June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Submitted via: http://www.regulations.gov

Re: Request for Information Regarding the CFPB's Inherited Regulations and Inherited Rulemaking Authorities, Docket No. CFPB-2018-0012, 12 CFR Chapter X

Dear Acting Director Mulvaney:

The undersigned civil rights, consumer, and other advocacy organizations submit these comments in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information (RFI) concerning regulations and rulemaking authorities that it inherited. Our comments focus primarily on the importance of maintaining Regulation B (Reg B) and the use of the long-established disparate impact doctrine in enforcement actions, examinations, and complaint investigations that have Equal Credit Opportunity Act (ECOA) implications.

Our nation's mainstream financial marketplace can be difficult to maneuver for most consumers, but it has historically excluded or underserved women, consumers of color, and other marginalized communities. The reality for many consumers is that rarely, if ever, are they aware that they are being treated differently because of a protected characteristic when they apply for credit. In nearly all instances of a credit application process, consumers do not have access to information about how other similarly-situated consumers are treated that they can compare to their own experiences. As the rampant targeting of toxic mortgage loan products to lower-risk consumers of color in the lead up to the foreclosure crisis depicted, absent effective monitoring and accountability measures, lending institutions may not act in accordance with their requirements under civil rights statutes. The Bureau was charged with conducting ECOA oversight by the Dodd-Frank Wall Street Reform and Consumer Protection Act explicitly to provide this safety mechanism for the public.

Regrettably, the Bureau has moved to undermine the public purpose of the its complaint database,[1] taken steps to strip enforcement powers from the Office of Fair Lending and Equal Opportunity,[2] and disbanded the CFPB's statutorily required Consumer Advisory Board,[3] raising concern among consumer advocates that the Bureau will not effectively implement Regulation B.

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[1] Cowley, Stacy. "Consumer Bureau Looks to End Public View of Complaints Database," New York Times. April 2018. Available at: https://www.nytimes.com/2018/04/25/business/cfpb-complaints-database-mulvaney.html.

[2] Berry, Kate. "CFPB's Mulvaney strips his fair-lending office of enforcement powers," American Banker. February 2018. Available at: https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers.

[3] Engel, Kathleen and Judith Fox, "Mick Mulvaney fired us for advocating for consumers," CNN. June 2018. Available at: https://www.cnn.com/2018/06/08/opinions/mick-mulvaney-doing-the-financial-sectors-dirty-work-by-abolishing-cab/index.html.

The comments below discuss the history and intent of ECOA, the long-standing jurisprudence affirming the cognizability of the disparate impact doctrine, the covert nature of lending discrimination and the types of systemic barriers in the financial market that necessitate disparate impact enforcement, the need to maintain and fully enforce Regulation B, and the nearly singular role that the federal government plays in detecting and abating lending discrimination in all credit markets in the United States.

We submit these comments to remind Acting Director Mulvaney of the responsibilities that the CFPB has to **fully** enforce the Equal Credit Opportunity Act.

The Origins of ECOA

The Equal Credit Opportunity Act of 1974 was passed at a time when women applying for credit regularly faced discrimination and was done so in response to a growing movement to win the right to their financial independence.[4] Following several hearings from the National Commission on Consumer Finance (NCCF), ECOA was originally passed with protections against discrimination on the basis of sex and marital status.

Prior to the passage of ECOA, it was commonplace for lenders to wholly deny women credit opportunities, especially when they applied on their own. As a general matter, to obtain credit, women needed higher incomes, less obligations, and more consistent employment than their male counterparts.[5] Other institutional barriers kept women from further accumulating wealth through homeownership and other credit-based ventures. Testimony before the Senate Committee on Banking and Urban Affairs described over a dozen common practices which precluded women from accessing mainstream credit. Some of these included:

- Requiring newly married women to reapply for existing credit, whereas men only needed to sign a Truth in Lending disclosure statement;
- Refusing to provide credit to married women who would have otherwise been granted credit as single women;
- Refusing to account for a wife's income or arbitrarily discounting her income when applying as a couple with her husband;
- Refusing to consider alimony, child support, and other lawful sources of income in the underwriting process;
- Asking about and considering a woman's birth control practices;
- Considering employed women as dependents of their husbands regardless of their earnings; and

[4] Kreiswirth, Brian and Anna-Marie Tabor, "What you need to know about the Equal Credit Opportunity Act and how it can help you: Why it was passed and what it is," Consumer Financial Protection Bureau. October 2016. Available at: https://www.consumerfinance.gov/about-us/blog/what-you-need-know-about-equal-credit-opportunity-act-and-how-it-can-help-you-why-it-was-passed-and-what-it/.
[5] Cuomo, Andrew A, "Equal Credit Opportunity Act: How Much Can women Expect" *Journal of Legislation*, Vol. 8: Iss. 1, Article 8, pp. 124. 1981.

- Refusing to provide loans to married women without their husband's formal approval.[6]

While ECOA was originally passed to prohibit discrimination in credit transactions based on sex and marital status, Congress recognized the need to provide broader protections. In deliberations leading up to the passage of ECOA, many in Congress disagreed over whether a bill that provided additional protections beyond sex and marital status could pass. Some argued that the Civil Rights Act of 1866 and the Fair Housing Act already provided protections against race, color, and national origin discrimination regarding some forms of credit access. At the time of ECOA's passage, civil suits based on race or color in employment and housing-related transactions could indeed be made under the Civil Rights Act of 1866, but these were limited to claims in which a plaintiff had to present evidence of *intentional* discrimination to prevail in court.[7]

As of the National Commission on Consumer Finance's report and the related House hearings on ECOA, the government could only bring legal action on the basis of other protected classes for discrimination related to the financing of *housing*, but "no law enabled the federal government to bring actions to prevent discrimination in other areas of consumer credit or on behalf of a broader set of protected classes."[8] Ultimately, Congress definitively recognized the need to expand protections from discrimination in all credit transactions and for other protected classes, and in 1976, Congress expanded ECOA to provide protections on the basis of race, color, religion, national origin, age, source of income from public assistance, and religion. In these deliberations, it was evident that relying on existing authority that only allowed claims of intentional discrimination was not sufficient to ameliorate credit discrimination for people of color and other traditionally underserved groups, and that the federal government must play a central role in abating credit discrimination.

Disparate Impact Plays a Critical Role in Protecting Against Lending Discrimination

Disparate impact liability occurs when government or private actors unjustifiably pursue practices that have a disproportionately harmful effect on women, people of color, people with disabilities, families with children, and other groups protected by civil rights statutes. By focusing on the consequences of unfair housing practices, the disparate impact standard often helps screen out discrimination that is intentional, but subtle or concealed. Equally important, it eliminates practices that may be neutral on their face but nevertheless freeze in place the effects of prior discrimination.

In May 2018, Acting Director Mick Mulvaney issued a statement in which he suggested that the Bureau would be reviewing the use of disparate impact in light of the Supreme Court's recent decision in *Inclusive Communities Project v. Texas Dept. of Housing and Community Affairs*.[9] The statement indicates that "the Bureau is required by statute to enforce federal consumer

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[6] Senate Comm. On Banking, Housing and Urban Affairs, S. Rep. 93-278, 93rd Cong., 1st Sess., p. 17.
[7] Ritter, Dubravka, "Do we Still Need the Equal Credit Opportunity Act?," Federal Reserve Bank of Philadelphia, p. 8-9. 2012.
[8] *Id*. at 8.
[9] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

financial laws consistently."[10] The Court's decision, ratifying disparate impact liability in the housing context, ultimately serves to buttress the agency's use of the doctrine under ECOA and other civil rights statutes.

Disparate impact is a hallmark of American civil rights jurisprudence. The Supreme Court, in deciding *Griggs v. Duke Power Co.* in 1971, unanimously allowed for disparate impact claims under Title VII of the Civil Rights Act of 1964.[11] This provided a powerful tool to those seeking to end the effects of systemic discrimination in the employment context. Chief Justice Burger famously wrote in *Griggs* that "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12]

Since the *Griggs* decision, disparate impact liability has only become more central to civil rights litigation. All nine federal circuit courts extended disparate impact liability to the Fair Housing Act in the twenty years after its adoption.[13] Then in 2015, the Supreme Court ruled that disparate impact liability is cognizable under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, holding that it is instrumental to achieving the mission of the act. "Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the Fair Housing Act was intended to address."[14]

Disparate Impact Liability Is Cognizable Under ECOA

Disparate impact under ECOA rests on the same principles as those found in the employment and housing civil rights statutes. As the legislative history of ECOA makes clear, the law proscribes both overt and disparate impact discrimination that results from neutral policies. The CFPB itself, in releasing a bulletin in 2012, cited a House Report that accompanied the passage of ECOA. The report stated that "[t]he availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing."[15] A Senate Report prepared in conjunction with the passage of ECOA stated that "in determining the existence of discrimination ... courts or agencies are free to look at the effects of a creditor's practices as well as the motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in such cases as Griggs ..., are intended to serve as guides in the application of this Act, especially with respect to

[10] "Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57," Consumer Financial Protection Bureau. May 2018. Available at: https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/.
[11] 401 U.S. 424 (1971).
[12] *Id.* at 431.
[13] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2519, 192 L. Ed. 2d 514 (2015).
[14] *Id.* at 2525.
[15] "CFPB Bulletin 2012-04 (Fair Lending)," Consumer Financial Protection Bureau. April 2012. Available at: https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

the allocations of proof."[16] For these reasons, the CFPB should maintain its previous bulletin as related to disparate impact and ECOA.

Since 1980, federal courts have consistently recognized that disparate impact claims are cognizable under the Equal Credit Opportunity Act.[17] The federal appellate courts which have addressed the question—the Fifth, Sixth, and Ninth Circuits—have all held that disparate impact claims are cognizable under ECOA.[18] In addition, federal district courts in the First, Second, Third, Fourth, Seventh, Eighth, and Eleventh Circuits have uniformly held that disparate impact claims are cognizable under ECOA.[19] The result is that nationwide jurisprudence regarding ECOA and disparate impact is in unanimous agreement: the Equal Credit Opportunity Act allows for disparate impact claims in the context of lending and credit access.

The Supreme Court has recognized the power of disparate impact claims under Title VII in *Griggs*, the Age Discrimination in Employment Act in *Smith v. City of Jackson*, and most recently the Fair Housing Act in *Inclusive Communities*. When the same analysis applied by the Supreme Court to these comparable anti-discrimination laws in order to prohibit disparate impact discrimination is applied to ECOA it is clear that the same liability also is cognizable under the statute.[20]

The disparate impact standard is critical to ensuring optimum compliance with ECOA and providing victims of widespread discrimination with appropriate recourse. The Administrative Procedure Act requires the CFPB to avoid action that is arbitrary and capricious or otherwise not in accordance with law under statutory mandate and judicial interpretation.[21] Under the broad consensus in the courts, the CFPB risks acting arbitrarily, capriciously, and contrary to law if it changes a regulation that was developed in accordance with existing jurisprudence and that was subsequently applied by the courts.

Lending Discrimination is More Commonly Covert, Requiring the Disparate Impact Doctrine to Combat Unfair Practices

An examination of lending discrimination complaints in the early years after the passage of the Equal Credit Opportunity Act reveals patterns and acts of discrimination that were more overt, blatant, and easily detected. However, over time barriers to fair credit access have become more

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[16] S. REP. No. 94-589, *supra* n. 27.
[17] Cherry v. Amoco Oil Co., 490 F.Supp. 1026 (N.D. Ga. 1980).
[18] *See,* Golden v. City of Columbus, 404 F.3d 950, 963 n.11 (6th Cir. 2005); Miller v. Am. Express Co., 688 F.2d 1235, 1239-40 (9th Cir. 1982); Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1101 (5th Cir. 1987), vacated and remanded on other grounds, 492 U.S. 901 (1989).
[19] *See,* Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104, 108 (D. Mass. 2009); Guerra v. GMAC LLC, 2:08-CV-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); Dismuke v. Connor, 05-CV-1003, 2007 WL 4463567 (W.D. Ark. Dec. 14, 2007); Powell v. Am. Gen. Fin., Inc., 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004); Wide ex rel. Estate of Wilson v. Union Acceptance Corp., IP 02-0104-C-M/S, 2002 WL 31730920 (S.D. Ind. Nov. 19, 2002); Faulkner v. Glickman, 172 F.Supp.2d 732, 737 (D. Md. 2001); Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama, CA 96-0922-MJ-C, 1997 WL 33644511 (S.D. Ala. July 31, 1997).
[20] Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015); Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005).
[21] 5 U.S.C. § 706(2)(A).

veiled and entrenched in the existing consumer finance system, creating a greater need for the disparate impact doctrine. Because credit discrimination plays out in more clandestine ways and barriers to fair credit access are predominately manifested by systems and policies that severely limit options for underserved groups, borrowers must be able to use the full breadth of our fair lending laws to preserve their rights, provide them access to tools that will help them build and obtain wealth, create stable environments for their families, and develop strong, viable neighborhoods and communities.

Lending discrimination used to be stated policy. Indeed, when the federal government began its involvement in substantially supporting the credit markets through the creation of the Home Owners Loan Corporation in 1933, the Federal Housing Administration (FHA) in 1934, and the Federal National Mortgage Association (Fannie Mae) in 1938, the federal government established protocols, systems, guidelines, policies, and practices that required lending programs supported by the government to be administered in a racially discriminatory fashion. The Home Owners Loan Corporation developed so-called "redlining" maps that prohibited fair lending in communities of color.[22]

The FHA's underwriting guidelines restricted lending in communities of color and the agency promoted the proliferation of discriminatory real estate practices that encouraged residential segregation. In its first FHA manual, the agency instructed:[23]

> "**233**. The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values. The protection offered against adverse changes should be found adequate before a high rating is given to this feature. Once the character of a neighborhood has been established it is usually impossible to induce a higher social class than those already in the neighborhood to purchase and occupy properties in its various locations."

FHA adhered to these blatantly discriminatory policies and practices until increased and more vigorous advocacy around the enforcement of the Fair Housing Act and the Equal Credit Opportunity Act forced the agency to change its stance.

More blatant forms of discrimination persisted for decades. For example, in one of the first fair lending cases, *Harrison v. Otto G. Heinzeroth Mortgage Company*,[24] a loan officer for Heinzeroth told the Harrisons, who wanted to purchase a home in the Old West End neighborhood, a predominately African-American neighborhood in Toledo, Ohio, that they would need to have a 50% down payment in order to purchase the home that they wanted

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[22] Squires, Gregory, "The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act," Routledge. 2018.
[23] Federal Housing Administration, "Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act With Revisions to February, 1938," (Washington, D.C.).
[24] Harrison v. Otto G. Heinzeroth Mortgage Company, 430 F. Supp. 893 (N.D. Ohio 1977).

because the neighborhood was a "bad" area. The Harrisons were told that if they would purchase a home in another (predominately White) neighborhood that they would only be required to place a 10% down payment. In another early case, *Laufman v. Oakley Building and Loan Company*, the Laufmans, seeking to purchase a home in the predominately African-American community of Avondale, Cincinnati, were told by the vice-president of the bank that despite their pristine credit, Oakley would deny the Laufman's loan because the Avondale community was "not under control."[25] In the vice-president's assessment, there were "good" and "bad" neighborhoods and you could tell the difference just by merely driving through them. Mr. Laufman probed Oakley's vice-president to tell him which neighborhoods in Cincinnati were good and which were bad: all the "bad" neighborhoods were predominately African-American or integrated, while all the "good" neighborhoods were predominately White.[26]

In one of the first fair lending cases to include a disparate impact argument, *Old West End Association v. Buckeye Federal Savings and Loan*,[27] the bank denied a loan for a home in a majority African-American neighborhood after it asserted that a bona fide independent appraisal valued the subject property at an amount that the lender viewed as being too high for the neighborhood. Plaintiffs prevailed in this case after demonstrating that the bank's "business justification" was inaccurate and provided statistical evidence that the bank's underwriting policies caused a clear discriminatory effect against communities of color. While the case included a disparate impact theory, the Old West End Association strongly believed that the bank discounted the independent appraisal because it intentionally did not want to make loans in the predominately African-American community.

Over the years, in the face of more fair lending scrutiny, practices have changed. Discrimination is much more subtle and hidden. NFHA's recent investigation into auto dealers' lending practices and behaviors provides a window into how customers are treated when they shop for loan products and why it is so hard to detect when discrimination occurs. As described in the detailed report[28] about this investigation, issued in January 2018, NFHA sent eight matched pairs of testers (16 consumers total), one White and one Non-White, to car dealerships in Virginia to inquire about the costs of purchasing a vehicle. Each matched pair inquired about the exact same vehicle in order to obtain car purchasing and loan quotes. In every pair, the Non-White tester was better qualified (i.e., had higher credit scores, lower debt-to-income rations, higher incomes, etc.) than his or her White counterpart.

The investigation revealed that when auto dealers have the authority to use their own discretion in the pricing of the vehicle and loan costs, there is an opportunity for discrimination to occur. The investigation found that, more often than not, auto dealers used their discretion to discriminate. Key findings included:

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[25] Laufman v. Oakley Building and Loan Company, 408 F. Supp. 489 (S.D. Ohio 1976).
[26] Nash, Andrew, "The Origins of Fair Lending Litigation." Available at: https://www.clearinghouse.net/chDocs/resources/caseStudy_AndrewNash_1228406481.pdf
[27] Old West End Association v. Buckeye Federal Savings and Loan, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987).
[28] Rice, Lisa and Erich Schwartz, Jr., "Discrimination When Buying A Car: How the Color of Your Skin can Affect Your Car-Shopping Experience." 2018. Available at: http://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.

- In five of eight cases, Non-White testers who were more qualified than their White counterparts received more costly pricing options.
- Non-White testers who experienced discrimination would have paid an average of $2,662.56 more over the life of the loan than less-qualified White testers.
- In six of eight cases, White testers were offered more financing options than Non-White testers.
- Dealers offered to help bring down interest rates and car prices using incentives and rebates or by making phone calls to personal contacts for White testers more often than they did for Non-White testers.

While this investigation revealed stark and disturbing disparities, it would have been difficult for the consumers who were treated unfairly to discern that they were experiencing discrimination. All of the consumers received quotes and would have been able to purchase the vehicle that they were viewing. However, it would have been impossible for the Non-White testers, for example, to know that they were not being offered discounts or favors that would have brought down the cost of financing and that their White counterparts were being offered such discounts or favors. In each case, it would have been almost impossible for the consumers to know that the auto dealers had discretion to lower the cost of the financing unless the auto dealer offered that information. In this investigation, the auto dealer only offered that information to White consumers.

Lenders rarely tell consumers when they are not receiving favorable treatment or that they are not receiving favorable treatment for a discriminatory reason. Oftentimes, discrimination is not detected until after the consumer has received a loan and an independent entity – like a fair housing organization or a regulatory agency – conducts a statistical analysis or compliance review that uncovers the disparity. Indeed, in many fair lending cases brought under ECOA, the discriminatory conduct was only brought to light via a regulatory fair lending examination or compliance process, which requires lenders to thoroughly review policies, procedures, and outcomes for disparate outcomes.[29]

Proliferation of Systemic Barriers to Credit Access Necessitate the Use of Disparate Impact

Lending discrimination has not only become more subtle but it also manifests itself through systemic barriers that restrict fair lending access. These systemic structures and policies can only be tackled by using the disparate impact doctrine and this important tool must be available to help make lending markets more fair and efficient. These systemic barriers stymy markets, perpetuate blight, harm consumers, and stifle economic progress. The Urban Institute has conducted ongoing research, revealing that overly restrictive credit policies and outdated,

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[29] *See e.g.,* United States v. Citizens Republic Bancorp, Inc. and Citizens Bank, 2011 WL 2014873 (E.D. Mich. 2011); United States v. Compass Bank, Civil Action No. 07-H-0102-S (N.D. Ala 2007); United States v. First American Bank, Civil Action No. 04C-4585 (N.D. Ill. 2004); United States v. Midwest BankCentre, Case No. 4:11-cv-01086 (E.D. Mo. 2011); United States v. PrimeLending, Case 3:10-cv-02494-P (N.D. Tex. 2010); United States v. SunTrust Mortgage, Case No. 3:12-cv-00397-REP (E.D. Va. 2012); United States v. Texas Champion Bank, Case No. Case 2:13-cv-00044 (S.D. Tex. 2013); United States v. C&F Mortgage Corporation, Case. No. 3:11-CV-00653 (E.D. Va. 2011); United States v. First United Bank, Case No. 3:15-cv-00144-L (N.D. Tex. 2015); United States v. AIG Federal Savings Bank and Wilmington Finance, Inc., Case No. 1:10-CV-00178 (D. Del. 2010).

inefficient systems have killed over 5 million loans since 2009.[30] Core Logic estimates that the market is producing a deficit of 250,000 loans to borrowers of color each year. These deficits represent billions of dollars in lost economic opportunity for communities, consumers, and markets.

There are a number of structures and policies that pose a discriminatory effect on consumer segments protected under the Equal Credit Opportunity Act. A discussion of just a few of these issues follows. It is imperative that the ability to use disparate impact remains intact, not just as an enforcement mechanism, but also as a policy-brokering tool to enable civil rights agencies, consumer protection groups, community-based lending institutions, and community development organizations to work with the primary and secondary lending markets to responsibly expand fair credit opportunities to underserved groups, which includes women, people with disabilities, senior citizens, people of color, residents of rural and urban communities, and returning veterans.[31]

Discriminatory Mark-Ups in Auto Lending

The Equal Credit Opportunity Act has been used to combat differential treatment in the auto lending space. The National Consumer Law Center (NCLC) was instrumental in tackling this area of discrimination in the 1990s and early 2000s. The NCLC recognized that auto lenders maintain policies which permit car dealers to "mark-up" the finance rates on loans based on subjective criteria unrelated to creditworthiness, and subsequently brought suit against several auto lenders alleging that mark-up policies had a disparate impact on African-American and Hispanic customers, who end up paying more for credit than White borrowers with similar credit ratings. The lawsuits, which exposed practices that had operated secretly for over 75 years and had resulted in higher-interest rate car loans for minorities, have transformed car financing practices across the industry and have led to settlements valued at over $100 million.[32]

Low Balance Loan Policies

Policies such as minimum loan and minimum value amounts have been proven to have a discriminatory effect on borrowers of color.[33] These policies also have a discriminatory effect on senior citizens. For example, in Virginia, 21% of senior households live in housing valued at $99,999 or lower as compared to approximately 13% for all owner-occupied housing units.[34] Minimum loan amounts cause severe restrictions in credit access for existing affordable homes. This negatively impacts the ability of hard-working families to secure stable housing. In many

[30] Goodman, Laurie, Jun Zhu and Bing Bai, "Overly Tight Credit Killed 1.1 Million Mortgages in 2015," Urban Institute. November 2016. Available at: https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015.
[31] While some of these under-served groups might not be explicitly named as a protected class under the Equal Credit Opportunity Act, often many fair lending agreements which eliminate discriminatory policies and practices have the result of expanding lending opportunities to broader groups.
[32] "Case Index - Closed Cases," National Consumer Law Center. To read more about the NCLC's work in this space, see https://www.nclc.org/litigation/case-index-closed-cases.html#auto.
[33] *See*, Briceno v. United Guaranty Residential Insurance Co., No. 3:89 CV 7325 (N.D. Ohio).
[34] Burton, Jovan, "Senior Housing Study," Partnership for Housing Affordability. 2018. Available at: https://partnershipaffordablehousing.com/wp-content/uploads/2018/02/2018-Senior-Housing-Seminar.pdf.

cases, the cost of purchasing an affordable home is much more financially advantageous than obtaining rental housing, particularly when rental housing rates have been rising faster than increases in household income for a number of years.

Some lenders argue that the cost of loan originations makes the provision of low balance loans untenable. The Mortgage Bankers Association states that the average cost to originate a loan is $8,475.[35] However, the average cost would decrease if lenders were to make more loans, including lower-balance loans. Moreover, many industry experts agree that technological advancements can significantly lower the cost of loan origination.

Age of House Restrictions

Age-of-housing restrictions also have a discriminatory impact on protected classes under ECOA. Lenders and mortgage insurers have historically used age-of-house policies as a means of protection against using blighted or deteriorated housing stock as collateral. However, this type of policy is a blunt, ineffective means of ensuring that a home is in good condition. Interior or exterior appraisals are the best means of ensuring that a house is in quality condition and also has a less discriminatory effect.

Maternity Leave Policies

Maternity Leave policies have a discriminatory effect on women and have been found to violate fair lending laws.[36] These policies typically require a woman who is pregnant or on maternity leave to return to work for a period of time before the lender will close on a loan. The policies, as was the case in *Williams, et. al. v. Countrywide* - the first lawsuit of this kind to be brought alleging a disparate impact claim - typically do not account for a woman's income while she is on maternity leave. In that case, Mrs. Williams' income would have actually increased while she was on maternity leave and her income would have never been interrupted.

Over-Reliance on Outdated Credit Scoring Models

The use of outdated credit scoring models, as is the case with today's primary and secondary mortgage market, are locking millions of consumers out of the opportunity to obtain affordable credit and sustainable homeownership. A disproportionate percentage of these consumers are people of color.

The mechanisms for determining borrower risk are built upon incomplete data records that, by design, create and perpetuate discriminatory disparities. Our lending markets began with a fundamental assumption that there was a direct correlation between race and risk. That principle

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[35] "Independent Mortgage Bank Production Profits Down in Fourth Quarter 2017," MBA News, March 2018. Available at: https://www.mba.org/2018-press-releases/march/mba-news-(32318)-independent-mortgage-bank-production-profits-down-in-fourth-quarter-2017.

[36] See Williams v. Countrywide Home Loans, Inc., No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002). This matter was filed under the Ohio Revised Code, which contains anti-discrimination provisions similar to those contained in the Equal Credit Opportunity Act. In this case, the plaintiffs alleged that Countrywide's policy constituted a disparate impact and had a discriminatory effect against women.

has, unfortunately, been inculcated in the apparatuses that determine creditworthiness. While these credit-scoring and automated underwriting systems may not include variables that directly include race, national origin, or ethnicity as variables, they do contain factors that, either in isolation or in combination, serve as a proxy for race, national origin, or ethnicity. American communities are still impacted by systemic redlining practices conducted decades ago. Still today, there are a dearth of mainstream financial institutions in communities of color. A new analysis by Trulia[37] reveals that communities of color in Oakland, Houston, Atlanta, and Detroit have roughly 33% fewer traditional banking institutions than predominately White communities. Additionally, communities of color in these cities have twice as many non-traditional or alternative banking services (offering products like debt-relief services, payday loans, check-cashing services, and title loans) than do predominately White communities. This means that consumers of color are more likely to access credit from a non-traditional financial provider because these are the lenders who operate in the communities in which they live.

As a result, people of color are disproportionately represented among those who use non-traditional credit. Forty-six percent of African-American, 40% of Hispanic, and 38% of American Indian and Alaskan Native borrowers use alternative or non-traditional financial services. Comparatively, 18% of White borrowers use these services. In the lead up to the financial crisis, borrowers of color disproportionately were targeted for and received subprime loans, even when they qualified for prime credit. Moreover, consumers of color are less likely to have a credit card than their White counterparts. One study revealed that 47% of African-Americans and 30% of Hispanic borrowers did not have access to a credit card as compared to 20% of White consumers.[38]

Consumers who are not able to access credit from a traditional bank and who access credit from non-traditional creditors are paying a hefty price. Not only are they paying a higher price for credit and receiving more volatile products, but they are not reaping the full benefit of paying their obligations on time. Non-traditional financial service providers typically do not report good behavior to credit repositories. However, in a very perverse arrangement, if borrowers go into collections or default on their obligations, this negative information will likely get reported to those credit repositories.

Additionally, not accessing traditional credit from a depository institution can cause a consumer's credit score to be lowered and this practice likely disproportionately impacts borrowers of color. For example, obtaining credit from a finance company could lower a borrower's FICO® score by up to 20 points – even if the borrower pays the finance company's debt obligation on time.

As a result of the historical and current systemic disparities in our financial system, people of color and persons with disabilities are disproportionately credit invisible, score insufficient, or have artificially low credit scores. According to the Consumer Financial Protection Bureau

[37] Young, Cheryl and Felipe Chacon, "50 Years After the Fair Housing Act – Inequality Lingers," Trulia Reports. April 2018. Available at: https://www.trulia.com/research/50-years-fair-housing/.

[38] "Report on the Economic Well-Being of U.S. Households in 2013," Board of Governors of the Federal Reserve System. 2013. Available at: https://www.federalreserve.gov/econresdata/2014-economic-well-being-of-us-households-in-2013-household-credit-behavior.htm#subsection-184-B14E9ACA.

(CFPB), 26 million American consumers – 11% of the adult population - are credit invisible. This does not mean that these consumers do not have credit, but it does mean that they do not have credit information that has been reported to the major credit repositories. An additional 8.3% (19 million consumers) do not have enough information on their credit profiles to generate a credit score. An analysis by the CFPB reveals that almost 30% of African-American and Hispanic adults are credit invisible or have an unscorable credit profile – compared to about 17% of White adults.[39]

Loan Level Pricing Adjustments

Government-sponsored enterprises (GSEs) employ Loan Level Pricing Adjustment (LLPA) matrices that have a discriminatory effect on consumers protected under ECOA. The matrices employ surcharges on borrowers who have lower credit scores, use non-traditional credit, and are non-wealthy and thus have less for down-payments.[40] For example, a borrower getting a typical mortgage loan with a 630 FICO score and who is putting 3% down to purchase his/her home will pay an additional 350 basis points based on the GSEs' LLPAs. This crude pricing system knocks too many underserved borrowers out of the GSE box.

The GSEs have consistently underperformed when it comes to providing investment capital, mortgage liquidity, or secondary housing finance support in communities of color and urban centers. Studies have shown that the GSEs' market share for loans to upper-income African-American borrowers are similar to their market share for loans to very low-income White borrowers.[41] Fannie's and Freddie's Loan Level Pricing Adjustments, that include an overreliance on outdated credit scoring mechanisms, coupled with higher pricing for low down-payment loans, have resulted in the GSEs purchasing few loans made to borrowers of color and/or loans made in communities of color. In 2014, even though they comprise 13% of the U.S. population, only 3.4% of the loans purchased by the GSEs were from African-American borrowers. In 2015, the share decreased to 3.12%. Additionally, while Hispanics comprise 17% of the U.S. population, in 2014, only 7.62% of loans purchased by the GSEs were made to Hispanics. In 2015, that share decreased to 7.46%.[42]

The Continued Need for Full Enforcement of Regulation B

The lending discrimination that the Equal Credit Opportunity Act is designed to eradicate has substantial effects on the lives of marginalized communities, necessitating that disparate impact claims be deemed cognizable under ECOA.

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[39] Brevoort, Kenneth P., Philipp Grimm, and Michelle Kambara, "Data Point: Credit Invisibles," Consumer Financial Protection Bureau Office of Research. May 2015.
[40] See the GSEs LLPAs at https://www.fanniemae.com/content/pricing/llpa-matrix.pdf.
[41] Bunce, Harold, and Randall Scheessele, "An Analysis of GSE Purchases of Mortgages for African-American Borrowers and Their Neighborhoods," Housing Finance Working Paper Series, U.S. Department of Housing and Urban Development. 2000. Available at: https://www.huduser.gov/publications/pdf/workpapr11.pdf.
[42] Squires, Gregory D, "The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act," Routledge. 2018.

While the statute's original purpose was to combat discrimination against women on the basis of sex and marital status, studies show that much work remains to be done. A 2006 report from the Consumer Federation of America showed that women are disproportionately represented in the high-cost, subprime mortgage market at the national level.[43] Similarly, a 2013 report by the Woodstock Institute also confirmed that disparities between men and women exist in particular markets, in that case Chicago.[44] Likewise, a 2010 report from Work Life Law, a product of UC Hastings College of the Law, found that discrimination against women in the lending market on the basis of pregnancy or maternity leave was widespread.[45] *Williams v. Countrywide Home Loans, Inc.*, in which a pregnant woman alleged that Countrywide had refused to grant her a loan because her income would be reduced for several years while she raised her child, was the first case to address disparate impact against women on these bases.[46]

Because the lending market also contains pervasive racial discrimination against African-American and Hispanic borrowers, disparate impact liability under the Equal Credit Opportunity Act also serves to combat deeply entrenched disparities between White and non-White Americans. Despite ECOA's protections, more work must be done in this context as well. A 2014 study in The Journal of Real Estate Finance and Economics analyzed discrepancies in mortgage interest rates between particular groups and found that the typical African-American male receives an interest rate that is 8.9 basis points higher than his White male counterpart, while the typical African-American woman pay 26.5 basis points more than their White female counterparts.[47]

The American Bar Association has also noted similar discrepancies in a variety of other contexts within the lending market, including subprime mortgages disproportionately being marketed to African-American borrowers.[48] Disparate impact litigation under ECOA has been widely successful on the basis of race after the landmark decision in *Hargraves v. Capital City Mortg. Corp.*, in which African-American plaintiffs established a prima facie showing of disparate impact in their claims under ECOA.[49] Borrowers in *Hargraves* provided documentation regarding their area's historically segregated housing market and statistical evidence that Capital City Mortgage made a greater percentage of its loans in majority black census tracts than other

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[43] Fishbein, Allen and Woodall, Patrick. "Women are Prime Targets for Subprime Lending: Women are Disproportionately Represented in High-Cost Mortgage Market," Consumer Federation of America. December 2006. Available at: https://consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf.

[44] "Unequal Opportunity: Disparate Mortgage Origination Patterns for Women in the Chicago Area," Woodstock Institute. March 2013. Available at: http://www.woodstockinst.org/advocacy/comment-letters/new-research-finds-disparities-in-mortgage-lending-to-women/.

[45] "Discrimination in Mortgage Lending on the Basis of Pregnancy and Maternity Leave," Work Life Law, UC Hastings College of the Law. 2010. Available at: http://worklifelaw.org/publications/WLLMortgageDiscriminationBrief.pdf.

[46] Williams v. Countrywide Home Loans, Inc., No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002).

[47] Cheng, Ping, Zhenguo Lin, and Yingchun Liu. "Racial Discrepancy in Mortgage Interest Rates. The Journal of Real Estate Finance and Economics." July 2014. Available at: https://link.springer.com/article/10.1007/s11146-014-9473-0.

[48] Bailey, Nikitra, "Predatory Lending: The New Face of Economic Injustice," American Bar Association Human Rights Magazine, Vol. 32 No. 2. 2005. Available at: https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator.html.

[49] Hargraves v. Capital City Mortg. Corp., 140 F.Supp.2d 7 (D.D.C. 2000).

subprime lenders. Following *Hargraves*, lenders have been willing to settle disparate impact claims brought against them.[50]

The evidence is clear: discrepancies continue to exist within the lending space, most notably affecting women and non-White borrowers. Disparate impact liability under ECOA is a tool to address these pervasive injustices. For this reason, disparate impact must continue to be cognizable under the Equal Credit and Opportunity Act.

The CFPB and Other Federal Regulatory Agencies are Critical to Ensuring Equitable Access to Credit

Access to credit is a fundamental need for consumers in our society, and in order for consumers to meet their financial needs and for our economy to function effectively, it is important to ensure that all consumers have access to the credit for which they are qualified on fair terms, and without facing discrimination because of their race, national origin, etc. The Equal Credit Opportunity Act is an important tool for keeping our country's financial services market operating on fair and non-discriminatory terms. Government has an important role to play in protecting the rights of borrowers, preventing lending discrimination, and achieving redress for borrowers who face discriminatory lending practices. In order for the CFPB to play this role effectively, it is critical that the Bureau preserve, protect, and continue its vigorous enforcement of ECOA.

The importance of the CFPB's role in maintaining a financial services marketplace that is fair and free from discrimination cannot be overemphasized. The credit transaction is typically highly individualized and very personal. Borrowers normally do not have the opportunity to compare their experiences with those of other borrowers. This makes it very difficult for any particular borrower to know whether he or she has been treated fairly, or has been denied credit or offered credit on less favorable terms than other, similarly situated borrowers with different personal characteristics, such as race, sex, marital status, or other protected characteristics under ECOA. In addition, borrowers are unlikely to know about a lender's policies and practices that may work to deny them access to credit, or provide credit on less favorable terms than those offered to other, similarly situated borrowers. Even if a borrower does become aware of what appears to be discriminatory policies or practices, he or she may not know how to address the problem and may not have the resources to take effective action.

In contrast, in its role as a regulator the CFPB has access to the policies and practices that lenders employ and, by reviewing loan files, can identify instances in which those policies and practices have a disparate impact on protected classes of borrowers, even when the borrowers themselves may not realize that they have faced discrimination. For example, the GE Capital customers who either lived in Puerto Rico or lived elsewhere but indicated that they preferred to communicate in Spanish likely never realized that, even though they qualified for it, they had not been offered the

[50] *See e.g.*, United States v. GFI Mortgage Bankers, Inc., Case No. 1:12-CV-02502 (S.D.N.Y. 2012); United States v. Luther Burbank Savings, Case No. 2:12-CV-07809 (C.D. Cal. 2012); Smith v. DaimlerChrysler Services North America, LLC, 2005 WL 2739213 (D.N.J. 2005).

same credit card debt relief program that the lender offered to English-speaking customers.[51] Nor is it likely that the thousands of African-American, Hispanic, and Asian and Pacific Islander customers of American Honda Finance Corporation whom the Bureau found had been charged higher rates than White customers,[52] or the hundreds of thousands of such borrowers of color whom the Bureau found had been charged higher interest rates on car loans by Ally Bank and Ally Financial,[53] ever knew that they had been discriminated against. The same is undoubtedly the case for the African-American customers of BancorpSouth Bank, whose neighborhoods were redlined and who were charged higher rates for mortgages or denied them altogether compared to similarly-situated White borrowers, as the Bureau discovered in 2016.[54] Yet in all of these cases, the Bureau was able to identify the discriminatory policies and practices, require the institutions to change their policies and practices, and make sure that in the future all of their borrowers, regardless of race or national origin, would have access to credit on a fair and non-discriminatory basis. Without the CFPB's effective oversight and aggressive enforcement, the rights of these and other borrowers would not have been vindicated.

Equally important, in cases such as these and others where the Bureau has uncovered discriminatory practices, it has the resources and authority to make sure that borrowers whose rights under the Equal Credit Opportunity Act have been violated are made whole. This is demonstrated by the fact that, since its inception, the Bureau has won nearly $12 billion in relief for some 29 million borrowers whose rights have been violated by various lending institutions. This is the kind of scope and scale of relief that can only be achieved by a government agency watching out for the rights of consumers. In order to ensure that future borrowers whose rights may be violated obtain the relief that they need and deserve, the CFPB must preserve the Equal Credit Opportunity Act fully and continue to enforce it vigorously, both in cases of intentional discrimination and in cases where a lender's policies and practices have a discriminatory effect on protected classes of borrowers.

Consumers deserve a federal agency that is employing all available tools under the law to protect them from predatory and discriminatory practices in the marketplace. It is therefore imperative that the CFPB retain and fully use its existing Regulation B and disparate impact bulletin. Thank you for the opportunity to comment. Please contact Jorge Andres Soto at JSoto@nationalfairhousing.org should you have any questions about the content of these comments.

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[51] United States v. Synchrony Bank, f/k/a GE Capital Retail Bank, Case No. 2:14-cv-00454-BCW (D. Utah 2014).
[52] In the Matter of American Honda Finance Corporation, Consumer Financial Protection Bureau, File No. 2015-CFPB-0014 (July 2015).
[53] United States v. Ally Financial Inc. and Ally Bank, Case No. 2:13-cv-15180-AJT-MAR (E.D. Mich. 2013).
[54] United States of America et al v. BancorpSouth Bank, Case No. 1:16-CV-00118 (N.D. Miss. 2016).

Sincerely,

National Organizations
Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Fair Housing Council of Orange County
Human Rights Campaign
Lawyers' Committee for Civil Rights Under Law
Main Street Alliance
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Association of Social Workers
National Center for Lesbian Rights
National Coalition for the Homeless
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Education Association
National Fair Housing Alliance
National LGBTQ Task Force
The Arc of the United States
The Leadership Conference on Civil and Human Rights
U.S. PIRG
World Privacy Forum

State and Local Organizations	**State**
Center for Fair Housing	Alabama
Arizona Community Action Association	Arizona
Arkansans Against Abusive Payday Lending	Arkansas
California Reinvestment Coalition	California
Fair Housing Advocates of Northern California	California
Greater Napa Valley Fair Housing Center	California
Housing and Economic Rights Advocates	California
Housing Equality Law Project (HELP)	California
The Cardoza Law Corporation	California
Equal Rights Center	District of Columbia
Jacksonville Area Legal Aid, Inc.	Florida
Atlanta Legal Aid Society, Inc.	Georgia

Metro Fair Housing Services, Inc.	Georgia
Savannah – Chatham County Fair Housing Council, Inc.	Georgia
Access Living of Metropolitan Chicago	Illinois
Chicago Area Fair Housing Alliance	Illinois
Heartland Alliance for Human Needs & Human Rights	Illinois
Housing Choice Partners	Illinois
Illinois People's Action	Illinois
South Suburban Housing Center	Illinois
Fair Housing Center of Central Indiana	Indiana
Greater New Orleans Fair Housing Action Center	Louisiana
Baltimore Neighborhoods, Inc	Maryland
CASH Campaign of Maryland	Maryland
Housing Options & Planning Enterprises, Inc.	Maryland
Public Justice Center	Maryland
Fair Housing Center of Southeast & Mid Michigan	Michigan
Fair Housing Center of Southwest Michigan	Michigan
Fair Housing Center of West Michigan	Michigan
Mississippi Center for Justice	Mississippi
Montana Fair Housing, Inc.	Montana
New Jersey Citizen Action	New Jersey
CNY Fair Housing, Inc.	New York
Long Island Housing Services, Inc.	New York
Fair Housing Resource Center, Inc.	Ohio
Miami Valley Fair Housing Center, Inc.	Ohio
The Fair Housing Center	Ohio
Greater Houston Fair Housing Center	Texas
North Texas Fair Housing Center	Texas
Texas Appleseed	Texas
Northwest Fair Housing Alliance	Washington
West Virginia Center on Budget and Policy	West Virginia