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

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

To Whom It May Concern:

The Housing Policy Council[1] appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB or Bureau) request for information (RFI) on the Equal Credit Opportunity Act (ECOA) and Regulation B. HPC members are committed to full compliance with the letter and spirit of ECOA. We thank the Bureau for exploring ways to provide more clarity and certainty to permit innovation that can allow better access to affordable credit, while still ensuring consumers are treated equally.

Our comments focus on four topics raised in the RFI: (1) Artificial Intelligence and Machine Learning; (2) ECOA Adverse Action Notices; (3) Affirmative Advertising to Disadvantaged Groups; and (4) Special Purpose Credit Programs.[2] For each of these topics, we have several recommendations, which are centered around the following themes:

(1) CFPB should provide guidance, whether through rulemaking, official commentary, or otherwise, on its expectations for the application of ECOA to emerging technologies, including expectations for proper monitoring;
(2) CFPB should update the Regulation B commentary and model notices to account for future changes in credit underwriting methodologies and decision making;
(3) CFPB should clarify the parameters and scope of the application of ECOA to help ensure avenues such as affirmative advertising to disadvantaged groups and special purpose credit programs are better utilized by creditors; and
(4) CFPB should coordinate with the other federal financial services regulators to ensure consistent guidance and regulatory expectations. When possible, this should include the attempts to seek consistency not only under ECOA itself, but also between ECOA and other antidiscrimination laws such as the Fair Housing Act.

[1] HPC is a trade association comprised of the nation's leading mortgage lenders, servicers, mortgage insurers, and title and data companies. HPC advocates for the mortgage and housing finance interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable home ownership opportunities that lead to long-term wealth-building and community-building for families.
[2] HPC is submitting a separate comment letter to address Limited English Proficiency.

## 1. Artificial Intelligence and Machine Learning

HPC members strive to expand access to credit, an objective that increasingly relies on technology solutions that enhance the identification of potentially eligible borrowers as well as those who are not financially prepared to take on the obligation of a mortgage. To do this well, lenders would benefit from more explicit guidance, which would reduce the level of litigation and compliance risk that stifles access some amount of lending activity.

One of the clearest examples of this challenge involves innovations in artificial intelligence (AI) and machine learning (ML) that have the potential to dramatically change the nature of financial services. From back-end core banking operations to customer-facing applications, leveraging the ability of AI to spot patterns and make predictions will streamline and improve every aspect of the businesses of banking, payments, and lending in innumerable ways. AI/ML triggers both the highest hopes – more accessible and appropriate financial services, enhanced cyber capabilities and fraud reduction – and the worst fears – bias, discrimination, lack of transparency, lost privacy and no consumer rights, in policymakers, thought leaders, consumer advocates, and the industry alike. AI and ML are exciting areas of exploration in financial services and mortgage lending. The depth and breadth of technology and data available makes the potential for innovation enormous. This potential, however, brings with it a number of caveats and concerns in the fair lending space. As these technologies grow in importance, fair lending regulations should be drafted with inherent flexibility to both accommodate and encourage use of these rapidly developing technological advances.

Overall, we request that the CFPB articulate expectations and accepted methodologies for measuring, monitoring, and mitigating fair lending risk when using AI and ML technologies. These include, but are not limited to, bias measurement techniques and thresholds, minimum standards for explainability[3] of the role of AI and ML in the process in general, the types of alternative data that are appropriate to consider, as well as how they impact marketing decisions (i.e., who to market to) and the impact to individual credit decisions. Specifically, HPC recommends that the CFPB establish an approach in which creditors will be explicitly permitted to use AI, ML, and other technologies that operate in a way that limits fair lending risks. A potential standard could be to conduct fair lending testing that compares approval rates and annual percentage rate (APR) results for protected classes under an AI credit underwriting system against the approval rates and APR results from the currently used underwriting system.

Establishing explicit AI/ML standards (including analytics) will enhance transparency regarding credit approvals and credit denials. Machine learning can be opaque because it does not always easily lend itself to plain interpretation. The industry needs to be able to articulate what happens in the models to a range of potential audiences with guardrails that ensure use of compliant, high quality, permissible data. It would also be helpful for the Bureau to offer

[3] The Defense Advanced Research Projects Agency has defined explainability to mean the ability for AI systems to explain their rationale to a human user, characterize their strengths and weaknesses, and convey an understanding of how they will behave in the future.

guidance regarding documentation, reproducibility, and explainability of data (not just models) that addresses specific questions a regulator may want answered.

As the Bureau recognized with its 2017 RFI on alternative data[4], systems utilizing alternative data (like AI and ML) "hold the promise of significant benefits for some consumers, but also present certain potentially significant risks." The CFPB should utilize the information received from the 2017 RFI, along with the responses to this RFI to further engage with industry and consumer advocates (including civil rights organizations) to identify certain categories or types of alternative data that are appropriate to use in AI/ML systems. This will help to provide clarity to AI developers about what types of data are appropriate for use while ensuring that consumer advocates have confidence that the use of AI/ML will expand access to credit to underserved groups.

The expanded use of AI/ML in financial services, as well as other sectors, faces challenges in whether and how they could introduce bias or lead to biased outcomes in the decision-making process. For example, there are concerns that the input data used to train the systems could underrepresent members of protected classes. Further, proxies for protected classes might be undetected within other factors used in ML models. One way to potentially address this challenge, suggested by an influential 2019 law review article[5] is to have the AI model explicitly incorporate data on legally prohibited characteristics. By incorporating this data, modelers can ensure that the AI does not use any data elements as a proxy for protected characteristics. However, the question remains as to whether doing so is acceptable, as there is insufficient clarity from the Bureau whether this sort of proactive fair lending analysis is permissible.

A similar issue exists when modelers attempt to solve a disparate impact issue for one protected class, and subsequently learn that the approach has a negative impact on another protected class. The Bureau has not provided guidance or standards for creditors to use in these types of scenarios. Additionally, there is no guidance on what analytics are necessary and sufficient to establish a business justification for using data identifying aspects of protected classes for this type of analysis. For example, a protected class factor may be used in a model and the model may then show that the inclusion of that factor resulted in more outreach and better outcomes for that protected class. We ask the Bureau to consider providing guidance on what level of business justification documentation would be adequate to include a protected class as a factor in a model, if ever.

In an April 2020 blog post, the Federal Trade Commission (FTC) stressed that "cavalier use of AI could result in discrimination against a protected class."[6] The FTC recommended rigorous testing of algorithms, both before use and periodically afterwards, to make sure it

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[4] 82 CFR FR 11183, CFPB RFI on alternative data, 02/21/17

[5] Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 Iowa Law Review 1257 (2020).

[6] Andrew Smith, *Using Artificial Intelligence and Algorithms*, FTC Business Blog (Apr. 8, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.

does not create a disparate impact on a protected class. We request that the Bureau issue similar guidance, but also go a step further and articulate expectations such as how often a creditor should re-test a model to ensure there are no disparate impacts on protected classes. In issuing this type of guidance, it is critical for the Bureau to engage with AI/ML technical practitioners on what is and is not possible, to ensure that whatever guidance is given is operationally feasible.

Lastly, as part of this process, the CFPB should also coordinate with the other agencies that have authority under ECOA, Regulation B and the Fair Housing Act to ensure consistent fair lending supervision and enforcement practices. These other agencies include the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the FTC, the Department of Housing and Urban Development, the Department of Justice, and state agencies. This should specifically include coordination as to the use of the various innovation practices that the CFPB and these other agencies have or plan to adopt in the future, including the various sandboxes, "no action" programs, advisory opinions processes, and other innovation tools.

## 2. ECOA Adverse Action Notices

In the RFI, the Bureau raises the issue of how creditors using complex AI/ML models can satisfy ECOA's adverse action notice requirements. ECOA requires creditors to provide consumers with the principal reason(s) for a denial of credit or other adverse action. This gives rise to questions about how institutions can comply with these requirements if the reasons driving an AI/ML decision are based on complex interrelationships.

In July 2020, the Bureau helpfully issued a blog post on this topic.[7] The Bureau highlighted the flexibility in the existing regulatory framework that can be compatible with AI algorithms. For example, although a creditor must provide the specific reasons for an adverse action, a creditor need not describe how or why a disclosed factor adversely affected an application or, for credit scoring systems, how the factor relates to creditworthiness. The Bureau noted that this flexibility may be useful to creditors when issuing adverse action notices based on AI models where the variables and key reasons are known, but which may rely upon non-intuitive relationships. HPC members found this guidance helpful but notes that there are still significant areas of uncertainty related to AI and adverse action notices, specifically:

- The methodologies for determining the principal reasons for an adverse action need to be modernized. The example methods currently provided in the Official Interpretation were issued in 1982, and there is uncertainty in the application of these examples to current AI models and explainability methods.

[7] Patrice Alexander Ficklin, Tom Pahl, and Paul Watkins, *Innovation Spotlight: Providing Adverse Action Notices When Using AI/ML Models*, CFPB Blog (July 7, 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/. This issue was also raised in the Bureau's 2019 Fair Lending Report, https://files.consumerfinance.gov/f/documents/cfpb_2019-fair-lending_report.pdf.

- The accuracy of explainability methods, particularly as applied to deep learning and other complex ensemble models.
- How to convey the principal reasons in a manner that accurately reflects the factors used in the model and is understandable to consumers, including how to describe varied and alternative data sources, or their interrelationships, in an adverse action reason.

All three of these areas could clearly use additional guidance from the CFPB. This is also a topic where our members would request that the Bureau coordinate guidance with other regulators, including the FTC, which published a blog post on this topic earlier in 2020.[8] The blog post notes that creditors may not rely on general statements ("[I]t's not good enough simply to say 'your score was too low' or 'you don't meet our criteria.' You need to be specific (*e.g.*, 'you've been delinquent on your credit obligations' or 'you have an insufficient number of credit references')."). Instead, creditors must know what data is used in the model and how that data is used to arrive at a decision (ability to explain your decision to your customer if asked). Additionally, the FTC states that if you use algorithms to assign risk scores to consumers, you must disclose the key factors that affected the score, rank ordered for importance. And, if you might change the terms of a deal based on automated tools, you must inform consumers. If the CFPB agrees with this, it should affirm this FTC guidance.

HPC's view is that the CFPB should expand upon existing guidance, as well as update model disclosures, to address the techniques that would be acceptable when using AI and ML to analyze and use rank-ordering of consumer creditworthiness to facilitate accurate and clear adverse action reasons. Additionally, the CFPB should supplement the sample notification forms in Appendix C to Regulation B to expand the illustrative list of adverse action reasons to reflect new factors or combinations of factors that may lead to credit denials in AI credit underwriting systems. The reasons for adverse action could remain short and straightforward and need not require customized explanations that "describe how or why a factor adversely affected" a specific applicant or application.

### 3. <u>Affirmative Advertising to Disadvantaged Groups</u>

Under ECOA/Reg B, a creditor cannot make 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. The official commentary states, however, that "a creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor."[9] The regulation and commentary currently do not provide any guidance or standards for such affirmative advertising that would assist a creditor with compliance management. Basic questions like the following remain unanswered:

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[8] Andrew Smith, *Using Artificial Intelligence and Algorithms*, FTC Business Blog (Apr. 8, 2020), https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms.
[9] 12 CFR pt. 1002, Supp. I, Comment 4(b)-2.

- Is affirmative advertising just a tool for outreach or awareness, or can it be accompanied by a product offer?
- What are the Bureau's expectations to demonstrate effective use?
- In situations in which collecting information about an applicant's racial status or status within a protected class would violate ECOA and Regulation B, how can a bank determine whether disadvantaged groups would "normally seek credit from that creditor?" Similar questions surround proxies. More guidance may be needed on how to use proxies and what data/analytics would need to be shown.

Overall, creditors need significantly more clarity about how to identify "traditionally disadvantaged groups" and "groups that might not normally seek credit from that creditor." One way that the Bureau could accomplish this is by identifying disadvantaged groups through its analysis of Home Mortgage Disclosure Act (HMDA) data. The Bureau already publishes analysis of HMDA data through its Mortgage Market Activity and Trends Report and could simply supplement this report with a section identifying disadvantaged groups who could potentially benefit from participation in Special Purpose Credit Programs (SPCPs) (discussed more below) or affirmative advertising. Taking this step would greatly enhance creditors confidence to engage in affirmative advertising campaigns, reduce compliance management concerns, and allow for more focus on how to effectively serve disadvantaged groups.

Another area the Bureau could provide assistance is by working with other federal regulators, specifically including the Office of Fair Housing and Equal Opportunity at HUD, to ensure that there is a consistent view on how to properly conduct affirmative advertising. This would help alleviate the concerns from publishers that the recent fair housing settlement that Facebook entered into could make social media and other advertising platforms less willing to participate in legally permissible affirmative advertising campaigns.

**4. <u>Special Purpose Credit Programs</u>**

HPC members are working to expand lending opportunities for members of traditionally underserved communities. This activity has increased with the nationwide focus on racial injustice. However, creditors must take care to comply with ECOA and Regulation B, which generally prohibit consideration of certain factors in a credit transaction, such as race or ethnicity, even when the purpose is to enhance opportunities for minority groups.

To address this, ECOA and Regulation B permit creditors to create "special purpose credit programs" (SPCPs) in order to extend credit to applicants who meet certain eligibility requirements.[10] Pursuant to such a program, creditors may offer special consideration for traditionally disadvantaged groups, such as different underwriting or pricing. Under Reg B, the program must be (1) established and administered) pursuant to a written plan that identifies the class of persons that the program is designed to benefit as well as the procedures and standards for extending credit and (2) designed to extend credit to a class of persons who,

[10] 12 C.F.R. Part 1002, Supp. I, ¶ 8.

under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.[11]

Although special purpose credit programs have been permitted under ECOA and Regulation B for over 40 years, HPC members are concerned that they have not been able to use them to their full potential. Other than the general requirements that there be a written plan, a demonstration of the need for such a program, and that they not discriminate against applicants, there is insufficient guidance regarding the acceptable parameters of a compliant special purpose credit program.

Specifically, additional guidance would be useful in how to conduct data collection and analyses to lawfully engage in an SPCP. For example, it would be useful for the CFPB to clarify standards and expectations for conducting a data-driven needs assessment for credit products in which certain applicant attributes, such as race, are prohibited from being collected and retained under ECOA and Regulation B. Also, creditors may already have a suitable product that may qualify an SPCP but cannot currently measure credit access for minority groups due to the ECOA and Regulation B prohibitions. It would be helpful in these situations if the CFPB would allow enhanced data collection so that such access could be measured.

Currently, the Bureau does not determine whether individual programs qualify as an SPCP, and it is the responsibility of the creditor offering the program to make such a determination. The CFPB could further facilitate the use of SPCPs by instead working with creditors as they are being developed. This could include dedicated Bureau staff to answer questions and provide input to creditors during the development process, providing assurances that these programs are compliant once they are finalized and fully incorporate the CFPB's input. This would reduce creditors' fear that the Bureau or other regulators will second guess a creditor's decision of whether to offer an SPCP, and how they go about operating the SPCP. It will also potentially allay concerns that regulators could choose to punish good faith attempts to run an SPCP if it turns out to be unsuccessful in serving the disadvantaged group. With the inherent challenges in serving underserved groups, regulators should provide clarity that SPCPs will be evaluated on carefully designed processes, not necessarily results. With this approach, the Bureau would encourage innovation to help address market challenges.

The Bureau could also help spur more innovation with SPCPs by updating the guidance to make it clear that they are not necessarily limited to loan originations. This would allow for creditors to explore ideas like loss mitigation flexibilities for areas of the country that are particularly hard hit by recessions and have high concentrations of people from traditionally disadvantaged groups. Additionally, the Bureau could help clarify how SPCPs can interact with affirmative advertising campaigns.

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[11] 12 CFR § 1002.8(a)(3). There are other types of SPCPs that we have not addressed (those expressly authorized by federal or state law or those offered by a not-for-profit organization).

As explained in the official interpretations, "a for-profit organization must determine that the program will benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms. This determination can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies."[12] Nevertheless, our members request that the Bureau provide more clarity on the use of what types of public research is appropriate, especially when the creditor doesn't have evidence that the firm itself has a problem with serving a specific disadvantaged group. Clarity from the Bureau that a creditor may engage in a SPCP for a group that, based on public research, but not necessarily its own data, is disadvantaged may provide significant opportunities in addressing significant issues, such as the racial equity gap in homeownership.

An additional concern that HPC members have, is about the lack of harmony with HUD and other prudential regulators on the use of SPCPs. Since there are no safe harbors in an SPCP, there is a real risk that if creditors conduct an SPCP in good faith, that other regulators will potentially second guess the programs, for example, under other applicable law such as the Fair Housing Act, especially if the program doesn't produce the hoped for results.

Thank you for the opportunity to comment on this RFI. If you have any questions or would like to discuss these comments, please contact Matthew Douglas, Vice President for Mortgage Policy, at 202-589-1924.

Yours truly,

Edward J. DeMarco

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President
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[12] 12 CFR pt. 1002, Supp. I, Comment 8(a)-5.