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CFPB Should Reform Regulation B to Protect Consumers from Credit Discrimination in Today's Marketplace

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The Equal Credit Opportunity Act (ECOA) is the primary bulwark against discrimination in credit transactions on such grounds as race, religion, national origin, sex, marital status, and age. Regulation B, which implements this important statute, is obsolete and contains loopholes that undermine its goals. Regulation B should be updated by the Consumer Financial Protection Bureau to reflect changes in the marketplace. The improvements summarized below will further the goal of promoting the availability of credit to all creditworthy applicants on a non-discriminatory basis.

1. Amend Regulation B to Enable Collection and Analysis of Auto Finance Data in Order to Address Discrimination in Automobile Finance

For most consumers, a car is the first or second most expensive purchase they will make in their lives, second only to purchase a home. Accordingly, discrimination in auto finance should be a matter of great concern. Yet Regulation B's data collection requirements are inadequate even to identify discrimination in auto finance, much less to address it.

Several academic studies and class action lawsuits have shown that discretionary automobile markup policies have a disparate impact on minorities in vehicle financing. Documenting this disparate impact has required needlessly complicated and expensive methods, however.

The problem is that Regulation B prohibits non-mortgage lenders from asking about or documenting a consumer's race. Regulation B allows creditors to ask for and document race and other information for *mortgage* lending, and in fact regulations under the Home Mortgage Disclosure Act (HMDA) mandate that lenders collect this information about their mortgage lending. This data has been instrumental in identifying discriminatory lending patterns, proving disparate impact claims, and enforcing anti-discrimination statutes. Similar data collection in the auto finance area could be even more effective, as privacy concerns are somewhat different than for mortgages. Therefore more data could be publicly available related to auto financing without raising privacy concerns. The Government Accountability Office and other commentators have noted that requiring lenders to collect and report such data could assist in stopping discrimination.[1] *Regulation B should allow for protected-class data collection for auto finance transactions in order to better address auto lending discrimination.*

[1] U.S. Government Accountability Office, Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending, GAO-08-698 (June 2008).

2. Strengthen Protections Against Reverse Redlining

"Reverse redlining" is the practice of targeting borrowers or neighborhoods for offers of credit with disadvantageous terms based on race or other prohibited characteristics. Reverse redlining has led to a disproportionately high foreclosure rate in minority neighborhoods throughout the United States. The importance of ending reverse redlining cannot be overstated.

Although a number of cases acknowledge that reverse redlining claims are cognizable under the FHA, the ECOA, the federal Civil Rights Act, and state discrimination statutes, inconsistency still exists among some courts. Explicit recognition that these types of claims are cognizable would aid the courts, clear up confusion, and help consumers who have been harmed by this form of discrimination. *The Bureau should update Regulation B to affirmatively state that reverse redlining claims are cognizable under the ECOA and Regulation B.*

Another problem is that courts have adopted unduly stringent requirements for proving reverse redlining. Borrowing from employment cases, courts have required the plaintiff to prove that he or she was qualified for the credit upon which the application was based. This requirement is an unnecessary barrier to a reverse redlining claim: if a borrower was given an abusive, unaffordable loan, the fact that he or she did not qualify for it should be treated as one of the reasons the loan is abusive, not as a barrier to the claim. *Regulation B should clearly indicate that evidence of intentional targeting of protected groups or communities with high concentrations of protected groups will establish a prima facie case of discriminatory treatment.*

Regulation B also should make clear that, absent direct evidence, a prima facie case can be established with circumstantial evidence, the elements of which would be: 1) the borrower is a member of a protected class or lives in a community with a high concentration of such borrowers; 2) the borrower applied for or was given a loan by the defendant; 3) the loan was given on substantially unfavorable terms and; 4) the lender either concentrates its business on such borrowers or communities or the lender makes loans on more favorable terms to other people or in other communities.

3. Promulgate Disparate Impact Regulations for the ECOA in Coordination with the FHA Disparate Impact Regulations

One means of proving discrimination under the ECOA and the Fair Housing Act is proving disparate impact. Under a disparate impact theory, a creditor who may not be directly treating applicants differently on a prohibited basis may nevertheless commit illegal discrimination if the *effect* of the creditor's practices adversely impacts a protected class. This disparate impact standard was first enunciated in *Griggs v. Duke Power Co.* and is now widely used as a basis for proving discrimination under both the ECOA and the Fair Housing Act. The Bureau should promulgate disparate impact regulations for the

ECOA, using the *Griggs* standard of proof and coordinating these efforts with the Department of Housing and Urban Development (HUD)'s Fair Housing Act disparate impact regulations. *Importing the Griggs standard of proof into Regulation B and coordinating those efforts with HUD would maintain consistency and provide a coherent set of applicable guidelines.*

4. Amend Regulation B To Require an Adverse Action Notice When a Counteroffer is Made

The ECOA requires a creditor who takes adverse action on an application for credit to give the applicant an adverse action notice. This requirement has the potential to deter bait-and-switch tactics, by alerting the consumer that the offered terms are less favorable than those for which the consumer applied. However, in its current form Regulation B undercuts this goal by defining "adverse action" not to include a refusal to grant credit on the terms requested if the creditor makes a counteroffer that the consumer accepts.

By creating this loophole for rejections accompanied by counteroffers, Regulation B encourages bait-and-switch tactics. For example, it means that borrowers can be presented with different loan terms at the point when the loan closes, without any indication that the terms have changed, and when it may be too late to find another lender.

In some circumstances, this gap will be filled by the risk-based pricing notice required by the Fair Credit Reporting Act (FCRA), but only when the offer of less favorable credit terms is due to a credit report or score—not when it is based on the discriminatory factors that the ECOA is intended to address. The Truth in Lending Act's requirement of early disclosures also does not fill this gap, as early disclosures are required only for certain mortgage loans, and even then do not directly inform the applicant that the terms requested have been changed. *Applicants who are offered less advantageous credit than that for which they applied should receive an adverse action notice regardless of whether they accept the creditor's counteroffer.*

5. Expand Record Keeping Requirements to Include Brokers and Dealers

The ECOA defines the term "creditor" broadly. It includes not only any person who regularly extends, renews, or continues credit, but also any person who regularly arranges for an extension, renewal, or continuation of credit.[2] Regulation B, however, interprets this definition narrowly. Under Regulation B, a person who refers applicants to creditors but does not participate in the credit decision is considered a "creditor" only for purposes of the ECOA's anti-discrimination provisions, but not its other requirements, including its record-keeping requirements.[3]

[2] 15 U.S.C. §1691a (e).

[3] Reg. B, 12 C.F.R. §202.2(l).

Discrimination by loan brokers, automobile dealers, and others can prevent creditworthy consumers from receiving credit. The actions of brokers, dealers and similar entities fall along a continuum, with some being sufficiently involved in the credit decision to be considered creditors for all purposes. However, it is difficult to prove that a broker, for example, should be considered a creditor for all purposes without the availability of records. *The definition of creditor should be expanded to require that persons who refer applicants to creditors are subject to ECOA record-keeping requirements.*