December 1, 2020

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

The Honorable Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

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

Dear Director Kraninger:

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to comment on this Request for Information ("RFI") from the Consumer Financial Protection Bureau (the "Bureau" or "CFPB") regarding the Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B. The following letter offers numerous suggestions regarding how the Bureau can update Regulation B so that its requirements are better aligned with today's lending technologies and the increasing diversity of the borrower population in the United States. Making the following updates to Regulation B would encourage lender innovation and promote fair and equitable access to credit throughout the lending industry.

I. Disparate Impact

MBA supports lending equality and regulatory efforts to prevent credit discrimination with respect to the application for, and extension of, credit. One of our key priorities is working to close the unacceptable gap in homeownership between the white community and communities of color. Undoing generations of systemic discrimination will require a multifaceted solution, and the Bureau, consistent with its statutory authority, should ensure its oversight of the mortgage

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's web site: www.mba.org.

industry focuses on preventing credit discrimination and ensuring equal treatment for all credit applicants. The Bureau should also ensure that the manner in which it administers ECOA and Regulation B is transparent, consistent with housing-related fair lending laws, and aimed at helping industry comply in light of continued uncertainty related to disparate impact.

To support efforts to promote lending equality and prevent credit discrimination, particularly with the backdrop of recent events that underscore racial inequality and homeownership gaps, we encourage the Bureau to provide further guidance to assist the industry in managing disparate impact risks. For example, the industry would benefit from guidance on the appropriate standards for evaluating fair lending risk associated with disparate impact, including the statistical methods the Bureau finds acceptable for calculating what constitutes a *significant disparity* in data, as well as providing concrete guidance on both the applicable thresholds for determining which disparities are problematic and the situations in which lenders would (and would not) be expected to engage in a disparate impact analysis. In MBA's experience, lenders use varying thresholds when measuring statistical or practical significance. However, MBA is not aware of lenders using any thresholds that are based on official guidance from the Bureau or the Federal Reserve Board. Such guidance will assist lenders in their efforts to prevent credit discrimination.

In addition to guidance, industry would also benefit from further discussion and comments from stakeholders as the Bureau considers, if necessary, any changes to ECOA's implementing regulations or associated commentary. One area that merits further consideration is how ECOA's official interpretation reflects the disparate impact standard under the Fair Housing Act ("FHA"), as articulated in the Supreme Court's decision in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc*. (*Inclusive Communities*).[2] Requiring lenders subject to both the FHA and ECOA to comply with two distinct legal standards may create compliance burdens and result in uncertainty or different legal standards governing the same conduct over time as case law develops.

The *Inclusive Communities* decision contains some features worth considering in the related context of ECOA disparate impact claims. For example, the decision suggests that a disparate impact claim should be based on a robust causal link between a specific challenged policy and an adverse impact on members of a protected class. Given this "robust causality" requirement, the Court noted that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[3] In a similar vein, the Bureau should ensure that, when flagging potential disparate impact, its examiners are identifying the specific policy causing that impact.

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[2] 576 U.S. 519, 541 (2015).
[3] *Id.* at 542, 544.

It is also worth considering that in recent years the Supreme Court has provided important clarifications to its anti-discrimination jurisprudence, in particular providing guidance on when an anti-discrimination statute accommodates disparate impact or "effects" claims. In these cases, it has made clear that it looks to the specific statutory language at issue.[4] The Supreme Court continued this line of cases in *Inclusive Communities*, where the Court concluded that the FHA permits disparate impact claims based on the Court's interpretation of the FHA's language.[5] Specifically, the Court found that the statutory language "otherwise make unavailable" in section 804 of the FHA refers to the "consequences of an action rather than the actor's intent," indicating that disparate impact liability could be derived from such effects-based language.[6] The Court indicated that the effects-based language "is of central importance" to its analysis.[7]

Given that ECOA uses different language than the FHA, it is uncertain precisely how the Court would address this question under ECOA. As our members nevertheless work to provide responsible credit on nondiscriminatory terms, and to understand and mitigate disparate impact risks, their efforts would be aided by the steps suggested above, including:

- additional regulatory guidance on identifying and responding to meaningful disparate impact risks,
- greater consistency in the approach to disparate impact under the two statutes, and
- greater coordination with HUD and prudential regulators on fair lending risk management expectations related to disparate impact.

These efforts would help support our common goals of promoting lending equality and closing the housing gap for people of color, and our shared efforts to prevent, detect, and mitigate potential credit discrimination in housing credit.

II. Limited English Proficiency

In its 2017 study on language access in the consumer financial marketplace, the CFPB noted that 65 million people in the United States speak a language other than English at home, and that approximately 40 percent of those individuals have limited proficiency in English. Along these lines, the Center for Immigration Studies determined based on 2018 Census data that 67.3 million people in the United States speak a language other than English at home, and in nine states, that statistic is one out of four people. That equates to approximately 22 percent of the United States population (over the age of five).[8]

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[4] *See, e.g., Smith v. City of Jackson*, 544 U.S. 228 (2005).
[5] *Inclusive Communities*, 576 U.S. at 534, 535 (internal citations omitted).
[6] *Id*. at 534.
[7] *Id*.
[8] https://cis.org/Report/673-Million-United-States-Spoke-Foreign-Language-Home-2018#:~:text=As%20a%20share%20of%20the,of%20all%20foreign%2Dlanguage%20speakers

MBA's members are eager to serve this population and welcome the Bureau to, in coordination with other regulators, create legal certainty in this area to help lenders expand access to credit for LEP consumers. To date, the Bureau has made statements encouraging expansion of services to accommodate LEP consumers but has not addressed the potential compliance burden and significant liability associated with serving populations that may not fully understand the benefits and risks associated with products described only in English.

To encourage lending to LEP consumers, the Bureau should consider taking the following steps:

- <u>Clearly state that providing services in one non-English language does not obligate a lender to provide services in another, or all other, non-English languages</u>: LEP populations are not equally distributed across lender footprints, and not all mortgage products address the needs of LEP consumers in all markets. Because of the cost and compliance burden associated with marketing in multiple languages, a lender might consider exploring limited marketing campaigns in languages other than English before engaging in a full-scale roll-out. However, given the regulatory uncertainty around marketing in languages other than English, lenders are also likely dissuaded from taking these affirmative inclusive steps for fear that regulators will second guess their marketing choices. Without such guidance, a lender that markets in a non-English language in a particular geography will no doubt be challenged on why they chose one language over another, or one geography over another. If the Bureau issued commentary in Regulation B offering protections from such second-guessing, it would encourage lenders to try innovative and inclusive marketing strategies that expand access to credit to LEP consumers.

- <u>Define lender obligations throughout the lending lifecycle</u>: In 2016, the Bureau indicated that one way to mitigate fair lending risk when marketing in a language other than English is to use disclosures that describe the "extent and limits of any language services provided throughout the product lifecycle." However, as a practical matter, to mitigate concerns of being accused of being engaged in unfair, deceptive, or abusive practices, many lenders have shied away from marketing products in a language other than English unless they could provide support throughout the entire product lifecycle. This means that a lender that markets in a foreign language would need to be able to at a minimum (1) take an application and issue disclosures in a foreign language, (2) provide application processing support in a foreign language, (3) service the account in a foreign language, and (4) create a compliance management system that analyzes complaints and audits transactions in a foreign language. Managing this product lifecycle and continuity of service in a foreign language is particularly challenging in the mortgage market, where the institution that makes the loan seldom holds the loan through payoff, and instead sells the loan to an investor and the servicing rights to a third party. Lenders also face uncertainty in serving LEP populations when using informal mechanisms that LEP consumers have used for decades—trusted friends or family members. On the one hand, such assistance has been invaluable in providing financial services to LEP customers but on the other hand lenders and servicers may not have appropriate mechanisms to control or monitor the translation effort and would also need appropriate clarifications of financial privacy laws. Lenders are eager to serve this market but are hesitant to make affirmative efforts absent clear understanding of what practices are permissible. The Bureau should create guidelines specific to each segment of the market (pre-application marketing and advertising, origination, servicing transfer, and long-term servicing) and create a safe harbor for following those guidelines. If the Bureau created a reasonable set of obligations or considerations for industry participants to offer and provide products, services, and other activities in foreign language, industry would be able to better understand the risks, costs, and benefits of doing so, which would encourage expansion of credit to LEP consumers.

- Utilize safe harbors and translated disclosures: The Bureau has the ability to establish safe harbors for engaging in certain conduct in a foreign language and has already begun issuing model forms in foreign languages. Along with continuing these practices, the Bureau should create official, translated versions of forms, such as the notice of adverse action, to assist institutions in satisfying their Regulation B obligations.

- Confirm that passing along translation or interpretive services costs to LEP consumers is not discriminatory: Technological advancements are improving access to, and reducing costs of, translation services. For instance, Google Translate is a free service that instantly translates entire phrases and webpages. However, a lender obligated to provide legal documents and regulatory disclosures to a consumer cannot itself rely on such free translation services and would instead need to pay for specialized translation services, which may be expensive. If the Bureau imposes additional disclosure and translation obligations upon lenders serving LEP populations, it should also clarify that passing along translation costs is a legitimate, non-discriminatory, cost of doing business, and that lenders will not be alleged to discriminate on this basis.

III. Special Purpose Credit Programs

Mortgage lenders take seriously their obligations to increase lending opportunities for protected class consumers, as well as other communities that have traditionally been underserved. The complexity of rising to meet these obligations will become more important, and increasingly challenging, in the country's efforts to rebuild communities particularly impacted by the COVID-19 pandemic.

Although special purpose credit programs have explicitly been permitted for more than 40 years, creditors have not tended to use these programs as part of their broader strategy for supporting underserved communities. Lenders have hesitated as a result of a combination of the inability to obtain some form of "pre-clearance," the paucity of actionable guidance for what is an acceptable or unacceptable SPCP, and the history of regulatory skepticism towards SPCPs, which has led to lenders' limited appetite for taking risk on these programs. Moreover, if an SPCP was not adopted and implemented properly, the lender will have violated ECOA and would face potentially significant regulatory exposure.

The Bureau has demonstrated through its Office of Innovation that it can create a strong, user-friendly process whereby a financial services provider with a great idea can work with the Bureau in a productive manner to facilitate the creation and development of a new product or service. MBA recommends that the Bureau:

- Develop guidance outlining with specificity how lenders can make use of the SPCP provisions of Regulation B;
- Create a prior-approval process or safe harbor for lenders attempting to execute an SPCP; and
- Arrange for a formal understanding from the Department of Housing and Urban Development that a lender developing a mortgage program under the SPCP will also be deemed to comply with the FHA.

It would be particularly helpful for this guidance to further describe how SPCPs work, outline fact-based scenarios such as those provided in the CFPB's periodic supervisory highlights, and explain how broad or narrow a permissible SPCP can be (*e.g.*, does it have to apply to one aspect of a credit transaction or can the protections be offered more broadly).

IV. Affirmative Advertising to Disadvantaged Groups

As the Bureau notes in its RFI, the official interpretation to Regulation B states 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 Bureau requests comment on whether it should, "provide clarity under ECOA and/or Regulation B to further encourage creditors to use such affirmative advertising to reach traditionally disadvantaged consumers and communities."[10] While affirmative advertising to certain groups may be a desirable policy goal, the Bureau should consider whether such a goal is actually within its statutory authority under ECOA.

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[9] 85 Fed. Reg. 46,600, 46,602; Comment 4(b)-2.
[10] 85 Fed. Reg. at 46,602.

ECOA does not reach beyond "applicants," and marketing activities discussed in the cited official interpretation and the RFI are therefore outside the scope of the law.[11] Indeed, courts often start their analysis of an ECOA claim with the question of whether the consumer is actually an "applicant." For this reason, the Bureau's Regulation B cannot legally restrict or affirmatively require advertising to any particular groups on a prohibited basis. By clearly acknowledging the limited scope of ECOA and its Regulation B to behavior between creditors and applicants, the Bureau will remove a significant barrier for institutions seeking to engage in affirmative marketing efforts on a prohibited basis to traditionally disadvantaged groups.

In addition, mortgage lenders likely would also face significant regulatory risks if they expressly considered prohibited-basis related information, or proxies for such information, in developing and deploying marketing strategies. Prominent social media marketing platforms have already come under significant scrutiny on such issues from regulators and consumer advocates.

If the Bureau does not clarify the inapplicability of ECOA to marketing activities because ECOA does not reach beyond "applicants," MBA welcomes any Bureau efforts to provide a safe harbor and additional guidance regarding this regulatory provision so that its lenders can directly implement action plans to market in high minority population areas, as well as in areas with other traditionally disadvantaged groups. Providing a definition for what constitutes a "traditionally disadvantaged group," or guidance regarding what it means that a group would not normally seek credit from the creditor, would be helpful.

In addition, as with our comments relating to SPCPs, mortgage creditors would appreciate coordination between the Bureau and HUD to ensure that ECOA and Fair Housing Act guidance is consistent.

V. Sexual Orientation and Gender Identity Discrimination

MBA fully supports equal treatment under the law for all credit applicants, including equal treatment based on sexual orientation and gender identity. Accordingly, MBA supports a CFPB interpretation that *Bostock v. Clayton County* is strong persuasive authority for the proposition that ECOA forbids discrimination based on sexual orientation and gender identity.[12] Consistent

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[11] Recent case law regarding whether ECOA and Regulation B applies to "guarantors" has been consistent with this interpretation that the scope of ECOA is limited to "applicants." *See e.g., Moran Foods v. Mid-Atlantic Market Development,* 476 F.3d 436 (7th Cir. 2007); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 (8th Cir. 2014); *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 119396 (11th Cir. 2019). In addition, the restriction applying to "prospective applicants" in 12 C.F.R. § 1002.4(b) of Regulation B (including consumers who have not even inquired about credit with the creditor) is therefore outside of the Bureau's authority. Indeed, although the Bureau may rely on this provision to support a "marketing discrimination" theory of discrimination under ECOA based on a creditor's lack of advertising targeted to certain groups on a prohibited basis, such a theory is outside of the Bureau's authority under ECOA.

[12] *See* 590 U.S. ___, 140 S.Ct. 1731 (2020).

with our recommendations related to disparate impact analysis, MBA recommends that the Bureau look to the statutory language to determine whether analogous reasoning is appropriate as persuasive authority in clarifying the state of the law.

As the Bureau is aware, the Court in *Bostock* held that Title VII of the Civil Rights Act of 1964's ("Title VII") prohibition on sex-based discrimination prohibits employers from discriminating on the basis of sexual orientation or gender identity because discrimination on the basis of homosexuality or transgender status "requires an employer to intentionally treat individual employees differently because of their sex."[13] ECOA, like Title VII, provides that it is unlawful for any creditor to discriminate against any applicant on the basis of sex.[14] Due to the direct similarities in the statutory language between Title VII and ECOA, as well as the Court's command that discrimination based on sexual orientation and gender identity is a violation of Title VII, the CFPB should consider *Bostock* as strong persuasive authority for the proposition that ECOA's prohibition against discrimination on the basis of sex includes discrimination based on sexual orientation and gender identity.

While MBA supports an interpretation that ECOA forbids such discrimination, MBA does not believe it would be useful to amend the information requirements of Regulation B or Regulation C to collect additional information from applicants on sexual orientation and gender identity. Our members' experience is that many applicants would find such questions to be unnecessary, intrusive, and uncomfortable, and our sense is that providing the usual scripting that "this is for government monitoring purposes" will not serve to reduce the discomfort and negative feelings that asking the questions would generate. Obligations under Regulation C regarding making a determination based upon "visual observations" would be particularly problematic.

Although it makes sense to leave the current set of information required to be collected and retained under Regulation B and Regulation C unchanged in light of a CFPB interpretation consistent with *Bostock*,[15] it would be productive for the Bureau to clarify whether it is permissible under Regulation B for a creditor to ask applicants about their preferred pronouns. Regulation B does permit mortgage lenders to inquire about an applicant's "sex" pursuant to 12 C.F.R. § 1002.13(a)(1)(ii); however, this is a limited exception to the more general restrictions around inquiring about applicant gender and title set forth in 12. C.F.R. § 1002.5.

VI. Questions of State Preemption

Although questions of preemption do not often arise with respect to ECOA, there are some examples, and it would be helpful to have at the Bureau a formal mechanism for swiftly weighing in on these issues instead of letting them play out slowly through the courts. For instance, on

[13] *Id*. at 1742.
[14] 15 U.S.C. § 1691(a)(1).
[15] *See*, *e.g.*, 12 C.F.R. § 1002.13(a); 12 C.F.R. § 1003.4(b).

June 1, 2019 the governor of Nevada signed into law a bill that permits an applicant for credit who has no credit history and was or is married to request that the creditor deem the applicant's credit history to be identical to that of the applicant's spouse during the marriage. It thus appears that in Nevada a creditor is explicitly required to consider an applicant's marital status in its criteria for evaluating creditworthiness, when requested by the applicant, but this is expressly prohibited by ECOA. Trade associations sought clarity from the courts regarding whether the law is preempted, but the case was dismissed on grounds that the case was not ripe. As a result, more than a year after enactment lenders are stuck with a potential conflict and are exposed to liability for complying with two laws that conflict with one another.

To the extent the Bureau begins undertaking rulemaking to assist LEP consumers, an efficient mechanism for addressing federal/state law conflicts could be even more important as states have various and sundry laws regarding language requirements when offering financial products and services. Furthermore, if the Bureau creates any safe harbors regarding lender practices for serving LEP consumers, it should make clear that those safe harbors will satisfy compliance with any state laws also addressing how to serve consumers in languages other than English.

VII. Public Assistance Income

The Bureau has previously issued guidance regarding how an institution should consider a unique type of income, such as social security and disability income, or Section 8 housing choice vouchers. Issuing this sort of formal guidance is helpful, and in the public assistance income context, particularly important given complicated underwriting issues, such as how a creditor should assess whether such income is likely to continue. Given that mortgage lenders are legally obligated to confirm that consumers have the ability to repay their loans, issuing formal guidance regarding various types of public assistance income will help lenders meet their obligations to comply not only with Regulation B, but also Regulation Z.

MBA also notes that the Bureau may wish to update its guidance regarding expectations for grossing up non-taxable income. While creditors have long relied on DOJ's 1994 fair lending statement for guidance, formalizing and updating this guidance would be helpful. The Bureau should also make clear that there is no discrimination in the event the creditor's failure to gross up nontaxable income has no impact on the outcome of the loan application or negative consequences to the applicant.

VIII. Artificial Intelligence and Machine Learning

A. Origination Practices

Although regulators have issued general statements encouraging the use of technological and data advances to market to new populations, and increase access to credit for consumers, there is still a lack of clarity around permissible practices, as well as how to test to ensure that these advanced methods are consistent with fair lending laws. The Bureau should play a significant role in helping the industry navigate these risks. MBA recommends that the Bureau explicitly permit lenders to adopt approaches that use artificial intelligence ("AI"), machine learning ("ML"), and other innovating technologies in ways that expand credit access and limit fair lending risks to the same or greater extent than existing models and techniques.

The Bureau should engage with key industry stakeholders to increase its understanding regarding these technological advances, and once adequately researched, provide mortgage lenders a roadmap for how to ensure their marketing and origination practices are compliant with fair lending laws. In doing so, the Bureau should work with industry experts to develop clear expectations and accepted methodologies for measuring, monitoring, and mitigating fair lending risk when using AI and ML technologies in marketing and origination. Specifically, through a transparent, coordinated effort with industry experts, the Bureau should address minimum standards for explaining the role of AI and ML in the process in general, as well as how these technologies affect marketing decisions and individual credit decisions.

B. Adverse Action

Companies that utilize AI-based algorithms to make lending decisions have expressed concerns that producing a statement of specific reasons, or an adverse action reason code, creates a complex compliance challenge. AI-based algorithms are dynamic, modifying their decision-making criteria over time based on experience gained from evaluating large amounts of data, including non-traditional, alternative data. These algorithms also evaluate complex patterns and relationships among multiple data points, making it difficult to isolate one or more decisive factors in any credit decision. Due to the difficulty in isolating decision factors, AI-based algorithms do not lend themselves easily to generating adverse action reason codes. Traditional models consider basic factors such as income, employment history, and credit card payment history; however, AI-driven models consider a much wider range of factors to determine creditworthiness (*i.e.*, utility bills, cellphone payments, and social media habits).

Companies are concerned that if they are required to outline the totality of reasons for an individual credit decision, they will have to spend considerable amounts of time and labor and be subjected to significant regulatory risk if they fail to sufficiently outline the reasons for an adverse action. One way to address these concerns may be to weigh the benefits to the consumer in requiring the totality of reasons in an adverse action notice. While consumers may be, to some extent, in the dark about what specific factors contributed to a denial, such could be outweighed by the millions of new consumers who will potentially be able to obtain credit through the adoption of these technologies.

In practice, MBA believes that the Bureau could enhance the adverse action rules to bring them in line with modern technology through the following specific recommendations:

- Consider alignment of methods for explaining AI decisions and the illustrative methods provided in the official interpretation for selecting reasons: The CFPB should expand upon existing guidance to address the methods that would be acceptable when using AI and ML to analyze consumers' creditworthiness, facilitating accurate and clear adverse action reason codes. The Official Staff Commentary to regulation B provides illustrative methods for selecting reasons for an adverse action. [16] The Bureau should consider how well methods for explaining AI decisions align with those illustrative methods for selecting reasons. Additionally, the Bureau should consider whether additional methods should be added as examples, and whether the official interpretations should reference the methods used in AI credit underwriting systems for identifying reasons for adverse credit decisions.

- Maintain the acknowledged "built-in" flexibility that exists in Regulation B: Although Regulation B requires a creditor to provide the specific reasons for an adverse action, the Official Staff Commentary acknowledges flexibility in providing the specific reasons. The Official Staff Commentary states that a creditor need not describe how or why a disclosed factor adversely affected an application, or how the factor relates to creditworthiness in the case of credit scoring systems.[17] Similarly, neither ECOA nor Regulation B mandate the use of any particular list of reasons for an adverse action.[18] The Bureau should further clarify that an adverse action reason need not be on the list of factors set forth in Regulation B's model forms. This flexibility for adverse action reasons can be compatible with the use of AI algorithms. The Bureau should maintain the Official Staff Commentary's current flexibility because research into methods for generating reasons or explanations is continually evolving.

- Engage in consumer education efforts: Consumer education efforts can also help minimize consumer misunderstandings regarding the content of adverse action notices where advanced underwriting models are used. The Bureau should conduct consumer education efforts focused on providing consumers with general information on the factors used in many AI underwriting models and the weight given to those factors, as credit decisions may be based on combinations of factors unfamiliar to consumers.

In addition, the Bureau should clarify that it is not a regulatory violation to provide the consumer with more than four reasons for the adverse action on his or her application. As discussed above, it may become difficult to distinguish the "primary" reason for denial from other relevant reasons for denial, as the use of alternative data becomes more common. For example, an algorithm may run thousands of permutations of decision data through its ML model to simulate the impacts, then comparing the initial decision with the adjusted factors, identifying which variables have the

[16] *See* Comment 9(b)(2)-5, 7.
[17] Comment 9(b)(2)-3, 4.
[18] Comment 9(b)(2)-2.

largest results on the decision. Such an algorithm may produce the top five positive and negative factors in contributing to decisions leading to an adverse action. However, the Official Staff Commentary provides that a disclosure of more than four reasons is not likely helpful to the application.[19] In such a situation where five factors are identified as having the largest effect on the credit decision, providing more than four reasons for denial may be helpful to the consumer.

Finally, the Bureau should coordinate with other federal and state agencies with authority under ECOA, Regulation B, and the FHA to ensure consistent fair lending supervision and enforcement practices. Specifically, such efforts for consistency should involve coordination in connection with the use of the various innovation practices that the Bureau and other agencies have implemented, or plan to implement, including sandboxes, "No Action" programs, advisory opinions processes, and other innovation tools that the agencies have at their disposal.

IX. Additional Items for Consideration

MBA recommends that the Bureau consider the following enhancements to ECOA:

- Create specific exemptions from Regulation B for certain mortgage servicing activities: When the Bureau adopted its Regulation X mortgage servicing rules, it created an application and evaluation process for loss mitigation applications in 12 C.F.R. § 1024.41. In many ways, the process mirrors the requirements set forth in ECOA and Regulation B. Just as Regulation B does for extensions of credit, Regulation X now defines what constitutes an application for loss mitigation, sets forth requirements for the evaluation of an application, and creates specific procedures for application denial. In promulgating its mortgage servicing rules, the Bureau failed to clarify whether the requirements of Regulation B apply to the loss mitigation process. As a result, servicers must rely on guidance from a 2009 Federal Reserve letter describing the applicability of Regulation B to HAMP loan modifications.[20]

  Regulation B's notification requirements at 12 C.F.R. § 1002.9 further muddy the waters. While they explicitly apply to the origination process, they may also apply to mortgage servicing practices. When the Bureau promulgated its ECOA valuation rule, it declined to create an express exception for loss mitigation transactions. Rather than offering clarity on the applicability of Regulation B to loss mitigation applications, the Bureau merely indicated that "questions on coverage of [loss mitigation] transactions

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[19] Comment 9(b)(2)-1.

[20] Federal Reserve Board Consumer Affairs Letter 09-13 (December 4, 2009), *available at* https://www.federalreserve.gov/boarddocs/caletters/2009/0913/caltr0913.htm.

are best addressed with reference to the existing provisions of Regulation B.”[21] The regulatory uncertainty created by the uncomfortable overlap between these two regulations causes unnecessary operational difficulties for servicers seeking to ensure compliance with all applicable requirements.

- Provide guidance regarding fair lending risk associated with fraud models: Mortgage lenders are at serious risk of fraud throughout the mortgage lifecycle, and vendors are offering increasingly complicated risk-scoring and monitoring products to protect lenders against fraud. However, in our experience some of these fraud-detection tools can also raise fair lending risks. This is either because of the attributes upon which the fraud detection tools are based, or the fact that the fraud-scoring results may result in the denial of credit to a particular set of consumers. On the other hand, there is a clear business need to manage the financial risks associated with fraud. The Bureau should offer guidance or commentary to address how to navigate situations where BSA/AML risk scoring and fraud risk scoring create ECOA concerns.

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Our members appreciate the opportunity to share our thoughts and suggestions to encourage innovation and promote fair access to sustainable credit throughout the mortgage lending industry. Please contact me at pmills@mba.org or my colleague Justin Wiseman at jwiseman@mba.org with any questions you may have about these comments.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy and Member Engagement
Mortgage Bankers Association

[21] Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), Consumer Financial Protection Bureau, 78 Fed. Reg. 7215, 7223 (Jan. 31, 2013).