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The CFPB's Proposed Disparate Impact Amendments to Regulation B

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By: Peter N. Cubita, Michael R. Guerrero

Earlier this year, President Trump issued Executive Order 14281 (the "Executive Order") directing a review of existing federal regulations and guidance documents that impose disparate impact liability (sometimes referred to as "effects test" liability) to determine whether they should be amended or repealed "as appropriate under applicable law."[1]

In the aftermath of the Executive Order, the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Federal Deposit Insurance Corporation (FDIC) issued bulletins and letters informing supervised entities of the steps that they are taking to conform their fair lending supervisory expectations.[2]

Those steps include no longer examining for disparate impact liability and removing disparate impact liability references from various guidance documents. In its recent Fair Lending Report, the Consumer Financial Protection Bureau (CFPB) likewise stated that it "will no longer use disparate impact in its supervision and enforcement of fair lending laws" and, to that end, it had "closed all elements of open exams and investigations that relied on disparate impact liability" and "terminated CFPB orders that relied on disparate impact liability."[3]

The CFPB also recently took the next step and proposed significant disparate impact amendments to Regulation B, which implements the Equal Credit Opportunity Act (ECOA). The Executive Order directive was particularly apropos with respect to Regulation B, which currently contains the following language regarding the "effects test": "The legislative history of the Act indicates that Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness."[5]

This statement, suggesting that disparate impact claims are cognizable under the ECOA, and two additional references to the "effects test" in the Official Staff Commentary to Regulation B, are based solely on references to the "effects test" in Congressional reports accompanying the 1976 ECOA amendments. However, as the CFPB

explains in its recent proposal,[6] and as commentators have previously noted, the ECOA does not contain language proscribing discriminatory ***effects.*** The statute merely declares 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" or any other prohibited basis.[8]

While the effects test has been applied in ECOA enforcement actions and referenced in supervisory manuals and guidance documents, scant attention has been paid to the text of the ECOA discrimination proscription and the fact that it is materially different from other federal discrimination statutes whose text the Supreme Court has analyzed and found to contemplate an effects test. In this connection, the Supreme Court has held that disparate impact claims are cognizable under other federal discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Emergency School Aid Act, and the Fair Housing Act, the text of which contains "effects"-based language.[9] In its proposed rule, the CFPB notes that language of this nature is conspicuously absent from the ECOA.

Proposed Amendments

In the Supplementary Information accompanying the proposed rule, the CFPB states that it has determined preliminarily "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."[11] The proposed amendments would remove existing references to the "effects test" from Regulation B and its Official Staff Commentary, and add to Regulation B a sentence affirmatively stating that "[t]he Act does not provide that the 'effects test' applies for determining whether there is discrimination in violation of the Act." If adopted, the proposed rule would also add the following comment to the Official Staff Commentary to Regulation B:

> *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.**

Proposed Comment 1002.6(a)-2 (emphasis added). With respect to the language relating to proxies, the CFPB explained that "consumers would remain protected under the ECOA from disparate treatment, including facially neutral policies and procedures that creditors adopt as proxies for ***intentional*** discrimination."[12]

In addition to the disparate impact revisions, the proposed rule would:

> (i) clarify and narrow the scope of the existing prohibition against discouraging an applicant on a prohibited basis; and
>
> (ii) add new prohibitions and restrictions for special-purpose credit programs ("SPCPs"), with a focus on those offered by for-profit organizations or in which a for-profit organization participates to meet special

social needs.

With respect to discouragement, Regulation B currently prohibits creditors broadly from making statements "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." The proposal would narrow this prohibition by limiting it to 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, or would grant on less favorable terms, a credit application by an applicant or prospective applicant's because of the applicant or prospective applicant's prohibited basis characteristic(s)."[13]

The proposal states that, for purposes of the discouragement prohibition, an "oral or written statement" means spoken or written words, or visual images such as symbols, photographs, or videos.[14] The discouragement prohibition expressly would not extend to "business decisions about where to locate branch offices, where to advertise, or where to engage with the community through open houses or similar events" or to "[s]tatements directed at one group of consumers, encouraging that group of consumers to apply for credit."[15] The proposal also would amend the Official Staff Commentary to clarify that "[s]tatements 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" constitute discouragement on a prohibited basis, but "[s]tatements directed at one group of consumers, encouraging that group of consumers to apply for credit" do not.[16]

The Bureau expressed its concern "that the overbroad coverage of the regulation [proscribing discouragement on a prohibited basis] and its potential interpretations may constrain free speech and commercial activity in ways that are unwarranted." The Bureau states that its proposal "would continue to prohibit illegal discouragement of potential applicants without exceeding that purpose in ways that may impose unnecessary constraints in the marketplace."[17]

With respect to special purpose credit programs ("SPCPs") not expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons, the proposed rule includes a prohibition against using the prohibited bases of race, color, national origin, or sex or any combination thereof as a common characteristic in determining eligibility for a SPCP and proposes new restrictions on using any permissible common characteristic that would otherwise be a prohibited basis as an eligibility criteria (*i.e.*, religion, marital status, age or income derived from a public assistance program).[18]

Conclusion

The comment period expired on December 15, 2025. As of the day after the expiration of the comment period, 40,821 comments had been posted to the rulemaking docket. While compelling comment letters were submitted in support of the proposed disparate impact and discouragement amendments, the comment letters submitted in opposition to the proposal included a joint comment letter by the attorneys general of 20 states and the District of Columbia.[19]

If finalized as proposed, the disparate impact proposal – and perhaps other aspects of the proposal – are likely to be challenged, with one potential outcome ultimately being Supreme Court review of the weighty question of whether disparate impact claims are cognizable under the ECOA. If the disparate impact proposal is adopted and takes effect in substantially the form proposed by the CFPB, creditors should be mindful of the possibility that state credit discrimination statutes may adopt different standards.[20]

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[1] Executive Order 14281 of April 23, 2023, *Restoring Equality of Opportunity and Meritocracy*, Section 5, 90 Fed. Reg. 17527 (Apr. 20, 2025).

[2] OCC Bulletin 2025-16 (July 14, 2025); NCUA Letter to Credit Unions No. 25-CU-04 (Sept. 2025); FDIC Financial Institution Letter 41-2025 (Aug. 29, 2025).

[3] CFPB, *Fair Lending Report of the Consumer Financial Protection Bureau for 2024*, at 2 (December 2025).

[4] CFPB, Equal Credit Opportunity Act (Regulation B), Proposed Rule, 90 Fed. Reg. 50901 (Nov. 13, 2025). CFPB Regulation B does not apply to motor vehicle dealers who are excluded from CFPB Regulation B by Section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 12 C.F.R. § 1002.1(a). Although the Federal Reserve Board retains authority to issue rules under the ECOA for motor vehicle dealers covered by Section 1029(a) of the Dodd-Frank, it apparently has not yet proposed counterpart disparate impact amendments with respect to its version of Regulation B or the Official Staff Commentary thereto. *See* Federal Reserve Board Regulation B, 12 C.F.R. Part 202; *see also id.* § 202.6(a) n.2; Comments 2(p)-4 & 6(a)-2.

[5] 12 C.F.R. § 1002.6(a); *see also* Regulation B, Comment 1002.6(a)-2 (stating, based solely on the aforementioned House and Senate Reports, that "[t]he 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."); Regulation B, Comment 1002.2(p)-4 (stating that "neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test. (See comment 6(a)-2 for a discussion of the effects test).").

[6] 90 Fed. Reg. at 50904-07.

[7] *See, e.g.,* Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact – Interpreting the Meaning of the Words That Actually Are There,* 61 Bus. Law. 829 (2006); Alan S. Kaplinsky et al., *Divided U.S. Supreme Court Holds Disparate Impact Claims Cognizable Under FHA, but Subject to Safeguards Against Abusive Disparate Impact Claims*, 68 Consumer Fin. L. Q. Rep. 472 (2014); Majority Staff, House Financial Services Committee, *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending*, at 8-14 (Nov. 24, 2015) (hereinafter cited as "Unsafe at Any Bureaucracy").

[8] 15 U.S.C. § 1691(a)(1) (emphasis added).

[9] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Bd. of Educ. of City Sch. Dist. of New York* v. *Harris,* 444 U.S. 130 (1979); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005); *Texas Dep't of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). The CFPB analyzes these Supreme Court disparate impact precedents in detail in the Supplementary Information accompanying the proposed amendments to Regulation B. 90 Fed. Reg. at 50904-05.

[10] 90 Fed. Reg. at 50905 (stating that the "ECOA does not include any effects-based language supporting disparate-impact liability, nor any ''otherwise'' language, as in [the Emergency School Aid Act], that may cloud the directness of its prohibition. ECOA section 701(a) is a straightforward, plainly stated prohibition against discrimination on the basis of certain characteristics."; "Unlike the statutory provisions at issue in *Harris* and *Inclusive Communities*, neither section 701(a) of the ECOA nor any closely connected statutory provisions include any effects-based language supporting disparate-impact liability"). *See also Unsafe at Any Bureaucracy*, *supra* note 7, at 14 (tabular chart juxtaposing the text of the ECOA discrimination proscription with the text of other federal discrimination statutes containing effects-based language).

[11] 90 Fed. Reg. at 50906. *See generally id.* at 50906 n.48 (citing Supreme Court authorities discussing the fundamental flaw associated with relying upon legislative history to discern the intent of statutes whose text is clear). The legislative history upon which the ECOA disparate impact edifice rests is even weaker than the Bureau noted because it is post-hoc legislative history – "history" from a subsequent Congress that merely added additional prohibited bases to the existing discrimination proscription as part of the ECOA Amendments of 1976 without amending the text of the discrimination proscription in relevant part. *See* Peter N. Cubita & Michelle Hartmann, *supra* note 7, at 836-39. It therefore cannot fairly be said to be probative of what the prior Congress intended when it enacted the statute proscribing discrimination "on the basis of" protected characteristics. *See* Paige Pidiano Paridon, EVP, Senior Associate General Counsel & Co-Head of Regulatory Affairs, Bank Policy Institute to CFPB Comment Intake, 2025 NPRM ECOA, at 6 & nn. 30-35 (Dec. 15, 2025) (available at hhtps://www.regulations.gov/comment/CFPB-2025-0039-0077).

[12] 90 Fed. Reg. at 50906 (emphasis added).

[13] *Id.* at 50920 (proposed 12 C.F.R. § 1002.4(b) (emphasis added)).

[14] 90 Fed. Reg. at 50920 (proposed 12 C.F.R. § 1002.4(b)).

[15] 90 Fed. Reg. at 50907 (supplementary information); *id.* at 50922 (proposed Comment 1002.4-1.ii.A).

[16] 90 Fed. Reg. at 50922 (proposed Comment 1002.4(b)-1.i.B, -1.ii.A.).

[17] 90 Fed. Reg. at 50907 (supplementary information).

[18] *Id.* at 50909-11, 50913 (supplementary Information), *id.* at 50921 (proposed 12 C.F.R. §§ 1002.8(b)(2)-(4)).

[19] Attorneys General of CA, CO, DE, DC, HI, IL, ME, MD, MA, MI, MN, NV, NJ, NY, NC, OR, RI, VT and WA to Acting Director Russell Vought, *Comment on Notice of Proposed Rulemaking Amending Provisions Relating to Disparate*

Impact and Discouragement of Applications Under Regulation B Implementing the Equal Credit Opportunity Act (Dec. 12, 2025), Equal Credit Opportunity Act (Regulation B), Docket ID No. CFPB-2025-0039.

[20] Notably, the New York Human Rights Law recently was amended in response to the Executive Order to establish a disparate impact standard for establishing unlawful employment discrimination. Laws 2025, Ch. 706, § 1, *reprinted in* 2025 N.Y. Sess. Laws ___ (McKinney) (codified at N.Y. Exec. Law § 296(5-a); *see* N.Y.S. 8338, *New York State Senate Introducer's Memorandum in Support* ("This legislation would codify disparate impact analysis for employment discrimination cases in New York State law, ensuring plaintiffs can continue to bring disparate impact cases under New York law, despite the shifting federal landscape."). Additionally, the New Jersey Division on Civil Rights also recently adopted new rules under the New Jersey Law Against Discrimination that codify state guidance on disparate impact liability in a variety of contexts. *AG Platkin Announces Division on Civil Rights Adopts Landmark Rules on Disparate Impact Discrimination under New Jersey Law* (Dec. 17, 2025) ("The rules cement critical state-law civil rights protections just as the Trump Administration has moved to reverse key protections against disparate impact at the federal level"); *see* N.J. Admin. Code §§ 13:16-1.1 *et seq.*

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Authors

Peter N. Cubita

Senior Counsel

212-471-6218

Michael R. Guerrero

Partner

213-614-7383

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