Regulation B provisions affecting SPCPs are to impose conditions on creditors' ability to create an SPCP and, therefore, reduce the expected net benefit of the programs relative to the baseline. In some cases, the changes will prohibit some types of SPCPs. For example, an SPCP that currently uses race as a common characteristic is prohibited under the changes. In other cases, the changes will impose additional costs on creditors who attempt to develop an SPCP. Such is the case when a creditor must establish the fact that members of a particular protected-class group otherwise are unable to receive credit in the absence of an SPCP. Imposing such conditions could make it difficult to achieve the intended effect of an SPCP or otherwise reduce the net benefit of doing so. This change imposes a cost on affected creditors who either have an SPCP or would have otherwise created an SPCP in the absence of the changes to Regulation B. As a result, it is likely that fewer SPCPs will exist under the final rule relative to the baseline.

However, such costs are mitigated to the extent that creditors redesign programs to use criteria that are not prohibited under the adopted changes to Regulation B. For example, if a creditor has an existing SPCP that uses race as a common characteristic determining eligibility to reach a certain segment of socioeconomically disadvantaged borrowers, it may be able to preserve much of its program in a form that is open to such socioeconomically disadvantaged borrowers without regard to prohibited basis characteristics. In this case, the creditor will incur both the one-time cost of the program redesign and any costs arising if the redesigned program is unable to achieve the intended results as effectively.

While the Bureau is unaware of data that can be used to comprehensively measure the scale of existing SPCPs, the Bureau does have reason to believe that the overall market effect of these changes is likely to be small. Historically, few SPCPs existed prior to the Bureau's advisory opinion in January 2021, when the Bureau last assessed the market.[202] In August 2020, the Bureau issued a Request for Information on the Equal Credit Opportunity Act and Regulation B.[203] Multiple commenters noted that, despite a long history of being allowed under Regulation B, most lenders have not used SPCPs.[204] In 2021, the U.S. Department of Housing and Urban Development noted in its statement on SPCPs that "very few of these Programs have been established to create homeownership opportunities for affected communities." [205]

Since 2021, there has been growth in the number of SPCPs, with prominent examples from large banks, large non-depository institutions, and several nonprofit organizations.[206] However, available information suggests that the use of SPCPs is likely still limited. The Federal Housing Finance Agency (FHFA) released a report in 2024 showing that government-sponsored enterprises (GSEs) acquired approximately 15,000 mortgages originated through SPCPs in 2023, or 0.8 percent of the total mortgages GSEs acquired that year.[207] With respect to small business lending, the American Bankers Association (ABA), as of 2025, also notes that few lenders have implemented SPCPs for small business lending.[208]

The Bureau also expects that SPCPs are even less likely to be provided by small lenders, compared to larger ones. In a 2022 comment letter, J.P. Morgan Chase Bank described that launching an SPCP required "significant effort" because they "often necessitate modifications to existing processes, close monitoring of execution and results, engagement with community leaders, adjustments to the program over time, updates to documentation, and consistent engagement with the relevant supervisory agency." [209]

While certain government agencies have sought to encourage SPCPs in recent years, the information available to the Bureau indicates that the actual prevalence of SPCPs is quite low. Therefore, while the Bureau cannot quantify with any precision the number of potentially affected lenders, it has documented reasons to believe that the number is small.

The Bureau also does not have detailed information on the amount of lending that SPCPs represent as a fraction of a creditor's portfolio. However, some individual lenders have made available information on their existing SPCPs. As one case study stated, "Wells Fargo [in the spring of 2022] set aside $150 million to lower interest rates on mortgages for Black customers" [210] under SPCPs. However, this amount only constituted a small percentage of Wells Fargo's overall lending business.[211] Large lenders such as Wells Fargo (one of the largest in the country) are best positioned to create and benefit from SPCPs. Given research showing that net interest margins increase with bank size and the fixed administrative costs and credit risks of operating an SPCP, it seems likely that SPCP lending will represent an even smaller fraction of lending for smaller lenders.[212]

Based on the limited information available, few lenders appear to have developed SPCPs, and SPCP lending seems to represent a small fraction of existing lending for individual lenders. As a result, the Bureau expects the total cost to covered persons by the SPCP changes to Regulation B will be small relative to the total dollar amount of lending.

Multiple consumer advocate, industry group, and individual commenters argued that the proposed prohibition on the use of certain common characteristics as well as the requirements to provide per applicant

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[202] 86 FR 3762.

[203] Request for Information on the Equal Credit Opportunity Act and Regulation B, *https://www.federalregister.gov/d/2020-16722.*

[204] *See* comment from Nat'l Fair Hous. All., *https://www.regulations.gov/comment/CFPB-2020-0026-0133,* and Mortg. Banker's Ass'n, *https://www.regulations.gov/comment/CFPB-2020-0026-0115.*

[205] Memorandum from Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to Office of Fair Housing and Equal Opportunity (Dec. 7, 2021), *FHEO's Statement by HUD's Office of Fair Housing and Equal Opportunity on Special Purpose Credit Programs as a Remedy for Disparities in Access to Homeownership, https://web.archive.org/web/20241024180840/https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Statement_on_Fair_Housing_and_Special_Purpose_Programs_FINAL.pdf.*

[206] U.S. Dep't of Hous. & Urb. Dev., *Market examples of SPCPs—SPCP Toolkit for Mortgage Lenders, https://spcptoolkit.com/market-examples-of-spcps/* (last visited Sept. 9, 2025).

[207] Inside Mortg. Fin., *Special Purpose Credit Program Mortgages a Fraction of GSE Business* (Oct. 19, 2023), *https://www.insidemortgagefinance.com/articles/230785-special-purpose-credit-program-mortgages-a-fraction-of-gse-business;* Fed. Hous. Fin. Agency, *Mission Report 2023* (2024), *https://www.fhfa.gov/reports/mission-report/2023.*

[208] Am. Banker's Ass'n, *Special Purpose Credit Programs, https://www.aba.com/banking-topics/commercial-banking/small-business/special-purpose-credit-programs* (last visited Sept. 9, 2025).

[209] *https://www.regulations.gov/comment/OCC-2022-0002-0252.*

[210] Orla McCaffrey, *JPMorgan Chase takes special-purpose credit program national* (Nov. 18, 2022), Am. Banker, *https://www.americanbanker.com/news/jpmorgan-chase-takes-special-purpose-credit-program-national.*

[211] According to 2024 Home Mortgage Disclosure Act data, Wells Fargo originated $38 billion in total mortgage volume. *See https://ffiec.cfpb.gov/data-publication/modified-lar/2024* (last visited Sept. 9, 2025).

[212] W. Blake Marsh & Taisiya Goryacheva, *Do Net Interest Margins for Small and Large Banks Vary Differently with Interest Rates?,* Fed. Rsrv. Bank of Kan. City (Feb. 10, 2022), *https://www.kansascityfed.org/research/economic-review/do-net-interest-margins-for-small-and-large-banks-vary-differently-with-interest-rates/.*

proof of discrimination made it significantly burdensome to operate an SPCP. Many of these commenters suggested that the result of this burden would be that many, if not all SPCPs, would cease to exist if the Bureau finalized these provisions. Additionally, several commenters noted how the Bureau's proposed changes to SPCPs amounted to a regulatory increase, in contrast to the deregulatory impacts of the other provisions.

Several commenters also suggested that SPCPs were more prevalent than the Bureau's characterization in the proposal. One commenter noted that a number of banks in their area operated SPCPs. Another commenter, arguing in favor of the Bureau's SPCP proposals, characterized SPCPs as ''ubiquitous.'' A consumer advocate commenter noted that between 2022 and 2024, GSEs purchased approximately 57,282 SPCP loans and paid approximately $81.9 million in subsidies via lender credits and argued that this was evidence of significant participation in SPCPs. One policy group commenter also disagreed with the Bureau's characterizing Wells Fargo's SPCP program based on dollar share of overall lending and argued that much of the $150 million was spread across multiple consumer's loans, resulting in a larger number of customers affected than the volume share would suggest.

In its analysis, the Bureau acknowledged that the new conditions on SPCPs would make implementation of the programs more costly, and that it expected fewer SPCPs to exist, relative to the baseline, as a result. The proposal's language is consistent with the characterization of commenters who argued that the new requirements would make it more burdensome to run SPCPs, although commenters generally suggested a more substantial impact than the Bureau's characterization in the proposal.

Despite a lack of comprehensive data on the number of SPCPs and the loans provided under them, the Bureau offered several references to Federal agency comments about the existence of SPCPs, publicly available information on SPCP purchases by GSEs, and the size of individual lenders' SPCP commitments in its proposal. Information provided by the commenters also showed that lending under SPCPs is a very small fraction of consumer lending in the United States.

The Bureau continues to acknowledge that the SPCP provisions finalized in this rule are likely to lead to a reduction in SPCPs, but the overall impact is likely to be small relative to overall lending, since SPCPs affect a very small proportion of consumer lending.

Benefits to Consumers

Some consumers will likely benefit from the changes in the form of additional credit availability. Designing and operating SPCPs involves meaningful administrative costs as well as, in many cases, accepting higher levels of risk from program participants. It is possible that creditors decide to provide fewer loans outside of the SPCP in response to these costs. Thus, consumers who do not qualify for an existing SPCP may see additional credit availability if the changes cause creditors to discontinue their SPCPs and make those funds available to borrowers at large, or else to broaden the eligibility criteria for existing SPCPs previously limited to certain prohibited basis groups. For reasons explained above, the Bureau has reason to believe that SPCPs currently account for an insignificant portion of consumer lending. The Bureau therefore believes that the extent to which consumers will benefit from additional credit availability as a result of this regulatory change is likely small.

A consumer advocate commenter stated that there are no benefits from the proposed SPCP changes, and the only potential benefit suggested by the Bureau is a hypothetical possibility that people who are not members of the specific protected class groups previously benefited by SPCPs might enjoy greater access to credit due to creditors no longer offering SPCPs. The commenter asserted that any impact from such possibility would be undetectable given the low number of SPCPs to date.

The Bureau believes this comment is consistent with its analysis from the proposal. It is possible for consumers to benefit economically from additional credit availability, but this benefit is likely small.

An individual commenter stated that SPCPs expand the overall market by serving populations previously excluded. The Bureau notes that this is not necessarily the case because an SPCP does involve some costs to the lender. These costs include the resources devoted to creating and administering the program as well as additional risks if, for instance, the lender relaxes credit standards for SPCP eligible applicants. Since administering an SPCP takes up lenders' resources, some lenders may redirect these newly available resources to non-SPCP applicants under the provision and the total effect on the overall market is ambiguous.

Costs to Consumers

Consumers who benefit from an SPCP under the baseline will likely see this benefit reduced or removed under the changes. This includes consumers who receive credit from an SPCP when they otherwise would not have, as well as consumers who receive more favorable credit terms under an SPCP than they otherwise would have in the absence of the SPCP. To the extent that the changes cause lenders to remove SPCPs or redesign programs such that these consumers no longer benefit, customers will incur a cost.

The Bureau lacks the necessary data to estimate the total cost of the changes to consumers. However, as described in the previous part, the Bureau has reason to believe that the prevalence of SPCPs is quite low, and, at a market level, the total number of consumers receiving benefits under SPCPs likely represents a small portion of total credit. Therefore, the Bureau expects the costs to consumers to be small from the changes to Regulation B related to SPCPs.

Multiple commenters argued that the Bureau's changes to SPCPs will harm borrowers, particularly women and minority borrowers. Several argued that SPCPs were important tools to address disparities in credit access. Multiple commenters provided citations for evidence on the existence of gaps in credit access by race, ethnicity, and sex. Commenters argued that the Bureau failed to take the effect of SPCPs on credit access gaps into consideration as part of its analysis. An individual commenter stated that SPCPs expand the overall market by serving populations previously excluded.

In part V.F of the proposal, the Bureau acknowledged that there are consumers who benefit from SPCPs, and such consumers would incur a cost if the Bureau's SPCP provisions affect a lender's willingness or ability to offer an SPCP. This includes situations where an SPCP offers consumers credit when they otherwise might not have, more favorable credit terms than they otherwise might have, or financial assistance towards fees or downpayment. However, as stated above, the Bureau's review of the size of existing SPCPs, while lacking comprehensive data, nevertheless suggests that the prevalence of SPCPs is low relative to the overall size of consumer lending. Thus, the Bureau continues to believe that potential negative effects to consumers from the SPCP provisions it is finalizing will not have a significant negative effect on consumers.

One policy group commenter noted that the Bureau did not seek out other sources of data which could be used to quantify the costs to consumers from the proposed SPCP provisions. The commenter noted that the Bureau did not review SPCP documents provided by lenders to the Bureau or solicit documentation on SPCPs from lenders. The commenter also noted that the Bureau did not seek loan-level data on loan purchases by GSEs from FHFA which document the amount of SPCP-related loan purchases by GSEs. Lastly, the commenter argued that the Bureau must have data on SPCPs via its supervision or enforcement authorities and possibly have mandated their use as part of a remedy for a violation.

In its proposal, the Bureau qualitatively described the potential cost to consumers from a reduction in the number and size of SPCPs but stated that it lacked comprehensive information on the full scale of lending under SPCPs. The Bureau does not believe that a review of SPCP plans would provide meaningful information on the quantitative scale of the potential cost to consumers. The SPCP plans, generally, can describe the structure of a program and sometimes describe the amount or expected size of the program for an individual lender. The limited information the Bureau might have or could obtain from such plans would not meaningfully affect its ability to quantify the total effect of the changes to SPCPs. The Bureau principally lacks comprehensive information on the scale of lending under SPCPs, rather than what SPCPs offer for beneficiaries of the programs.

To the extent the Bureau is aware, data from FHFA would be most useful towards understanding the potential amount of lending under SPCPs. To this end the Bureau used public sources to describe the extent of SPCP loan purchases by GSEs in the proposal. The Bureau does not believe that additional data from FHFA about GSE purchases would have provided additional useful information to quantify the costs to consumers of the proposed SPCP provisions beyond the publicly available information on overall purchases.

The Bureau may review a lenders' SPCP plans upon request. However, the Bureau's Office of Supervision does not mandate the use of SPCPs nor generally collect data on the administration of SPCPs as part of its authority. Any information regarding SPCPs from individual financial institutions under its supervisory authority would not provide sufficient information to estimate the potential cost to consumers from the proposed changes.

F. Potential Impacts of the Final Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

The Bureau believes that nearly all depository institutions and credit unions with $10 billion or less in total assets are subject to Regulation B and therefore subject to the changes described above. To estimate the number of covered depository institutions with $10 billion or less in total assets, the Bureau uses data collected by the Federal Financial Institutions Examination Council's (FFIEC's) Reports of Condition and Income (Call Reports). To estimate the number of credit unions with $10 billion or less in total assets, the Bureau uses data collected by the National Credit Union Administration's (NCUA) Call Reports. Based on the 2024Q4 FFIEC Call Reports, there are 4,328 banks with $10 billion or less in total assets. Based on 2025Q2 NCUA Call Report data, there are 4,348 credit unions with $10 billion or less in total assets.

The Bureau expects that the impacts of the rule on depository institutions and credit unions with $10 billion or less are likely similar to the impacts on covered institutions more broadly. These institutions are likely to benefit from the compliance cost savings produced by the disparate impact and discouragement provisions, while possibly incurring a one-time adjustment cost of changing systems and procedures to comply with this final rule. For more discussion, see part V.E above. The Bureau also expects that the amount of lending under SPCPs is likely to be low among depository institutions and credit unions with $10 billion or less, similar to covered entities, more broadly. Therefore, the Bureau expects that the impact of the SPCP provisions on these entities will, likewise, be small.

G. Potential Impacts on Consumers in Rural Areas, as Described in Section 1026

This part assesses the potential impact of the amendments to Regulation B on rural consumers. The Bureau evaluates the provisions jointly given their overall implications on fair lending protections and credit access for rural consumers.

Consumers in rural areas may experience greater impact from fewer protections against disparate impact because of the changes to Regulation B. Without disparate-impact liability, covered persons may curtail their efforts in reviewing and mitigating neutral policies that could disproportionately exclude some rural borrowers. One potential reason for this exclusion is that the loan application process in rural areas often involves consideration of informal or soft information, given the small-dollar or agricultural nature typical of such rural loans. On the other hand, other rural borrowers may experience increased credit availability.

The Bureau expects that rural consumers will face many of the same costs and benefits from the changes to discouragement provisions as described above in part V.E. It is possible that rural consumers of prohibited basis groups will be excluded from advertising about products from which they would have benefitted, relative to the baseline. They also may experience fewer protections from discouraging behavior by lenders made at the pre-application stage, relative to the baseline. On the other hand, other rural consumers may experience more advertisements and an increased number of product choices because lenders can conduct more targeted advertising campaigns and offer certain products to subsets of consumers when they otherwise could not under the baseline. As described in the previous section, the overall impact to rural consumers is ambiguous because covered persons are still liable under other antidiscrimination statutes such as FHA and State laws similar to ECOA, so the incentives for covered persons to implement policies or engage in practices that lead to disparate impact or discouragement may be restricted.

Conditions on SPCP eligibility criteria will curtail programs designed to increase lending to consumers of prohibited basis groups in rural areas. Consumers who benefit from targeted mortgages and small business SPCPs could face higher barriers to credit access and fewer opportunities for entrepreneurship. However, as described in the previous section, the Bureau believes that the prevalence of SPCPs is quite low and the total number of consumers receiving benefits under SPCPs represent a small portion of any credit market. Therefore, the changes to SPCPs will likely have a small impact on rural consumers.

VI. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units,

and small not-for-profit organizations.[213] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[214] Potentially affected small entities include depository and non-depository providers of credit.

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[215] The Bureau also is subject to certain additional procedures under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[216] which amended the RFA by requiring the convening of a panel to consult with small business representatives, commonly called a SBREFA panel, in addition to publishing a report, prior to proposing a rule for which an IRFA is required.[217]

The RFA does not require an initial or final regulatory flexibility analysis in a rulemaking when the rule will not have a significant economic impact on a substantial number of small entities. Similarly, convening a SBREFA panel and report are not required when the rule will not have a significant economic impact on a substantial number of small entities. The Bureau does not expect the rule to impose significant economic impacts on small entities relative to the baseline. Any effects, including one-time costs, are expected to be small for each entity. That is, the Bureau does not expect any entity to have a significant cost as a result of this final rule. In part V.E, the Bureau described how the size of SPCPs as a share of a lender's overall portfolio is expected to be small based on existing evidence. In part V.E, the Bureau also described how the prevalence of SPCPs is low and the Bureau expects this is true of (and especially for) small entities. Therefore, the Bureau does not expect the SPCP provisions to affect a substantial number of small entities.

Accordingly, the Acting Director certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Several commenters, including policy group and consumer advocate commenters, argued that the Bureau needs to complete both an IRFA and FRFA and convene a SBREFA panel. A policy group commenter also noted that the Bureau did not provide a persuasive rationale why convening a SBREFA panel was unnecessary. That commenter also claimed that the Bureau's certification of no significant economic impact on a substantial number of small entities lacks an adequate factual basis. By certifying that the final rule will not have a significant economic impact on a substantial number of small entities, the Bureau does not have to complete an initial/final RFA or convene a SBREFA panel and report.

Several commenters, including policy group and consumer advocate commenters, noted several studies, including a 2024 Bureau published report ''Matched-Pair Testing in Small Business Lending Markets,'' that show that discrimination and/or discouragement occur within the small business credit market even under the prior Regulation B regime. A consumer advocate commenter argued that a rollback of these requirements will affect the lending and borrowing activities of small and medium-sized creditors, and consequently, the Bureau should have convened a SBREFA panel. Similarly, another consumer advocate commenter stated that the Bureau neglected to consider the effects of the entire proposed rule as a whole, and, if the Bureau had made those considerations, it would have needed to complete an initial/final RFA and the SBREFA process. Finally, a policy group commenter claimed that the Bureau neglected to consider or analyze the impacts on small lenders.

In response to the comments about the 2024 Bureau report, in the Executive Summary of that report, the Bureau wrote at the time that ''[g]iven the design and scope of this pilot research, these findings should not be generalized to the broader small business lending market or to specific financial institutions.'' [218]

The Bureau previously considered and analyzed the impacts on small lenders and concluded that there was no significant economic impact on a substantial number of small entities. As part of the process of reaching this conclusion, the Bureau typically assesses the effect on small businesses directly covered by the proposed rule. In this instance, that would be small businesses operating as creditors who would be bound by the requirements of the proposed rule. However, in preparing the proposal, the Bureau nonetheless assessed whether the consideration of small businesses as credit applicants was likely to change its conclusion and determined that it was not.

Both a policy group commenter and a consumer advocate commenter argued that, for the Bureau to certify that the proposal would not have a significant economic impact on a substantial number of small entities, the Bureau needed to use more robust data and consider the benefits of the proposal. Similarly, these commenters also argued that the Bureau needed to use more data and take additional analytical, statistical, quantitative, and methodological steps to satisfy the RFA.

For determining whether a proposal would have a significant economic impact on a substantial number of small entities, the Bureau does not need to consider the benefits of the rule for small entities. Additionally, the Bureau believes it has used the best data available and has taken the necessary steps to reasonably and fully consider relevant costs to small entities. Commenters did not provide or suggest any additional data or analyses that would improve or change the Bureau's analysis. Once the Bureau determines that a proposal would not have a significant economic impact on a substantial number of small entities, then the Bureau does not need to complete an initial/final RFA.

VII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies are generally required to seek the Office of Management and Budget (OMB)'s approval for information collection requirements prior to implementation. The collections of information related to Regulation B have been previously reviewed and approved by OMB and assigned OMB Control Number 3170–0013 (Regulation B). Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau received one comment related to the PRA, stating that the Bureau underestimates the rule's

[213] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any small governmental units or not-for-profit organizations to which this final rule would apply.

[214] 5 U.S.C. 601(3) (the Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment).

[215] 5 U.S.C. 603 through 605.

[216] Public Law 104–121, tit. II, 110 Stat. 857 (5 U.S.C. 601 note).

[217] 5 U.S.C. 609.

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

burden. The Bureau acknowledges this comment, but the Bureau has determined that this final rule will not impose any new or revised information collection requirements (recordkeeping, reporting, or disclosure requirements) on covered entities or members of the public that would constitute collections of information requiring OMB approval under the PRA.

VIII. Severability

The Bureau intends that the provisions of the final rule are separate and severable from one another. If any provision of the final rule, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue to be in effect. The Bureau has designed each provision to operate independently so that the effect of each provision will continue regardless of whether one or another provision is not effectuated. Therefore, provisions related to disparate impact, discouragement, and special purpose credit programs are intended to be separate and severable. Moreover, aspects of these provisions are also intended to be severable, if any portion is not effectuated, including the changes to the discouragement provision and the prohibitions and conditions for special purpose credit programs.

IX. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Bureau will submit a report containing this final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the final rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this final rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

X. Executive Order 12866

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select those regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; and distributive impacts). Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, or the President's priorities. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this action is an economically significant regulatory action under section 3(f)(1) of E.O. 12866, as amended. Accordingly, OMB has reviewed this action. This rule is considered a deregulatory action under E.O. 14192.

List of Subjects in 12 CFR Part 1002

Banks, banking, Civil rights, Consumer protection, Credit, Credit unions, Marital status discrimination, National banks, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation B, 12 CFR part 1002, as set forth below:

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b. Subpart B is also issued under 15 U.S.C. 1691c–2.

Subpart A—General

■ 2. Amend § 1002.4 by revising paragraph (b) to read as follows:

§ 1002.4 General rules.

* * * * *

(b) *Discouragement.* A creditor shall not make any oral or written statement, in advertising or otherwise, directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristic(s). For purposes of this paragraph (b), oral or written statements are spoken or written words, or visual images such as symbols, photographs, or videos.

* * * * *

■ 3. Amend § 1002.6 by revising paragraph (a) to read as follows:

§ 1002.6 Rules concerning evaluation of applications.

(a) *General rule concerning use of information.* Except as otherwise provided in the Act and this part, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis. The Act does not provide that the ''effects test'' applies for determining whether there is discrimination in violation of the Act.

* * * * *

■ 4. In § 1002.8:

■ a. Revise paragraphs (a)(3)(i) and (ii), the heading of paragraph (b), and paragraph (b)(2).

■ b. Add paragraphs (b)(3) and (4).

■ c. Revise paragraph (c).

The revisions and additions read as follows:

§ 1002.8 Special purpose credit programs.

(a) * * *

(3) * * *

(i) The program is established and administered pursuant to a written plan that:

(A) Identifies the class of persons that the program is designed to benefit;

(B) Sets forth the procedures and standards for extending credit pursuant to the program;

(C) Provides evidence of the need for the program;

(D) Explains why, under the organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program; and

(E) When the persons in the class are required to share one or more common characteristics that would otherwise be a prohibited basis, explains why meeting the special social needs addressed by the program:

(*1*) Necessitates that its participants share the specific common characteristics that would otherwise be a prohibited basis; and

(*2*) Cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria; and

(ii) The program is established and administered to extend credit to a class of persons who, under the organization's standards of creditworthiness, would not receive such credit.

(b) *Controlling provisions*—

* * * * *

(2) *Common characteristics.* A program described in paragraph (a)(2) or (3) of this section qualifies as a special purpose credit program only if it was

established and is administered so as not to discriminate against an applicant on any prohibited basis; however, except as provided in paragraphs (b)(3) and (4) of this section, all program participants may be required to share one or more common characteristics that would otherwise be a prohibited basis so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.

(3) *Prohibited common characteristics.* A special purpose credit program described in paragraph (a)(3) of this section shall not use the race, color, national origin, or sex, or any combination thereof, of the applicant, as a common characteristic or factor in determining eligibility for the program.

(4) *Otherwise prohibited bases in for-profit programs.* Subject to paragraph (b)(3) of this section, a special purpose credit program described in paragraph (a)(3) of this section may require its participants to share one or more common characteristics that would otherwise be a prohibited basis only if the for-profit organization provides evidence for each participant who receives credit through the program that in the absence of the program the participant would not receive such credit as a result of those specific characteristics.

(c) *Special rule concerning requests and use of information.* If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more common characteristics that would otherwise be a prohibited basis and if the program otherwise satisfies the requirements of paragraphs (a) and (b) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

* * * * *

■ 5. Amend § 1002.15 by revising paragraph (d)(1)(ii) to read as follows:

§ 1002.15 Incentives for self-testing and self-correction.

(d) * * *

(1) * * *

(ii) By a government agency or an applicant in any proceeding or civil action in which a violation of the Act or this part is alleged.

* * * * *

■ 6. In supplement I to part 1002:

■ a. Under *Section 1002.2—Definitions,* revise *2(p)—Empirically derived and other credit scoring systems.*

■ b. Under *Section 1002.4—General Rules,* revise *Paragraph 4(b).*

■ c. Under *Section 1002.6—Rules Concerning Evaluation of Applications,* revise *6(a)—General rule concerning use of information.*

■ d. Under *Section 1002.8—Special Purpose Credit Programs,* revise *8(a), 8(b),* and *8(c).*

The revisions read as follows:

Supplement I to Part 1002—Official Interpretations

* * * * *

Section 1002.2—Definitions

* * * * *

2(p) Empirically Derived and Other Credit Scoring Systems

1. *Purpose of definition.* The definition under § 1002.2(p)(1)(i) through (iv) sets the criteria that a credit system must meet in order to use age as a predictive factor. Credit systems that do not meet these criteria are judgmental systems and may consider age only for the purpose of determining a ''pertinent element of creditworthiness.'' (Both types of systems may favor an elderly applicant. See § 1002.6(b)(2).)

2. *Periodic revalidation.* The regulation does not specify how often credit scoring systems must be revalidated. The credit scoring system must be revalidated frequently enough to ensure that it continues to meet recognized professional statistical standards for statistical soundness. To ensure that predictive ability is being maintained, the creditor must periodically review the performance of the system. This could be done, for example, by analyzing the loan portfolio to determine the delinquency rate for each score interval, or by analyzing population stability over time to detect deviations of recent applications from the applicant population used to validate the system. If this analysis indicates that the system no longer predicts risk with statistical soundness, the system must be adjusted as necessary to reestablish its predictive ability. A creditor is responsible for ensuring its system is validated and revalidated based on the creditor's own data.

3. *Pooled data scoring systems.* A scoring system or the data from which to develop such a system may be obtained from either a single credit grantor or multiple credit grantors. The resulting system will qualify as an empirically derived, demonstrably and statistically sound, credit scoring system provided the criteria set forth in § 1002.2(p)(1)(i) through (iv) are met. A creditor is responsible for ensuring its system is validated and revalidated based on the creditor's own data when it becomes available.

4. *Disparate treatment.* An empirically derived, demonstrably and statistically sound, credit scoring system may include age as a predictive factor (provided that the age of an elderly applicant is not assigned a negative factor or value). Besides age, no other prohibited basis may be used as a variable. Generally, credit scoring systems treat all applicants objectively and thus avoid problems of disparate treatment. In cases where a credit scoring system is used in conjunction with individual discretion, disparate treatment could conceivably occur in the evaluation process.

* * * * *

Section 1002.4—General Rules

* * * * *

Paragraph 4(b)

1. *Discouragement.* Generally, the regulation's protections apply only to persons who have requested or received an extension of credit. In keeping with the purpose of the Act—to promote the availability of credit on a nondiscriminatory basis—§ 1002.4(b) prohibits creditors from making oral or written statements directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s). For purposes of § 1002.4(b), encouraging statements directed at one group of consumers cannot discourage other consumers who were not the intended recipients of the statements.

i. Statements prohibited by § 1002.4(b) include:

A. A statement that the applicant should not bother to apply, after the applicant states that he is retired.

B. Statements directed at the general public that express a discriminatory preference or a policy of exclusion against consumers based on one or more prohibited basis characteristics in violation of the Act.

C. The use of interview scripts that discourage applications on a prohibited basis.

ii. Statements not prohibited by § 1002.4(b) include:

A. Statements directed at one group of consumers, encouraging that group of consumers to apply for credit.

B. Statements in support of local law enforcement.

C. Statements recommending that, before buying a home in a particular neighborhood, consumers investigate,

for example, the neighborhood's schools, its proximity to grocery stores, and its crime statistics.

D. Statements encouraging consumers to seek out resources to develop their financial literacy.

* * * * *

Section 1002.6—Rules Concerning Evaluation of Applications

6(a) General Rule Concerning Use of Information

1. *General.* When evaluating an application for credit, a creditor generally may consider any information obtained. However, a creditor may not consider in its evaluation of creditworthiness any information that it is barred by § 1002.5 from obtaining or from using for any purpose other than to conduct a self-test under § 1002.15.

2. *Disparate treatment.* The Act prohibits practices that discriminate on a prohibited basis regarding any aspect of a credit transaction. The Act does not provide for the prohibition of practices that are facially neutral as to prohibited bases, except to the extent that facially neutral criteria function as proxies for protected characteristics designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

* * * * *

Section 1002.8—Special Purpose Credit Programs

8(a) Standards for Programs

1. *Determining qualified programs.* The Bureau does not determine whether individual programs qualify for special purpose credit status, or whether a particular program benefits an ''economically disadvantaged class of persons.'' The agency or creditor administering or offering the loan program must make these decisions regarding the status of its program.

2. *Compliance with a program authorized by Federal or State law.* A creditor does not violate Regulation B when it complies in good faith with a regulation promulgated by a government agency implementing a special purpose credit program under § 1002.8(a)(1). It is the agency's responsibility to promulgate a regulation that is consistent with Federal and State law.

3. *Expressly authorized.* Credit programs authorized by Federal or State law include programs offered pursuant to Federal, State, or local statute, regulation or ordinance, or pursuant to judicial or administrative order.

4. *Creditor liability.* A refusal to grant credit to an applicant is not a violation of the Act or regulation if the applicant does not meet the eligibility requirements under a special purpose credit program.

5. *Determining need.* In designing a special purpose credit program under § 1002.8(a)(3), a for-profit organization must determine that the program will benefit a class of people who would otherwise be denied credit. This determination can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies. For example, a creditor might design new products to reach consumers who would not meet its traditional standards of creditworthiness due to such factors as credit inexperience or the use of credit sources that may not report to consumer reporting agencies. Or, a bank could review Home Mortgage Disclosure Act data along with demographic data for its assessment area.

6. *Elements of the program.* The written plan must contain information that supports the need for the particular program. The plan also must either state a specific period of time for which the program will last, or contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it.

8(b) Controlling Provisions

1. *Applicability of rules.* A creditor that rejects an application because the applicant does not meet the eligibility requirements (common characteristic or financial need, for example) must nevertheless notify the applicant of action taken as required by § 1002.9.

2. *Use of common characteristics.* Section 1002.8(b)(2) permits a creditor to determine eligibility for a special purpose credit program using one or more common characteristics that would otherwise be a prohibited basis only so long as that section's requirements, the requirements of § 1002.8(b)(3) and (4), and the other requirements of this part are satisfied. Under § 1002.8(b)(2), once the characteristics of the program's class of participants are established, the creditor is prohibited from discriminating among potential participants on a prohibited basis.

8(c) Special Rule Concerning Requests and Use of Information

1. *Request of prohibited basis information.* This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§ 1002.5 and 1002.6 to determine an applicant's eligibility for a particular program.

2. *Example.* An example of a program under which the creditor can ask for and consider information about a prohibited basis is an energy conservation program to assist the elderly, for which the creditor must consider the applicant's age.

* * * * *

Russell Vought,

Acting Director, Consumer Financial Protection Bureau.

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