CDBA Community Development Bankers Association
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December 1, 2020

The Honorable Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

RE: Response to Notice and Request for Comments on ECOA and Reg B, Docket No. CFPB-2020-0026

Dear Director Kraninger:

The members of the Community Development Bankers Association (CDBA) respectfully submit the enclosed comments on the Notice and Request for Information published by the Bureau of Consumer Financial Protection (the Bureau) in the Federal Register on July 28, 2020. As stated, the Bureau is seeking comments and information to "identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under the Equal Credit Opportunity Act (ECOA) and Regulation B."

CDBA is the national trade association for banks that are U.S. Treasury designated Community Development Financial Institutions (CDFIs) - banks with a mission of serving low- and moderate-income communities that are underserved by traditional financial service providers. CDFI banks promote entrepreneurship and economic opportunity by providing financial products and services to small businesses located in places that are often disinvested and under resourced. There are 145 banks and 104 bank holding companies with the Treasury's CDFI designation – which means at least 60% of the bank's total lending, services, and other activities are targeted to low- and moderate-income (LMI) communities.

CDFI banks strongly support the efforts of the Bureau to meet its joint mandate of protecting consumers from unlawful discrimination and fostering innovation. We appreciate the opportunity to provide feedback to maximize the effectiveness of ECOA and Regulation B for

the benefit and protection of all bank customers, but particularly, for the underserved communities across our nation that our member banks serve.

Generally speaking, where the Bureau's question is whether more clarity is desired, CDBA members respond with a strong desire for greater clarity. The form in which the Bureau delivers this clarity might vary by topic, but CDBA members note the important contributions to guidance that "Q&A" documents provide. Perhaps the most notable of these are the Interagency Community Reinvestment Act Q&As[1].

Our comments are organized below to respond to questions raised in the Notice and Request for Information.

I. Disparate Impact

***Bureau Question:* Should the Bureau provide additional clarity regarding its approach to disparate impact analysis under ECOA and/or Regulation B? If so, in what way(s)?**

CDBA Response: CDBA supports the intent of the disparate impact standard in ensuring all communities receive equal access to credit. We further believe that the standard would be best supported with additional clarity from the Bureau regarding its approach to disparate impact, and that enforcement of disparate impact standards should be consistent across the Federal Government. We note that all CDFI banks are regulated depository lenders. We are therefore entirely subject to the rulemaking imposed by Federal agencies. CDFI banks are also universally small, community-focused lenders, and any divergent enforcement by agencies of otherwise applicable rules causes expensive uncertainty that threatens these lenders' ability to serve their communities.

CDFI lenders should be able to operate under the presumption that this rule holds equally across financial products, regardless of the rule making agency associated with the product. Accordingly, the greatest clarification that the Bureau can provide is to work with U.S. Department of Housing and Urban Development (HUD) to draft and promulgate guidance that is consistent, as appropriate to each agency's areas of oversight.

[1]Federal Register, www.federalregister.gov/documents/2016/07/25/2016-16693/community-reinvestment-act-interagency-questions-and-answers-regarding-community-reinvestment

HUD has recently published a disparate impact rule[2] that was written to conform to the U.S. Supreme Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities* requiring that a plaintiff show that a policy or procedure actually caused a disparate impact. As noted by Austin Holland and Christopher K. Friedman: *"The decision . . . established several guard rails designed to 'protect potential defendants against abusive disparate impact claims.' For instance, the court held that a disparate impact claim cannot be sustained solely by evidence of a statistical disparity.[3]"*

Public debate[4] following the publication of HUD's rule has elevated criticisms that the rule sets an inappropriately high standard for plaintiffs to prove disparate impact. CDBA believes that consumer protection rules should not erect insurmountable challenges to proving harm under disparate impact standards. We urge the Bureau to work with HUD to promulgate guidance that protects the rights of consumers while remaining consistent with the Supreme Court's ruling.

II. Limited English Proficiency (LEP)

***Bureau Question:* The Bureau seeks to understand the challenges specific to serving LEP consumers and to find ways to encourage creditors to increase assistance to LEP consumers. Should the Bureau provide additional clarity 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)?**

CDBA Response: CDBA welcomes further regulatory and enforcement clarity to encourage the provision of financial assistance, products and services in bi- and multi-lingual communities. Furthermore, this clarity should help CDFI banks and other lenders both extend their services, and, in this case, help prevent harm to consumers who may speak a different language.

Small lenders often struggle to bridge the gulf between ensuring staff have language skills that are representative of a local population, and providing language-appropriate documentation for products and services such as loans and deposit accounts, which can vary widely. Differences in local laws can exacerbate these situations, with the notable

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[2]Federal Register, www.federalregister.gov/documents/2020/10/09/2020-21634/huds-implementation-of-the-fair-housing-acts-disparate-impact-standard-correction

[3]Bradley, *Financial Services Perspectives*, www.financialservicesperspectives.com/2020/09/hud-issues-final-rule-on-the-fair-housing-acts-disparate-impact-standard/

[4]National Low Income Housing Coalition, *Preliminary Analysis of HUD's Final Disparate Impact Rule*, www.nlihc.org/resource/preliminary-analysis-huds-final-disparate-impact-rule

example of California, where a written contract must be in the same language it was negotiated in[5]. Bureau guidance should discuss state laws related to LEP and how banks can best serve communities.

CDBA members emphasize that the key element of any Bureau-issued guidance should be flexibility. This is especially important given the range of language diversity (e.g. dialects) in borrower communities. Lender business models, competitive environments, and product offerings also vary widely. For example, Illinois allows English-proficient friends or family members to accompany and assist limited English proficiency customers with transactions or negotiations resulting in a written contract[6].

Many CDBA members serve bi- and multi-lingual communities. They strive to accommodate the needs of all members of those communities to the best of their abilities. The Bureau's guidance should help establish bright lines for banks to remain compliant, while ensuring that lenders have the flexibility to meet the myriad and various situations presented in their day-to-day work.

III. Special Purpose Credit Programs (SPCP)

***Bureau Question:* Should the Bureau 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?**

CDBA Response: CDBA members believe the SPCP provision presents great opportunities for the communities served by CDFI banks. Many CDFI banks would like to participate in SPCP because it will enable them to more effectively target resources to underserved borrowers and communities, as well as collect data to analyze their effectiveness and improve service in these markets. CDFI banks that have explored the SPCP provision in Reg B have encountered mixed interpretations from the Bureau and bank examiners. Specifically, CDFI banks do not have certainty whether there is an implied "and" or an "or" in between Program Standards (a)(1) and (a)(2) that would determine whether the provision excludes for-profit lenders. Ambiguity discourages participation in the program. We ask that guidance be written to clearly state that CDFI banks can participate in SPCP and

[5]California Civil Code, Section 1632, www.leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1632.&lawCode=CIV
[6]Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2N; Illinois Banking Act, 205 ILCS 5/5f, www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2356&ChapterID=67

outline the circumstances in which SPCP is applicable to for-profit lenders. We believe participation in CDFI Fund programs should qualify for SPCP.

CDFI banks are often market leaders in pioneering new products to serve underserved and distressed populations, with a particular focus on tailoring to meet community needs. As an example, in September of this year CDBA submitted a comment letter to the CDFI Fund of the U.S. Treasury in support of the Fund's small dollar loan (SDL) program. We cited examples of CDFI banks' providing consumers with access to mainstream financial institutions through SDLs within the constraints of safe and sound banking practices. These banks' markets range from sparsely populated, rural communities to dense, urban areas. Some make loans as small as $500, and others have made "small dollar" loans up to $3,500. Some loans are priced as low as 5%. Origination fees range widely, with some members waiving fees on the smallest loans. Consistently however, these lenders provide these products to promote financial inclusion or as affordable alternatives to expensive products offered by unregulated lenders. Based on this experience, clarity in SPCP guidance could encourage further innovation from our sector in support of communities.

To the extent that Reg B encourages further experimentation, the Bureau's guidance should clarify that SPCP participation is open for all CDFIs, including for-profit lenders. For example, the guidance could state that the SPCP may be extended to products offered by any and all lenders certified as a CDFI, whether bank, credit union, loan fund, or otherwise. Guidance should further provide representative, non-exhaustive examples of acceptable practices, state what the process is to apply for SPCP consideration, and provide written references directed to regulatory agencies with oversight of depository institutions.

IV. Affirmative Advertising to Disadvantaged Groups

Bureau Question: **Should the Bureau provide clarity under ECOA and/or Regulation B to further encourage creditors to use such affirmative advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?**

CDBA Response: CDBA believes communities would benefit from increased clarity for lenders on how to use affirmative advertising to reach traditionally disadvantaged groups. Many CDFI banks have a strong desire to increase their outreach and lending to disadvantaged consumer and communities, but struggle to understand the right balance. There is a gray area between affirmative advertising and discriminatory advertising. We refer the Bureau back to the problems posed in our response to the question regarding borrowers with limited English proficiency and the SPCP provision. Small lenders often

struggle to answer the compliance questions raised when the line between affirmative and discriminatory advertising is approached. Without guidance, many lenders will often choose the option least likely to raise questions from examiners about compliance. This has the unfortunate effect of harming underserved communities, depriving them of information that would advise them of constructively targeted opportunities.

Guidance should provide representative, non-exhaustive examples of acceptable practices affirmative advertising practices, as well as a process for receiving pre-emptive regulatory approval for affirmative advertising materials.

V. Small Business Lending

***Bureau Question:* In what way(s) might the bureau support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned?**

CDBA Response: CDBA is strongly supportive of initiatives to meet the needs of minority- and women-owned small businesses. These needs can be met responsibly through the combination of: (1) a broad, equitable and uniform implementation of the data gathering and reporting requirements of Dodd-Frank Section 1071, and (2) regulatory clarity to address the provisions of ECOA and Reg B highlighted above (i.e. limited English proficiency, SPCP, and affirmative advertising). Together, these provisions are integral to serving a market. First by understanding the market, next by designing products to serve the market, and third, distributing the products within the market in a beneficially impactful and sustainable way. CDBA will be submitting specific recommendations for implementing Section 1071.

VI. Sexual Orientation and Gender Identify Discrimination

***Bureau Question:* The Bureau wants to know if the Supreme Court's decision in Bostock v. Clayton County (2020), which held that "[a]n employer who fires an individual merely for being gay or transgender violates Title VII" of the Civil Rights Act of 1964, should have an impact on ECOA regulation.**

CDBA Response: This answer should be left to the courts, Congress and regulatory agencies to determine – rather than the opinion of lenders. On the legislative side, we note that the ECOA was passed in 1974, and in its original form prohibited lending discrimination based on sex or marital status. Updates made by Congress two years later amended the law to

further prohibit lending discrimination based on race, color, religion, national origin, age, the receipt of public assistance income, or exercising one's rights under certain consumer protection laws. On the judicial side, we note that Justice Samuel Alito's dissent in *Bostock* included a list of Federal statutes, including ECOA, prohibiting sex discrimination that would presumably be newly required to encompass sexual orientation in the wake of *Bostock*.

Clearly, the definition of illegal discrimination is open for review and expansion. While we cannot offer a legal opinion on whether there are one -- or many ways -- for the definition of protected classes to be expanded, CDBA unequivocally supports the stated purpose of ECOA. Our members will work with the Bureau to provide a lending environment in which affordable, useful financial products are accessible to all applicants without consideration for any personal characteristics unrelated to the applicant's creditworthiness.

VII. Scope of Federal Preemption of State Law

Bureau Question: **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?**

CDBA Response: CDBA strongly welcomes guidance to assist lenders in evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B. Ideally, Bureau regulations should be made in consultation with both state and other federal regulatory authorities. The current legal environment is complicated and expensive. We note that the question of Federal Preemption in the dual banking system continues to be a subject of intense, and well-publicized debate and scrutiny beyond the subject of ECOA, as summarized in the May 17, 2019 Congressional Research Service report: *Federal Preemption in the Dual Banking System: An Overview and Issues for the 116th Congress*[7].

One example of inconsistency is that lenders in California are not allowed to discriminate on the basis of citizenship status[8]. However, ECOA does not identify citizenship status as a basis

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[7]Congressional Research Service, *Federal Preemption in the Dual Banking System: An Overview and Issues for the 116th Congress,* www.fas.org/sgp/crs/misc/R45726.pdf

[8]Civil Rights Act, www.leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV§ionNum=51

for non-discrimination, but does allow a creditor to consider immigration status[9]. In this example, lenders would generally defer to the rule that provides the greater level of protection, which is the state law. The Bureau should provide guidance that establishes a protocol for making this decision.

We urge the Bureau to ensure that any guidance on this, and other examples, is prepared in consultation with both federal and state financial regulatory authorities, and with appropriate congressional oversight, to ensure consistent interpretation and application.

VIII. Public Assistance Income

Bureau Question: **Should the Bureau 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?**

CDBA Response: CDBA strongly welcomes additional clarity under ECOA and/or Regulation B regarding when all or part of the applicant's income derives from any public assistance program. Guidance should provide representative, non-exhaustive examples of acceptable practices to help creditors address situations where ascertaining the continuance of public assistance benefits is integral to underwriting, as well as a process for receiving real-time regulatory approval for situations unforeseen in the guidance.

CDBA members note that it can be difficult to correctly, and legally, account for public assistance income in underwriting decisions, particularly for longer-termed consumer products such as auto loans, where the duration of projected debt-service coverage is central to determining risk and pricing. For example, as reported by the US Census, recipients of means-tested public assistance vary in the longevity of both their eligibility and participation, occasionally even moving in and out of programs as the economic circumstances (income and asset levels) which establish their eligibility change[10].

IX. Artificial Intelligence and Machine Learning

[9]12 CFR 1002.6(b)(7) states "A creditor may consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment."
[10]United States Census Bureau, *How Long Do People Receive Assistance?*, www.census.gov/newsroom/blogs/random-samplings/2015/05/how-long-do-people-receive-assistance.html

Bureau Question: **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)?**

CDBA Response: CDBA strongly welcomes additional clarity in guidance on adverse action notices as well as any other consumer disclosure requirements related to credit underwriting decisions based (in whole or in part) on models that use AI/ML.

The Bureau should address a number of potential situations. For example, what are the obligations of lenders when they are themselves the developer or owner of an AI underwriting tool, as well as the originating lender? Do a lender's obligations vary in these situations from those when a lender partners with an independent FinTech in some combination of loan sourcing, underwriting, funding, and servicing? Another example of guidance should be to identify thresholds for disclosure if AI is a contributing, but the not sole or even primary, factor in credit decision making.

X. ECOA Adverse Action

Bureau Question: **Should the Bureau provide any 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)?**

CDBA Response: CDBA strongly welcomes additional guidance on adverse action notices requiring a notification that includes a statement of specific reasons for the adverse action.

We note, for example, that some members have had questions of the correct process regarding borrowers requesting deferment based on circumstances related to the COVID-19 health and economic crisis. We believe a request by a borrower for a deferment of payments on an existing loan is a request for credit, and if that request is denied, an adverse action is required. However, this conclusion is not immediately clear in Regulation B and is reached after an analysis of the definitions of "extension of credit," "application," and "adverse action" in the regulation. Expanding the Official Staff Commentary with specific examples would provide additional clarity on the issue of adverse action requirements for payment deferrals and modifications.

In conclusion, the membership of CDBA fully appreciates the thoughtful consideration of the Bureau and its staff in continuously seeking to improve the effectiveness of ECOA. We sincerely appreciate the opportunity to comment and offer feedback. We look forward to future discussion on these important issues.

If you have any questions, please contact Jeannine Jacokes, CDBA Chief Executive Officer, at 202-689-8935 ext. 222 or *jacokesj@pcgloanfund.org*, or Brian Blake, Public Policy Director at 646-283-7929 or *blakeb@pcgloanfund.org*.

Thank you for considering our recommendations.

The Membership of the Community Development Bankers Association

Bank of Anguilla (MS)
Bank of Brookhaven (MS)
Bank of Cherokee County, Inc. (OK)
Bank of Commerce (MS)
Bank of Franklin (MS)
Bank of Kilmichael (MS)
Bank of Lake Village (AR)
Bank of Moundville (AL)
Bank of St. Francisville (LA)
Bank of Winona (MS)
BankFirst Financial Services (MS)
BankPlus (MS)
Bay Bank (WI)
Beneficial State Bank (CA)
BNA Bank (MS)
BOM Bank (LA)
Broadway Federal Bank (CA)
Carver Federal Savings Bank (NY)
Carver State Bank (GA)
Central Bank of Kansas City (MO)
Century Bank of the Ozarks (MO)
Citizens Bank & Trust Company (MS)
Citizens National Bank of Meridian (MS)
City First Bank of D.C., N.A. (DC)
Commercial Bank, Kemper County (MS)
Commercial Capital Bank (LA)
Community Bank of the Bay (CA)
Copiah Bank (MS)
Farmers & Merchants Bank (MS)
FBT Bank & Mortgage (AR)
First Bank (MS)
First Eagle Bank (IL)
First Independence Bank (MI)
First National Bank of Picayune (MS)
First NaturalState Bank (AR)
First Security Bank (MS)
First SouthWest Bank (CO)
FNBC Bank (AR)
Friend Bank (AL)
GN Bank (IL)
Great Southern Bank (MS)
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Harbor Bank of Maryland (MD)
Holmes County Bank and Trust Company (MS)
Industrial Bank (DC)
Industrial Bank of Chicago (IL)
Legacy Bank & Trust Company (MO)
Lime Bank (MO)
M&F Bank (NC)
Merchants & Planters Bank (MS)
Mission Valley Bank (CA)
Native American Bank, N.A. (CO)
New Haven Bank (CT)
Noah Bank (PA)
OneUnited Bank (MA)

Optus Bank (SC)
Pan American Bank & Trust (IL)
Partners Bank (AR)
Peoples Bank (MS)
Pike National Bank (MS)
Planters Bank and Trust (MS)
Priority One Bank (MS)
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Security State Bank of Oklahoma (OK)
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Spring Bank (NY)
Sunrise Banks, N.A. (MN)
Sycamore Bank (MS)
Texas National Bank (TX)
The Bank of Vernon (AL)
The Cleveland State Bank (MS)
The First National Bank & Trust (AL)
The First, A National Banking Association (MS)
The Jefferson Bank (MS)
The Peoples Bank (MS)
Tri-State Bank of Memphis (TN)
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