December 1, 2020

Via Regulations.gov

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Request for Information on the Equal Credit Opportunity Act and Regulation B (Docket No. CFPB-2020-0026)

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to comment on the request for information issued[2] by the Consumer Financial Protection Bureau seeking input on the Equal Credit Opportunity Act and Regulation B.

The Equal Credit Opportunity Act is the nation's principal fair lending law and, with its implementing regulation, Regulation B, plays a vital role in protecting consumers against unlawful discrimination in any aspect of a credit transaction. ECOA and Regulation B use a variety of regulatory tools to prevent discrimination on the basis of race, national origin, sex, and other prohibited bases, including principles-based prohibitions on unlawful discrimination and discouragement, substantive restrictions on the collection and use of certain consumer information, and consumer disclosures. At the same time, ECOA and Regulation B seek to promote expanded credit availability to traditionally underserved populations through methods such as affirmative outreach and advertising (including to non-English speaking populations) and special purpose credit programs. The CFPB and other federal and state regulators exercise their supervisory and enforcement powers to monitor and enforce compliance with ECOA and Regulation B.

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] Request for Information on Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46,600 (August 3, 2020) (hereafter "ECOA RFI"), as modified to extend the comment period in Request for Information on Equal Credit Opportunity Act and Regulation B; Extension of Comment Period, 85 Fed. Reg. 52,332 (August 25, 2020).

BPI and its members support the twin goals of ECOA and Regulation B to prevent unlawful credit discrimination and promote the availability of credit to all creditworthy applicants without regard to race, national origin, sex, or other prohibited bases. BPI believes the CFPB has an opportunity to modernize Regulation B and related guidance to better meet these goals. As outlined below, BPI strongly supports efforts to enhance the fairness and accuracy of credit decisions and to expand access to credit for traditionally underserved borrowers. Specifically, BPI urges the CFPB to take the steps set forth below to promote fairer, more inclusive, and more accurate credit markets:

- <u>Serving limited English proficiency consumers</u>. The CFPB should provide flexible standards and safe harbors to support the provision of in-language services to limited English proficiency ("LEP") consumers. These flexible standards and safe harbors should clarify fair lending and unfair, deceptive, or abusive acts or practices ("UDAAP") compliance expectations for in-language communications without imposing impractical or burdensome requirements on banks, such as obligations to service an entire loan in-language or to require identical treatment when providing in-language services (*e.g.*, such as requiring an interpreter in all cases). In particular, the CFPB should adopt safe harbors for good faith efforts to provide in-language disclosures materially similar to English-language disclosures and translation services, and to document and disclose LEP policies, and should publish in-language model forms and disclosures. The CFPB also should clarify that verbatim translations of marketing and advertising are not required to ensure accuracy and should facilitate in-language consumer financial education to LEP consumers. Additional guidance or safe harbors could address third-party risk management, testing, the use of in-language across business lines and at different stages of the loan process, and consideration of relevant state law requirements.

- <u>Adopt a pragmatic Small Business Data Collection Rule</u>. The CFPB should take a pragmatic approach in proposing and finalizing its Small Business Data Collection Rule. As BPI will discuss in a separate comment letter, the CFPB should create a level playing field between large and small reporting institutions to equalize the burdens and avoid distortions in the data, adopt a streamlined definition of small business (gross revenues of $1 million or less in the preceding calendar year), and limit data collection to the data points mandated by Section 1071 of the Dodd-Frank Act.

- <u>Provide additional clarity on special purpose credit programs to enhance their use</u>. The CFPB should promote the enhanced use of special purpose credit programs ("SPCPs") to foster a more inclusive credit system through programs targeted to reach traditionally disadvantaged groups, including minority borrowers. The CFPB should make SPCPs more useful by creating a safe harbor from liability for good faith efforts by creditors to establish and implement SPCPs designed to serve traditionally disadvantaged borrowers, publishing a model written plan or plans, and providing additional guidance to clarify what constitutes a business justification for a SPCP and the appropriate scope and limits for SPCPs.

- <u>Provide additional guidance regarding affirmative advertising to promote constructive outreach</u>. The CFPB should revise the currently sparse official commentary regarding affirmative marketing to provide greater clarity and guidance to promote such affirmative outreach to traditionally disadvantaged groups, including minorities. Additional guidance would assure creditors and other participants in the credit marketing ecosystem that affirmative advertising to disadvantaged and underserved borrowers is consistent with fair lending laws and regulations. The CFPB, among other things, should clarify how to determine the status of a "traditionally disadvantaged group," provide guidance to distinguish affirmative advertising from prohibited steering, redlining, discouragement, or UDAAPs, and make clear that market research and the use of fictional personas do not raise fair lending issues.

- Provide more, and more frequent, determinations about whether state laws are "inconsistent" with ECOA and Regulation B. BPI recognizes that the preemption standard in ECOA and Regulation B set a high bar for determining whether state law prohibitions against credit discrimination are preempted. State anti-discrimination laws vary widely, however, and the multiplicity of state-law standards and the lack of clarity about whether they apply makes institutions' compliance programs more costly and less efficient. A regular cadence of CFPB review and determination of state laws identified as potentially inconsistent would mitigate this uncertainty.

- Undertake a principled modernization of Regulation B and related guidance to foster the use of artificial intelligence ("AI") and machine learning ("ML") models in credit underwriting. The CFPB has an opportunity to advance fair lending objectives in a meaningful way through a principled modernization of the regulatory framework to accommodate AI/ML credit underwriting models. These models hold great promise for generating fairer, more inclusive, and more accurate credit underwriting decisions. This principled modernization should focus on: (i) coordination and consistency among the CFPB and the federal banking agencies; (ii) maintaining ECOA's focus on preventing credit discrimination; (iii) updating model risk management standards to reflect the unique features of AI/ML models and to harmonize consumer protection and safety and soundness goals; (iv) transparency; and (v) reconsidering the methods and reasons provided in adverse action notices.

The rest of this letter elaborates on BPI's views regarding each of these important issues.

I. The CFPB Should Provide Further Clarity Related to the Provision of Financial Services to Limited English Proficiency Consumers.

BPI appreciates the continued dialogue with the CFPB regarding issues related to the provision of financial services to LEP applicants and borrowers. The CFPB first comprehensively addressed the challenges for institutions that seek to provide increased access to credit for LEP consumers in its 2017 Spotlight on Serving LEP Consumers (the "Spotlight").[3] The CFPB's Spotlight work was constructive in recognizing the challenges financial institutions face in serving LEP consumers and the need for flexible approaches when serving LEP consumers.

As a general matter, financial institutions continue to face many of the risks and constraints identified in the Spotlight. Among the challenges addressed in the CFPB's Spotlight, banks continue to face the following issues: (i) ensuring materials are written at a reading level accessible to the LEP consumer regardless of the language used; (ii) having no nationally recognized organizations offering financial interpreters and translator certification; and (iii) determining the accuracy of translations

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[3] CFPB, *Spotlight on serving limited English proficient consumers: Language access in the consumer financial marketplace* (Nov. 2017); *see also* CFPB Blog, *Five ways banks and other lenders work with people who speak or understand limited English* (Nov. 22, 2017).

related to financial terms that are made into other languages. Nevertheless, banks continue to offer services tailored to the needs of LEP consumers, although the type and scope of these services vary based on factors including the level of fair lending or UDAAP risk posed by particular activities.

The CFPB should provide institutions with the flexibility to proactively engage with LEP consumers in-language, while minimizing legal and regulatory uncertainty that creates barriers to providing in-language services to LEP consumers. Such an approach would ensure an appropriate balance between facilitating greater access to credit for LEP consumers, while mitigating the costs and risks to institutions that choose to provide in-language services.

A. Current Practices for Providing Services Vary by Each Institution and A Lack of Clarity Regarding Federal and State Legal Requirements Is Determinative.

Most institutions currently use the methods and approaches identified in the CFPB's Spotlight for serving LEP consumers, but they do so using a risk-based approach in light of the fair lending and UDAAP considerations. In many instances, institutions also look to the CFPB's prior guidance or to state requirements to determine how to meet the needs of the LEP consumers in their footprint.

The types of services for which institutions offer in-language can vary, but may include: (i) verbal support through third parties or bilingual employees; (ii) point of purchase advertising and sales and marketing aids; (iii) in-language mobile applications (typically for Spanish language); (iv) co-branded credit card applications and servicing communications; (v) consumer deposit account opening, onboarding and servicing communications; or (vi) certain translated documents (which include those required by state law). Institutions generally manage in-language services, including document translation and/or verbal support, through a combination of in-house staff (*e.g.*, certified linguists, compliance managers) and third-party vendors, although the approach may vary across institutions and depends upon the availability of these services in the geographic footprint. Some institutions also use translation tools such as approved glossaries and translation memory to ensure consistency across relevant documentation and materials.

Institutions consider a number of factors in deciding which services to provide in-language, including: (i) customer demand; (ii) business opportunity; (iii) the ability and capability of the institution to provide bi-lingual servicing; (iv) appropriate control points (*e.g*., the ability and capability to integrate compliance review approval, and to provide certified staff in servicing and translation); (v) requests for assistance by applicants and borrowers; (vi) the languages that may be used in product advertising; or (vii) the applicable legal requirements (*e.g*., the Remittance Transfer Rule). These same factors may be used to consider the specific languages in which an institution may choose to provide services to LEP consumers and the types of services provided.

In many instances, the dispositive factor is whether the institution has sufficient resources to support in-language services (*e.g.*, third-party translation services, customer support, or other similar services) and this will often vary by language. Banks generally work to serve consumers using in-house multilingual personnel when possible, supplemented by third-party translation vendors where necessary. Institutions may use third-party vendors to support a variety of LEP services, such as (i) proofreading tools; (ii) translation memory, glossary of terms or a style guide; (iii) connectors for digital translations; (iv) document and verbal translation services; (v) telephone translation services; or (vi) "back translation" to ensure accuracy.

Another factor relevant to the provision of services to LEP consumers relates to requirements imposed under applicable state law that, in some circumstances, may restrict the ability of an institution to provide certain services in particular locations throughout its footprint. However, any language services that are offered in any geographic area generally are consistent throughout that area.

B. Without Clearer Guidelines, Providing Services to LEP Consumers Raises Challenges.

A primary challenge for financial institutions regarding the provision of services to LEP consumers is managing and limiting potential liability exposure under federal and state fair lending and UDAAP laws and anticipating how those may be applied when institutions choose to provide services to LEP consumers.

Fair lending risk can arise in a number of scenarios. For example, institutions must ensure that there is parity across the range of languages in which a product is offered and through the product lifecycle, and that the language options provided are appropriate considering the communities in which the bank operates. In these circumstances, institutions also must consider potential UDAAP risks. These risks create uncertainty regarding an institution's potential liability for any inaccuracies in in-language communications (including those provided by a customer-provided translator) and the continued obligation to ensure that such communications are translated appropriately, as well as the significant operational challenges in ensuring accurate and appropriate translations.

Applicable state law requirements create additional regulatory uncertainty for institutions that seek to provide increased services to LEP consumers. For example, California and New York law require institutions to provide materials in the language in which the contract was negotiated, for certain specified languages.[4] The variations in these state laws create specific challenges for institutions that include the requirement to implement state-specific procedures, practical limits on the ability to service LEP customers in an institution's marketplace and footprint, and operational challenges.[5]

In addition, institutions continue to face regulatory uncertainty regarding the translation of documents. For example, there are ongoing questions regarding which documents should be translated and whether the translation of certain documents would result in a requirement to translate other types of documents. Similarly, if marketing is conducted in a particular language, institutions continue to have questions regarding whether and how the in-language translations must flow through to the credit transaction documents.

Institutions also need to know whether they are obligated to respond in-language in circumstances where an LEP consumer engages in written correspondence in a language other than English. More generally, institutions continue to have questions regarding when they would be

[4] Other examples include: (i) Illinois requirement of signed acknowledgements for transactions aided by an interpreter (815 Ill. Comp. Stat. § 505/2N); (ii) Massachusetts requirement that mortgagers take reasonable steps to communicate "material facts" in a language the borrower can understand (Mass. Gen. Laws ch.940 § 8.05); (iii) Texas requirement that home equity-related disclosures be translated into the language, such as Spanish, used in discussions with the borrower (Tex. Bus. & Com. Code § 341.502), (iv) relevant laws that require any non-English documents sent for recording to be accompanied by an English translation, and (v) state laws requiring non-English statements/text for default or disclosure related notices.

[5] For example, in the context of California, this would require state-specific procedures for call center interactions for customers from California.

obligated to offer in-language materials. Thus, institutions could benefit from additional guidance and safe harbors from the CFPB regarding whether and/or how to prioritize providing in-language materials in certain languages and the fair lending and UDAAP considerations relevant to these choices.

Finally, in certain cases, institutions may interact with an LEP applicant or borrower that chooses to use their own interpreter. In those cases, banks need clarity to be able to rely on the accuracy of a consumer-provided translator.

C. The CFPB Should Undertake Efforts to Provide Legal Clarity Regarding the Expectations for Institutions Offering In-Language Services to LEP Consumers.

BPI believes that the CFPB can and should provide additional guidance and safe harbors with respect to serving LEP consumers to promote the offering of LEP services, reduce legal and regulatory uncertainty, and assist institutions in making their products and services available to creditworthy applicants of all backgrounds. Specifically, BPI recommends that the CFPB take the following steps to further enhance the services available to LEP consumers.

First, the CFPB should consider providing fair lending and UDAAP compliance expectations for in-language communications, third-party risk management, testing and the use of in-language across various business lines that give financial institutions clarity and flexibility with regard to the delivery of LEP services. Providing customers services in-language is a complex process with no way to ensure that the customer's experience will be identical to one they would receive in English; in fact, the mere provision of translation services results in a different customer experience. Additional complexity is raised in situations where an institution engages with the customer in-language during the intake process, but the origination process is conducted in English, which raises potential UDAAP considerations, particularly with respect to the language break. The CFPB should clarify that institutions are permitted to provide services to customers in a language other than English, and that non-material differences in how these customers are treated relative to those customers served in English are not deemed to violate ECOA or Regulation B, or UDAAP principles. Put another way, we recommend that CFPB adopt a safe harbor which states that providing services to LEP customers in a language other than English in a materially similar manner to the services provided to similarly-situated customers served in English is deemed to be in compliance with ECOA and UDAAP. In articulating "material similarity" for these purposes, the CFPB should consider similar product terms and similar access to product features, loss mitigation offers and relevant complaints. By contrast, examples of non-material activities (*i.e.*, those services where certain differences would be permitted), would include the manner of communication (*e.g.*, use of an interpreter versus use of a directly fluent bank representative), hours of availability of customer support in-language and imagery provided in marketing communications.

Second, the CFPB should adopt one or more safe harbors and other tools to protect institutions from liability for good faith efforts undertaken by an institution to satisfy the "material similarity" standard established by the CFPB. For example, the CFPB should create in-language model forms and disclosures the appropriate use of which would provide a safe harbor for institutions to mitigate concerns about the accuracy of translated communications. As a part of these in-language forms and disclosures, the CFPB should ensure flexibility for institutions by stating that disclosures provided to LEP consumers are permitted to be at least as comprehensive as the CFPB-issued model disclosures.

Third, the CFPB should adopt standards regarding the types of policies and procedures for the provision of in-language services (including considering approaches that provide flexibility with regard to an individual institution's structure and business model). These standards should recognize the full life-cycle of the financial products or services, including processes relating to marketing, servicing or loss mitigation, and the fact that LEP services may be offered in some, but not all, parts of the life-cycle. In adopting these standards, the CFPB should consider also clarifying whether an institution is obligated to respond in-language when an LEP consumer submits written correspondence in a language other than English and how to undertake in-language marketing and advertising in-language given differences between languages and the possibility that the LEP consumer has limited financial knowledge (for example, by suggesting minimum standards for in-language marketing or advertising materials). Furthermore, the CFPB should address its expectations for compliance with state requirements.

Fourth, the CFPB, on its own and through partnerships with banks and other third-party organizations, offer financial education in-language to LEP consumers alongside its regulatory efforts.

II. The CFPB Should Ensure A Balanced Process to Meet the Needs of Small Businesses as a Part of Its Section 1071 Rulemaking.

BPI appreciates the CFPB's engagement on the topic of expanding access to credit for small businesses, including women- and minority-owned small businesses. BPI members are deeply committed to enabling small businesses to have access to the credit they need and, collectively, make nearly half of the nation's small business loans. As the CFPB begins its process into proposing a rulemaking under Section 1071 of the Dodd-Frank Act, we believe now is an opportune time to stress certain principles that the CFPB should follow as it promulgates its rule—principles that we believe will further the goals of Section 1071 in furthering access to credit to women- and minority-owned businesses. BPI also intends to comment in further detail regarding the CFPB's SBREFA proposal through a separate letter.

When considering any exemptions from the Section 1071 rule for certain financial institutions, we would encourage the CFPB to ensure a level-playing field among various types of reporting institutions and to consider the relative risks presented by reporting institutions that, in the aggregate, may pose significant risks to small business owners. In addition to ensuring a level-playing field, the CFPB should adopt a streamlined definition of small business—one that adopts a threshold of gross revenue of $1 million or less in the preceding calendar year.[6] Such a threshold would both streamline reporting obligations and appropriately focus on the small businesses for which the CFPB seeks to collect information. Further, the CFPB should consider harmonizing any such thresholds with other relevant statutes, such as the Community Reinvestment Act or the Institution Call Report.

Finally, the CFPB should limit its initial Section 1071 rulemaking to the statutorily mandated data points. We understand why the CFPB may seek the collection of additional discretionary data points, given the size and scale of the data collection undertaking and the lack of certainty as to what actionable insights the data collection may yield. Nevertheless, we encourage the CFPB to undertake the collection and analysis of the statutorily-mandated data points in the first instance, take the necessary time to understand and analyze the resulting data, and then determine, based on actual experience, what, if any, additional data points should be collected, prior to engaging in a rulemaking to collect additional data points.

[6] This threshold also would include traditional Small Business Administration loans.

III. The CFPB Should Provide Greater Certainty to Encourage Special Purpose Credit Programs.

Regulation B provides creditors with the opportunity to establish SPCPs to facilitate the extension of credit to traditionally underserved borrowers, including minority borrowers. SPCPs serve the goals of ECOA and Regulation B by promoting expanded credit availability to traditionally underserved populations. The current rules, however, pose risks to banks by not providing sufficient certainty regarding when SPCPs are appropriate. As a result, SPCPs are not used to their full potential.

Specifically, credit-granting institutions must make an educated guess about whether an SPCP satisfies the regulatory standards, including making its own determination of whether a program will target a traditionally disadvantaged group. Creditors implementing SPCPs assume the risk that a regulator may conclude that the SPCP criteria have not been met and that the creditor has violated ECOA and Regulation B. More institutions would adopt SPCPs if the CFPB provided greater legal certainty, including safe harbors, for good faith efforts to implement SPCPs.

A. <u>The Legal Standards for Developing and Administering a SPCP</u>.

Regulation B provides that a SPCP offered by a for-profit organization, such as a bank, must be established and administered: (i) pursuant to a written plan that identifies the class of persons it is designed to benefit and that sets forth procedures and standards for extending credit under the program; and(ii) to extend credit to a class of persons who, under the organization's customer standards of creditworthiness, probably would not receive credit or would receive it on less favorable terms than other applicants applying for a similar type or amount of credit.[7]

The Official Commentary to Regulation B provides that a for-profit organization may determine the need for a SPCP based on an analysis using the organization's own research or data form outside sources, including government reports and studies.[8] One example provided in the commentary is reviewing HMDA data and a bank's own demographic data and concluding that there is a need for a SPCP for low-income minority borrowers.[9] The written plan must support the need for the SPCP and either state a specific time period that the program will last or state when the SPCP will be reevaluated to determine if there is a continuing need for it.[10]

Regulation B also provides that a SPCP must not discriminate against an applicant on any prohibited basis. However, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program is not established or administered for the purpose of evading the requirements of ECOA or Regulation B.[11] As a result, notwithstanding Regulation B's general prohibition on data collection, a creditor may request and consider the common characteristics (such as race, national origin, or sex) in determining the applicant's

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[7] 12 C.F.R. § 1002.8(a)(3).

[8] 12 C.F.R. part 1002, supp. I § 1002.8(a)-5.

[9] *Id.*

[10] 12 C.F.R. part 1002, supp. I § 1002.8(a)-6.

[11] 12 C.F.R. § 1002.8(b)(2).

eligibility for the SPCP.[12] In addition, if financial need is one of the criteria under a SPCP, the creditor may request and consider the applicant's marital status, alimony, child support, and separate maintenance income, and the spouse's financial resources in determining an applicant's eligibility for the SPCP.[13] A creditor also may obtain the signature of an applicant's spouse or other person on an application or credit instrument if required by federal or state law.[14]

B. Currently, Institutions Face Challenges in Developing and Administering SPCPs.

SPCPs hold great promise for facilitating expanded and more inclusive access to credit for traditionally underserved populations. Banks and other creditors, however, face a significant lack of certainty, and related legal, regulatory, and reputational risk, that limits their use of SPCPs to expand credit access.

Specifically, as noted above, SPCP's permit creditors to engage in activities, such as the collection and consideration of data on applicants, that otherwise are prohibited by Regulation B. This creates a significant risk of regulatory action if a creditor, in good faith, concludes that it has met the standards for a SPCP, but a regulator reaches a different conclusion and determines that the elements of a SPCP have not been met.

In such a case, the bank or other creditor may not only be found to have established a deficient SPCP, but also may be found to have violated other provisions of Regulation B, such as unlawfully collecting and evaluating information about prohibited basis characteristics. Such a finding could lead to regulatory enforcement, private litigation, and reputational harm to the institution. For these reasons, for-profit institutions need greater regulatory certainty and assurance from the CFPB that good faith efforts to establish and administer SPCP's will not result in regulatory actions alleging discrimination or other violations of Regulation B.

The potential for regulatory action if a regulator disagrees with a bank's basis for a SPCP creates a significant disincentive to establishing such programs given the consequences the bank may face if it miscalculates and errs in its assessment of its compliance with the SPCP requirements. These consequences include potential regulatory action, private litigation, and reputational harm. As a result, the decision to establish a SPCP is a high-stakes gamble for regulated financial institutions with major downside risk for guessing wrong on how to establish and implement a SPCP.

C. The CFPB Should Eliminate Uncertainty Inherent in SPCPs by Creating a Safe Harbor for Good Faith Efforts to Establish and Administer a SPCP.

BPI recommends that the CFPB eliminate the uncertainty and high-stakes risk inherent in SPCPs by creating a safe harbor from ECOA and Regulation B liability for good faith efforts to establish and administer a SPCP designed to extend credit to traditionally underserved borrowers and providing additional guidance on implementing a compliant SPCP. The safe harbor should make clear that the establishment of a SPCP is not evidence of, and may not be used as evidence of, prior discriminatory

[12] 12 C.F.R. § 1002.8(c).

[13] 12 C.F.R. § 1002.8(d).

[14] *Id.*

behavior by the creditor.

BPI also recommends that the CFPB publish one or more models of a written plan for a SPCP that creditors can use as guidance when developing their own written plans. The model written plan(s) should provide guidance that describes how these programs would work and give examples of different types of SPCPs. Appropriate use of a model written plan should be deemed compliant with the written plan requirements for a SPCP. The CFPB also should coordinate with the federal banking agencies and HUD to create a uniform, consistent approach to evaluating SPCPs across the different agencies.

BPI further recommends that the CFPB provide additional guidance on what constitutes a business justification for a SPCP. Specifically, BPI recommends that the CFPB clarify that a business justification for a SPCP is a flexible standard that may, but need not, be based on the creditor's own situation. For example, the CFPB should clarify that a SPCP may be based on a business goal of proactively encouraging minority access to credit, even if not tied to any finding that the creditor is or may be deficient in lending to minorities, or may be based on a business goal of increasing market penetration with minority borrowers compared to peer organizations.

Finally, BPI recommends that the CFPB provide additional guidance on the scope and limits of SPCPs. Specifically, BPI recommends that the CFPB clarify that a SPCP may be established and administered to address any aspect of a credit transaction, including servicing and loan modifications, and is not limited in scope to loan origination activities or to activities covering the full life of the loan. BPI also recommends that the CFPB clearly set forth any limits on the application of SPCPs. For example, the CFPB should specify whether it would consider SPCPs inappropriate for the extension of certain types of loans to consumers, such as high-cost or subprime loans. By clarifying the requirements for and boundaries of SPCPs, the CFPB would encourage greater use of SPCPs by banks to promote expanded and more inclusive access to responsible credit for traditionally underserved borrowers.

IV. The CFPB Should Provide Greater Clarity to Encourage Affirmative Advertising.

The Official Commentary to Regulation B authorizes the use of affirmative advertising to traditionally disadvantaged groups, including minority populations, to promote greater, more inclusive access to credit. The laudable goals of the affirmative advertising provision, however, are undermined by a lack of clear guidance on how to support, document, and administer an appropriate affirmative advertising campaign consistent with the regulatory requirements.

A. The Legal Standards Applicable to Affirmative Advertising.

Regulation B prohibits a creditor from making any oral or written statement, 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.[15] The Official Commentary, however, permits creditors to engage in affirmative advertising, specifically to "affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor."[16]

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[15] 12 C.F.R. § 1002.4(b).

[16] 12 C.F.R. part 1002, supp. I § 1002.4(b)-2.

B. The Challenges Inherent in Engaging in Affirmative Advertising Are A Result of Uncertainty and Limited Relevant Guidance.

The affirmative advertising provision serves a laudable goal and should further the fair lending objectives of ECOA and Regulation B. However, the potential positive impact of this provision has been undermined by the commentary's lack of clear guidance on how to support, document, and administer an appropriate affirmative advertising campaign. In addition, the lack of certainty regarding the provision of services to LEP borrowers also limits affirmative advertising to non-English speaking populations. The LEP issues are discussed above in Section I of this letter.

The current guidance on affirmative advertising is sparse, raises a number of interpretive questions, and, in practice, limits banks' ability to engage in affirmative advertising. BPI submits the three examples that follow as areas where greater interpretive clarity is needed.

First, the current comment focuses on advertising that encourages members of "traditionally disadvantaged groups" to apply for credit, especially "groups that might not normally seek credit" from the creditor. It is not clear how creditors can identify such groups given the general prohibition on collecting data on applicants' prohibited basis characteristics. In the absence of such data, there is no guidance regarding what data or documentation is necessary or sufficient to support an affirmative marketing campaign.

Second, the current commentary contains no guidelines or guidance relating to the limits of affirmative advertising and when, for example, affirmative advertising might raise fair lending or UDAAP issues. It also is not clear whether affirmative advertising must be limited to one disadvantaged group or one product or whether it may encompass multiple groups or products.

Third, many online advertising platforms restrict any use of prohibited bases for target marketing based on fair lending and UDAP/UDAAP concerns. These restrictions prevent banks from engaging in affirmative advertising on those platforms. These advertising platforms are highly unlikely to permit any form of affirmative advertising without clear regulatory guidance that provides assurance that some uses of prohibited bases for marketing are lawful and appropriate, and, indeed, encouraged by regulators.

C. The CFPB Should Revise and Update the Guidance for Affirmative Advertising to Ensure a Consistent Approach.

BPI recommends the CFPB revise the official commentary regarding affirmative marketing to provide greater clarity and guidance, along with safe harbors. The revised guidance should give participants in the credit marketing ecosystem the assurance that affirmative advertising to disadvantaged and underserved borrowers is consistent with fair lending laws and regulations.

First, BPI recommends that the CFPB revise the official commentary to: (a) permit a determination of "traditionally disadvantaged groups" to be based on government and other external research data, consistent with the approach taken in the SPCP provisions of Regulation B; and (b) provide a non-exclusive list of examples of "traditionally disadvantaged groups." *Second*, BPI recommends that the CFPB revise the official commentary to: (a) state that affirmative advertising may apply to "one or more" traditionally disadvantaged groups and/or to "one or more" credit products; (b) create a safe harbor against claims of steering, redlining/reverse redlining, discouragement, or UDAAP for good faith efforts to affirmatively encourage members of traditionally disadvantaged groups to apply for credit through advertising; and (c) provide illustrative examples of affirmative advertising that would not be considered steering, redlining/reverse redlining, discouragement, or UDAAP, as well as examples of advertising that may raise concerns in these areas. *Third*, BPI recommends that the CFPB clarify in the commentary that market segmentation on a prohibited basis for target marketing falls outside the scope of discouragement because it does not involve any communication to consumers. *Fourth*, BPI recommends that the CFPB clarify in the commentary that the use of personas or fictional people for market research and modeling for affirmative advertising falls outside the scope of discouragement because it does not involve any communication to consumers.

BPI believes that the adoption of these clarifications would reduce uncertainty and risk related to affirmative advertising, promote the greater use of affirmative advertising, and lead to expanded and more inclusive access to credit for minority borrowers.

V. The CFPB Should Consider How Best to Ensure More, and More Frequent, Determinations Regarding Federal Preemption under ECOA and Regulation B.

A. The Preemption Standard in ECOA and Regulation B.

ECOA expressly addresses the preemption of state law. It provides that state laws "with respect to credit discrimination" are preempted only "to the extent that those laws are inconsistent with any provision of" ECOA and then "only to the extent of the inconsistency." The CFPB has the authority to determine whether there is an inconsistency between ECOA and any state law, but it may not determine that a state law is inconsistent if it determines that the state law "gives greater protection to the applicant."[17] Regulation B restates the statutory preemption standard, lists several categories of state laws that are preempted, and provides that a creditor, state, or other interested party may request that the CFPB determine whether a state law is inconsistent under the statutory and regulatory standard. There is no provision for the CFPB to make that determination in the absence of a request. Regulation B also includes Appendix D, which states the CFPB's practices for issuing interpretations, and Supplement I, which sets forth interpretations of the statute and regulation.[18]

B. Institutions Face Challenges in Complying with Multiple Inconsistent State Laws.

The ECOA and Regulation B preemption standard creates a presumption that state anti-discrimination laws apply. BPI's members typically offer credit in many states or nationwide. These institutions must have a sophisticated and comprehensive compliance infrastructure to assure compliance with ECOA and Regulation B as well as with many other consumer protection requirements at the federal level and in multiple states. The challenges of identifying laws in many different states that may be "inconsistent" under the ECOA and Regulation B standard, together with the case-by-case approach to requesting inconsistency determinations, adds complexity, time, and cost to institutions'

[17] 15 U.S.C. § 1691d(f).

[18] 12 C.F.R. § 1002.11; App. D to Part 1002; Supp. I to Part 1002.

compliance efforts.

BPI recognizes that under ECOA and Regulation B state prohibitions against credit discrimination apply where those prohibitions are more protective of consumers, even though different states approach the issue of credit discrimination differently from one another and differently from the approach under federal law. Differences between one or multiple states' laws on the one hand and federal law on the other can only be resolved by a CFPB determination of inconsistency or through litigation that may be protracted and costly. BPI believes there are process improvements that the CFPB could undertake that could serve to mitigate this uncertainty.

C. The CFPB Should Consider Taking A More Proactive Approach to Identifying State Laws That Are Inconsistent with ECOA and Regulation B.

BPI recommends that the CFPB take a more proactive approach to identifying state laws that may be inconsistent with ECOA and Regulation B with a view toward making inconsistency determinations more frequently and with respect to more state laws. One way to do this would be for the CFPB to request information from time to time about state laws that commenters believe are inconsistent with ECOA and Regulation B under the statutory standard. The elements of this process could include: (1) a notice published by the CFPB at regular intervals in the *Federal Register* asking commenters to identify state laws that may be inconsistent with ECOA and Regulation B; (2) analysis by the CFPB of those state laws under the statutory and regulatory standard; and (3) prompt publication of the CFPB's conclusions promptly.

To further evaluate opportunities to promote consistency between federal and state laws, BPI urges the CFPB to invoke its authority to coordinate with federal and state regulators pursuant to Section 1015 of the Dodd-Frank Act[19] to consult with other agencies and identify and reconcile potential conflicts between federal and state laws.

Review cadenced in this fashion, together with coordinated action by key regulators, could produce positive results. First, providing regular opportunities for a CFPB ruling on state laws under the "inconsistency" standard will in cases of doubt provide better clarity to institutions than they currently have, allowing them to adjust their compliance programs accordingly. In addition, reviewing more state laws more frequently could enable the CFPB to identify more features or characteristics of state laws likely to be preempted under the inconsistency standard so that stakeholders could generalize their conclusions to categories of state laws. That generalization could in turn be useful in the design and standardization of compliance programs. Finally, coordination among federal and state regulators should enhance clarity and help minimize conflicting interpretations about the effect and consequences of federal and state fair lending laws.

VI. The CFPB Should Undertake Principled Regulatory Modernization Regarding the Use of Artificial Intelligence and Machine Learning in the Credit Decisioning Process.

BPI is encouraged by the CFPB's constructive engagement on innovation issues, including in the area of artificial intelligence ("AI") and machine learning ("ML"). BPI applauds the CFPB for publishing a thoughtful and timely blog post on providing adverse action notices when using AI/ML models and for

[19] 12 U.S.C. § 5495.

launching its first tech sprint to generate improvements to adverse action notices.[20]

Building on this innovation focus, the CFPB's RFI notes that "financial institutions are starting to deploy artificial intelligence (AI) and machine learning (ML) across a range of functions." Many of these functions, such as the use of AI/ML to efficiently fulfill customer requests, and to detect fraud or other potential illegal activity, are widely accepted. However, the use of these same innovations in credit underwriting to increase access to credit and improve the accuracy and fairness of credit underwriting is hampered by a lack of regulatory flexibility.

In certain respects, the legal and regulatory standards set forth in ECOA and Regulation B (as well as in certain other regulatory guidance) simply have not kept pace with advances in AI/ML technology. BPI believes it is important for the CFPB to address these issues because AI/ML has such vast potential to make credit decisions more accurate and fair, expand access to credit, and further reduce disparate outcomes in credit decisions.

A. A Suggested Framework for Principled Regulatory Modernization.

BPI believes that consumers are best served by regulatory approaches that are sufficiently flexible and adaptable to the emergence of new technologies and new methods of providing financial products and services. With regard to the use of AI/ML in credit underwriting, there are a host of ways in which regulatory approaches could be modernized to keep pace with technological advances.[21]

The regulatory provisions, guidance, and supervisory approaches that impede the use of AI/ML were all enacted before these technologies became a feasible for use in credit underwriting. In many respects, the disconnect between current regulatory approaches and the use of AI/ML derives from outdated methods of applying existing regulatory standards to AI/ML, rather than from any conflict between the use of AI/ML and long-standing legal standards, regulatory requirements, and policy goals.

In the past, other regulatory frameworks have been modernized to reflect changes in technology and consumer behavior, and so provide a roadmap for updating the regulatory framework to promote the responsible use of AI/ML credit underwriting systems.

BPI has been at the forefront of the effort to modernize the regulatory framework to facilitate the use of AI/ML in credit underwriting. BPI's work on AI/ML issues is reflected in a white paper published in September 2020, which we incorporate by reference in this comment letter.[22] BPI is confident that such modernization can and must preserve essential regulatory principles, such as the prevention of unlawful discrimination, while aligning regulatory practices with the technological innovations that are reshaping the landscape of consumer financial services.

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[20] CFPB Blog, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 7, 2020); CFPB Blog, *CFPB's first tech sprint on October 5-9, 2020: Help improve consumer adverse action notices* (Sept. 1, 2020).

[21] Another area the CFPB may consider providing further clarity relates to the use of AI and ML in the marketing space.

[22] Bank Policy Institute and Covington & Burling LLP, *Artificial Intelligence: Recommendations for Principled Modernization of the Regulatory Framework* (Sept. 14, 2020).

BPI is convinced that principled modernization can protect consumers, prevent unlawful discrimination, and promote bank safety and soundness while allowing banks to use AI/ML to improve the efficiency and fairness of credit underwriting. Such principled modernization would encompass updated approaches to ECOA and Regulation B.

B. Recommendations for Principled Modernization of the Regulatory Framework.

BPI submits the following recommendations as measures necessary and appropriate to facilitate the wider use of AI/ML underwriting models to expand access to credit and make credit decisions fairer, particularly for underserved borrowers, such as minorities, immigrants, and young adults.

1. *Coordination and Consistency.*

BPI recommends that the CFPB work closely with the federal banking agencies to modernize the regulatory framework for AI/ML. Interagency coordination and consistency are critical components of principled modernization of the legal framework surrounding AI/ML. No one statute or regulation, and no single agency by itself, has comprehensive authority to foster the responsible use of AI/ML in credit underwriting.

Interagency coordination and consistency is essential for creating a level playing field for banks and non-bank lenders in the AI/ML space. A level playing field is needed to ensure that consumers have the same protections when dealing with bank and non-bank lenders. Unfortunately, experience with AI/ML underwriting to date illustrates the differences in the intensity of regulatory scrutiny between banks and non-banks. This asymmetry does not serve the interests of consumers or the policy objectives of current law.

Interagency coordination and consistency will require leadership from the CFPB. Because AI systems implicate both consumer protection and safety and soundness concerns, the creation of a level playing field requires a coordinated and consistent effort by both the federal banking agencies and the CFPB. That said, the CFPB has exclusive rule-writing and interpretive authority over a wide range of relevant federal consumer financial protection laws, including ECOA, making CFPB leadership on these issues critical. Similarly, the CFPB is the only federal agency that examines and enforces ECOA and other consumer financial protection laws against both banks and non-banks.

2. *Preventing Discrimination.*

It is essential to preserve and maintain ECOA's core purpose of preventing unlawful discrimination while adopting regulatory innovations to make ECOA's anti-discrimination purpose relevant to AI/ML models. ECOA applies to the use of AI credit underwriting systems, just as it applies to conventional underwriting systems or any other aspect of a credit transaction. Where possible, the standards for AI credit underwriting systems should mirror standards that apply to conventional credit underwriting systems.

Some regulatory innovation may be needed, however, because AI in credit underwriting presents novel issues. The CFPB should consider whether the current regulatory framework for ECOA—including its rules, official interpretations, and examination procedures—adequately takes into account the dynamic nature of AI and the use by AI of new factors or combinations of factors not currently used in conventional credit underwriting systems. For example, the CFPB should consider whether additional techniques for testing and validating AI/ML models may serve ECOA's anti-discrimination purposes as well as or better than existing testing and validation techniques. In addition, the CFPB should consider clarifying that an AI credit underwriting system can qualify as an empirically derived, demonstrably and statistically sound credit scoring system.

3. *Reconsidering Model Risk Management Standards.*

The need for interagency coordination and consistency becomes especially apparent when considering the standards for evaluating models. In this context, the CFPB's standards for evaluating models under ECOA for fair lending purposes intersect with the federal banking agencies' Model Risk Management Guidance, which focuses on prudential considerations. The federal banking agencies' Model Risk Management Guidance raises potential impediments to the implementation of AI/ML credit underwriting systems at banks, and the application of that Guidance may magnify those impediments.

The application of the current Model Risk Management Guidance to AI/ML credit underwriting systems could adversely impact banks' ability to deploy and use such systems in a timely manner to meet consumer credit needs and compete with non-bank lenders using AI/ML systems. *First*, the application of the Guidance to AI/ML credit underwriting systems (and updates to such systems) may constrain the dynamic, constantly evolving, and data-driven nature of AI/ML systems and limit the operational benefits at the heart of AI/ML. *Second*, the Guidance applies only to banks, not to non-bank lenders, and therefore results in an uneven playing field. *Third*, although the Guidance gives banks flexibility to modify the model risk management framework for validating vendor and other third-party models, the federal banking agencies reportedly have not consistently granted this flexibility to banks with regard to vendor-developed AI/ML credit underwriting systems. *Fourth*, as noted above, Title X of the Dodd-Frank Act shifted primary responsibility for consumer financial protection from the federal banking agencies and the FTC to the CFPB, which affords the CFPB with broad insight into the use and application of consumer lending systems and their application across banks and non-banks.

Revised joint guidance related to developing, implementing, and using AI/ML credit underwriting models should: (i) specify steps that a lender may take in reviewing systems to ensure compliance with the consumer financial protection laws and apply those steps to banks and non-banks alike; (ii) harmonize relevant standards derived from the Guidance with Regulation B standards for empirically derived, demonstrably and statistically sound credit scoring systems for application to AI/ML credit underwriting systems; and (iii) clarify, among other things, that examiner approval is not required prior to adopting or modifying an AI/ML credit underwriting system. BPI recommends that the CFPB actively participate in this process to ensure that ECOA standards are harmonized with and accurately reflected in revised Model Risk Management Guidance.

4. *Transparency.*

BPI recommends that the CFPB, as well as the federal banking agencies, consider using the wide range of available tools, including regulations, official interpretations, examination procedures, and interagency guidance or statements, to modernize the regulatory framework. A transparent process that actively encourages public participation will best serve the interests of all stakeholders and create public trust in AI/ML credit underwriting systems and the regulatory framework established to provide oversight of those systems.

5. *Adverse Action Notices.*

BPI recommends that the CFPB take steps to modernize the adverse action notice provisions and related reason codes. As the CFPB's RFI notes, ECOA's adverse action notice requirements serve important anti-discrimination, educational, and accuracy purposes. However, there are "questions about how institutions can comply with these requirements if the reasons driving an AI/ML decision are based on complex interrelationships."

As the RFI suggests, there is a need to expand the universe of adverse action notices to recognize that the specific reasons for adverse action notices will need to reflect the broader data sets and factors considered in AI/ML credit underwriting systems. BPI recommends that the CFPB undertake a principled modernization of the rules that require a statement of specific reasons for an adverse credit decision in an adverse action notice. The CFPB, for example, might consider whether to supplement the official interpretations to reference the methods used in AI/ML credit underwriting systems for identifying reasons for adverse credit decisions. In addition, the CFPB should consider providing an expanded list of sample adverse action reasons in the sample notification forms in Appendix C to Regulation B.

VII. Conclusion.

BPI appreciates this opportunity to comment on the CFPB's ECOA RFI. BPI believes we are at a point where it is possible to advance fair lending goals in a meaningful way by promoting affirmative outreach to traditionally disadvantaged or underserved borrowers, enhancing the fairness and accuracy of credit decisions, and expanding access to credit. To advance these goals, however, the CFPB needs to provide clearer guidance on the do's and don'ts related to each of the topics outlined above, and to modernize the current regulatory framework to enable innovation, as well as to drive fairer and more inclusive outcomes.

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BPI appreciates the opportunity to comment on the request for information. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at Naeha.Prakash@bpi.com.

Respectfully submitted,

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