

Responding to the CFPB's Proposal to Eliminate Disparate Impact and Related Fair Lending Protections of Regulation B

by Joseph Lynyak and Erin Bryan

On November 13, 2025, the CFPB published in the *Federal Register* a significant proposed rule (the "Proposal")¹ that would radically diminish the protections against discriminatory lending practices afforded to protected classes under the Equal Credit Opportunity Act (the "ECOA") and the CFPB's Regulation B², as well as to limit the concept of discouragement in connection with credit applications to reduce the range of circumstances under which lenders could be liable. Further, the Proposal would narrow the flexibility by creditors to create and sponsor "special purpose credit programs."

If the Proposal is ultimately adopted substantially as proposed and a Democratic Administration is elected in 2028, it is a virtual certainty that the Proposal will be reversed in large part (if not completely).

From a risk management perspective, this *Alert* summarizes for banks and other creditors the Proposal when analyzing legal exposure following the adoption of the Proposal, as well as structuring future fair lending programs to avoid criticism should the Proposal eventually be reversed.

What follows is a discussion of: (a) the three primary components of the Proposal; (b) the legal justification for those components; (c) compliance considerations for FDIC-insured institutions and other creditors; and (d) risk management considerations looking forward should the Proposal in its final form ultimately be reversed.

1. The Proposal

The Proposal addresses three components of Regulation B: (a) *disparate impact*, which is the primary evidentiary tool available to federal and state governmental entities and private parties to enforce the anti-discrimination provisions under the ECOA and Regulation B; (b) *application discouragement*, by which a lender engages in activity that could discourage protected groups from applying for credit from a lender; and (c) *special purpose credit programs* ("SPCPs"), which are credit programs to address and ameliorate identified past instances of possible credit discrimination, including

Related People

- Joseph Lynyak
- Erin Bryan

Related Capabilities

- Lending Transactions
- Securities & Financial Services Litigation & Enforcement

inadequate outreach (e.g., marketing) to protected classes.

The Proposal responds to President Trump's April 2025 Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," 90 *Fed. Reg.* 17537 (the "EO"), which directed, among other things, that "the Director of the Consumer Financial Protection Bureau [...] and the heads of other agencies responsible for enforcement of the Equal Credit Opportunity Act (Public Law 93-495) [...] evaluate all pending proceedings that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of [the EO]" and "in coordination with other agencies, the Attorney General [...] determine whether any Federal authorities preempt State laws, regulations, policies, or practices that impose disparate-impact liability based on a federally protected characteristic [...], or whether such laws, regulations, policies, or practices have constitutional infirmities that warrant Federal action, and [...] take appropriate measures consistent with the policy of [the EO]."

Each of the Proposal's three Regulation B components are discussed in greater detail below.

Disparate Impact

In regard to what is considered the primary tool to identify credit discrimination against protected classes³, the Proposal would eliminate the use of disparate impact analysis. Disparate impact analysis permits the use of statistical data to identify and prove from an evidentiary perspective that, despite the absence of intentional discrimination (*i.e.*, the use of race neutral credit terms), the statistical results of a disparate impact analysis support a finding of a pattern of discriminatory lending by a creditor.

Despite several decades of consistent government and judicial approval of the use of disparate impact analysis (the legal justification of which is discussed in greater detail below), the Proposal would eliminate the use of disparate impact when evaluating a lender's fair lending performance.⁴

The language of the Proposal arguably could be seen as limiting proof of a discriminatory lending pattern to those instances in which an overt intent to discriminate can be demonstrated directly.

Application Discouragement

In regard to the practice of discouragement of applications for credit, the Proposal narrows the scope of conduct that could constitute credit discouragement. Currently, this limitation has been interpreted to include advertising and oral statements that convey the implied message that credit applications submitted by covered individuals would not be approved—thereby preventing in advance the filing of an application for credit by a covered individual.

The Proposal would narrow "statements" to oral or written words or visual images (including advertising), but not to "acts or practices" such as branch placement or

advertisement targeting. Further, discouragement would only apply to statements "directed at" intended recipients, and a statement would be subject to a reasonableness standard. Stated another way, statements directed at one targeted group of customers would not be treated as discouraging to others who were not the intended recipients of such messages.⁵

Special Purpose Credit Programs

In order to ameliorate and address past instances in which a fair lending violation might have been identified (e.g., failing to market or open offices in minority-populated neighborhoods), creditors have been authorized to create SPCPs that target protected classes under Regulation B.

The use of SPCPs is circumscribed by the statutory authority of the CFPB to outline how SPCPs may be structured.⁶ Accordingly, the Proposal severely restricts the further use of SPCPs by imposing additional procedural compliance requirements and costs that arguably would result in diminishing the use of SPCPs by creditors.

2. The Legal Justification for the Proposal

Assuming the Proposal is adopted in substantially the current form, it almost certainly will be challenged by representatives of protected classes. In the event that litigation occurs, challenges would focus on the continued viability of the use of disparate impact analysis to prove or disprove fair lending compliance.

In litigation, the principal challenge to the Proposal would likely be to attempt to void the elimination of disparate impact as an evidentiary tool to prove discriminatory lending behavior. In that regard, advocates challenging the elimination of disparate impact will have numerous supportive legal positions.

As acknowledged in the Proposal itself, disparate impact analysis has been approved and utilized for several decades by federal and state agencies responsible for fair lending enforcement, which directly evolved from the Supreme Court's approval of the use of disparate impact in the employment sector, as well as by direct analogy to other federal non-discrimination statutes.⁷ Further, Congressional amendments to ECOA in 1976 strengthens the legal position that disparate impact analysis applies in the fair lending context.⁸

The CFPB's response—and as set forth in the Proposal—may be two-fold: First, as stated in the Proposal, the CFPB rejects the historical supporting precedent referenced above as not being dispositive. Second, the CFPB asserts that, notwithstanding the forgoing, it holds the power to *de facto* interpret the ECOA and Regulation B in a manner that eliminates the use of disparate impact as an evidentiary tool.⁹

In regard to application disparagement, lenders operating in the national market have a record over the past decades of carefully avoiding marketing (*i.e.*, advertising) and other public statements that would form the basis for alleging a fair lending violation.

Accordingly, complaints based upon application discouragement may be local in nature, and state law counterparts to Regulation B's prohibition on discouragement may constitute the primary means of enforcing this fair lending protection.

In regard to the continued use of SPCPs, the CFPB's authority to determine the structure of a compliant SPCP is based upon specific statutory authority as set forth in the ECOA. Accordingly, following the likely adoption of the Proposal, to avoid violating Regulation B creditors will be required to adopt compliance procedures to determine whether a current SPCP requires modification or termination.

3. Creditor Risk Management Considerations

In light of the statutory authority of the Acting Chairman of the CFPB to unilaterally adopt regulatory changes to Regulation B, it is probable that the Proposal may be adopted as substantially proposed. Because the use of disparate impact analysis is so central to fair lending enforcement, it is likely that, if adopted as proposed, the Proposal will likely be challenged by both private parties and possibly state regulators responsible for fair lending enforcement.

When considering the implications of the Proposal from a risk management perspective, we offer the following initial observations:

First, in regard to the continued availability of disparate impact as an evidentiary means for monitoring compliance by a creditor and its regulators of its fair lending obligations, the significant legal and historical support for the continued use of disparate impact appears to be likely. Particularly in light of the recent Supreme Court case of *Loper Bright Enterprises v. Raimondo*,¹⁰ the CFPB may be faced with a difficult legal burden to succeed. Further, many state regulatory agencies responsible for fair lending enforcement will continue to utilize disparate impact analysis—particularly if the ECOA and Regulation B have been incorporated directly into state law.

Second, although national enforcement against fair lending discouragement may remain, national creditors have virtually eliminated advertising and other actions that could be deemed to constitute fair lending application disparagement. Stated another way, actionable disparagement claims have become local in nature, which means that local state governmental agencies responsible for fair lending enforcement will likely continue to monitor for disparagement violations under state law prohibitions.

Third, the CFPB's specific authority to adopt rules governing SPCPs is sufficiently broad as to cause many creditors to review the continued use or scope of current SPCPs. Particularly in light of the expanded procedural steps made necessary by the Proposal to justify the use of a SPCP, banks and other creditors may elect to address the goals of SPCPs by the use of third-party lenders, such as non-profit organizations and community development financial institutions.

Fourth, when considering the implications of the Proposal, risk management might include addressing the possibility that any future Democratic Administration will reverse

the majority of the modifications made by the Proposal. In that regard, it is noteworthy the Proposal does not prohibit monitoring the scope of lending to economic classes by a lender, which may include as part of a monitoring data set the identification of protected individuals under the ECOA and Regulation B. Developing that capability as part of a lending data set might be employed to evaluate fair lending based upon a modified disparate impact approach to enable a creditor to demonstrate compliance with its fair lending obligations should the federal government reinstate disparate impact.

Finally, while the Proposal appears to draw clear lines between the various federal anti-discrimination statutes and regulations, most of those laws and regulations interact with each other when viewed from a compliance perspective, including, for example, the Fair Housing Act and the Community Reinvestment Act.¹¹ While beyond the scope of this *Alert*, the modifications set forth in the Proposal may affect a lender's compliance approach to these and other related laws, all of which will require continued monitoring as the Proposal as adopted affects these and other related statutes and regulations

Banks and other creditors reviewing this Alert should note that this analysis is intended to focus on the Proposal from a risk management perspective and is not a comprehensive summary of the Proposal.

Dorsey attorneys, of course, are available to discuss in greater detail the Proposal upon request.

¹ Federal Register: Equal Credit Opportunity Act (Regulation B)

² 15 U.S.C. §§ 1691 *et seq.*; 12 C.F.R. 1002.1 *et seq.*

³ Section 1691(a) of the ECOA sets forth the following protected classes: (i) race; (ii) color; (iii) religion; (iv) national origin; (v) sex; (vi) marital status; (vii) age (provided the applicant has the capacity to contract); (viii) receipt of income from any public assistance program; and (ix) exercise of any right under the Consumer Credit Protection Act.

⁴ The Proposal would amend Section 1002.6(a) of Regulation B and the CFPB's Commentary at 6(a)-2 and 2(p)-4 to eliminate the use of disparate impact. Those modifications would clarify that the "effects test" recognized for use in other anti-discrimination laws does not apply to the ECOA and Regulation B.

⁵ Section 1691(c) of the ECOA; Section 1002. (8) of Regulation B; the CFPB's Commentary at 1002.8(a)-1.

⁶ 15 U.S.C. §1691(c)(3); 15 U.S.C. § 1691b(a).

⁷ See, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 576 U.S. 519 (2015); *Ramirez v. Green Point Mortgage Funding, Inc.*, 633 F. Supp. 2d 922(D.D. Cal. 2008); *Miller v. Countrywide Bank, N.A.* 571 F. Supp 2d 251 (D. Mass. 2008).

⁸ Public Law 94-239; See also S. Rep. No. 94-589, at 4-5 (1976); 15 H. Rep. No. 94-210, at 5 (1975).

⁹ It is noteworthy that challenges to disparate impact have occurred in the past several

years. For example, during the first Trump Administration, former HUD Secretary Ben Carson had proposed a similar rule to drastically reduce the availability of the disparate impact standard under the Fair Housing Act. That proposal was challenged in litigation and implementation was delayed. Then, upon a change in administrations, President Biden's HUD Secretary, Marcia Fudge, published a proposed rule to reinstate disparate impact analysis. 86 *Fed. Reg.* 33590 (June 5, 2021).

¹⁰ 603 U.S. ____ (2024).

¹¹ 42 U.S.C. § 3601 *et seq.*; 12 U.S.C § 3601 *et seq.*