A Fair Lending Request for Information from the Consumer Financial Protection Bureau

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Categories:

Publications

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On August 19, 2020, the comment period related to the fair lending request for information discussed in detail below was extended from the initial date of October 2, 2020 to December 1, 2020 to allow interested persons more time to consider and submit their comments

On July 28, 2020, the Consumer Financial Protection Bureau ("Bureau") issued a request for information (RFI) with a desired outcome of a regulatory environment that expands access to nondiscriminatory credit and in a more inclusive financial system. The Bureau is soliciting comments concerning actions which it can, or should, take to prevent discrimination in lending and to develop viable solutions to regulatory compliance challenges under the Equal Credit Opportunity Act (ECOA) and its implementing Regulation B.

The RFI is straightforward. It asks that interested members of the public — which the Bureau anticipates will include financial institutions and their service providers; trade associations; individual consumers, fair lending, civil rights, consumer and community advocates; Federal, Tribal, State and local regulators and agencies; researchers or members of academia; or attorneys who represent any of the above — to respond to questions related to the topic of fair lending.

The Bureau's questions are encouraging and give interested parties an opportunity to seek clarification on many topics from Special Purpose Credit Programs to small business lending to the federal preemption of state law. The Bureau is permitting additional comments related to fair lending and the topic of inclusion. Early submission to the RFI is encouraged, but all submissions are due 60 days from the date of the RFI's publication in the Federal Register.

- **Disparate Impact:** Is more clarity needed from the Bureau regarding its approach to disparate impact analysis under ECOA and/or Regulation B? The Bureau further requests, if so, in what way(s)?
- **Limited English Proficiency:** Is additional clarity needed from the Bureau under ECOA and/or Regulation B to further encourage creditors to provide assistance, products, and services in languages other than English to consumers with limited English proficiency? If so, in what way(s)?
- **Special Purpose Credit Program (SPCP):** Is there a need for the Bureau to address any potential regulatory uncertainty and facilitate the use of SPCPs? If so, in what way(s)? For example, should the Bureau clarify any of the SPCP provisions in Regulation B?
- **Affirmative Advertising to Disadvantaged Group:** Is there a need for the Bureau to provide clarity under ECOA and/or Regulation B that would further encourage creditors to use affirmative advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?
- **Small Business Lending:** The majority opinion in *Bostock v. Clayton County* interpreted Title VII and did not address ECOA matters. Should the Supreme Court's *Bostock* decision influence how the Bureau interprets ECOA's prohibition of discrimination on the basis of sex? Is so, in what way?
- **Scope of Federal Preemption of State Law:** What are examples of potential conflicts or intersections between state laws, state regulations, and ECOA and/or Regulation B, and should the Bureau address such potential conflicts or intersections? For example, should the Bureau provide further guidance to assist creditors evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B?
- **Public Assistance Income:** Is there a need for the Bureau to provide additional clarity under ECOA and/or Regulation B regarding when all or part of the applicant's income derives from any public assistance program? If so, in what way(s)? For example, should it provide guidance on how to address

situations where creditors seek to ascertain the continuance of public assistance benefits in underwriting decisions?

- **Artificial Intelligence and Machine Learning:** Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML? If so, in what way(s)?
- **ECOA Adverse Action Notices:** Is there a need for the Bureau to provide lenders additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor, requiring a notification that includes a statement of specific reasons for the adverse action? If so, in what way(s)?

Consider your challenges in complying with ECOA and Regulation B. What are your pain points? Do you find your lending numbers show possible disparate treatment, but you are unsure what aspect of the lending policies are causing the disparities? Have you considered implementing a Special Purpose Credit Program and found the lack of resources and guidance to be daunting? What do you want to ask the Bureau?

The Bureau's July 28 request for information is both broad in scope and an opportunity to appropriately address compliance concerns in this area. Should you need assistance in framing your submission to this RFI, please contact Nancy Presnell or any attorney on Frost Brown Todd's Consumer Financial Services and Consumer Protection team.

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[i] Bostock v. Clayton County, Georgia 140 S.C. 1731, June 15, 2020