NAFCU

3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

December 1, 2020

Comment Intake
Bureau of Consumer Financial Protection
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 Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing to share our comments regarding the Bureau of Consumer Financial Protection (CFPB or Bureau) request for information (RFI) regarding the *Equal Credit Opportunity Act* (ECOA) and Regulation B. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 122 million consumers with personal and small business financial service products. Credit unions strongly support the fair lending protections embedded within ECOA and Regulation B, which give consumers confidence that they will not face discrimination in credit transactions. These laws also accommodate credit union efforts to promote financial health and access to credit within underserved and low- and moderate-income (LMI) communities; however, additional clarity and flexibility to address today's virtual market for financial services would help improve the efficacy of such outreach.

General Comments

NAFCU appreciates the opportunity to share our members' feedback regarding aspects of Regulation B that might be amended or clarified to facilitate compliance with ECOA. NAFCU supports efforts to detect and eliminate discrimination in all forms, and additional regulatory clarification will serve to modernize and preserve the Bureau's oversight of fair lending standards. In areas such as language access and disparate impact, NAFCU believes that focused clarification of regulatory expectations can give credit unions greater certainty that good faith efforts to help members do not trigger unintended compliance risks. Along similar lines, NAFCU recommends the Bureau engage with digital advertisers and credit unions to facilitate the efficient deployment of affirmative advertising programs, which are impeded when advertising platforms adopt overly restrictive geotargeting policies due to perceived regulatory risk.

With respect to future amendments to ECOA, such as implementation of section 1071 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, we ask the Bureau to carefully consider whether the costs of instituting extensive, small business data collection requirements will be worth marginal improvements in supervisory data. Credit unions are committed small business lenders, but many lack the capacity to implement new compliance systems, particularly those with minimal business loan volume and staffing arrangements that may involve only a single employee handling business credit applications.

In general, the Bureau should recognize that ECOA already permits the Bureau to detect and remediate discrimination in commercial products and services. It remains unclear whether the agency's supervisory toolset truly suffers from lack of section 1071 data and what tangible benefits will result from vastly expanded data collection. NAFCU urges the Bureau to extend the timeline of the 1071 rulemaking to ensure that a robust cost-benefit can be performed at the appropriate time—namely, when there is greater confidence regarding how the economy has changed in response to the pandemic.

Disparate Impact

Regulation B provides that ECOA may prohibit creditor practices that have a disparate impact. Regulation B's commentary explains that a disparate impact exists when a practice is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. NAFCU acknowledges the intended purpose of disparate impact liability, but the standard has produced confusing and sometimes counterintuitive results in cases arising under the *Fair Housing Act* (FHAct). To provide greater clarity regarding the framework used to allocate the burden of proof in disparate impact cases, the Bureau should seek to follow the path taken by the Department of Housing and Urban Affairs (HUD), which amended its disparate impact regulation to align more closely with the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* (Inclusive Communities).[1]

HUD's decision to amend its rules recognized a critical need to clarify the legal framework used for evaluating disparate impact claims to ensure that only artificial, arbitrary, and unnecessary practices are targets of disparate impact liability. HUD's clarification also affirmed the Court's view that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit related decisions that sustain a vibrant and dynamic free-enterprise system."[2] In comments to HUD, NAFCU has explained the importance of codifying these judicial safeguards in regulatory provisions governing the evaluation of disparate impact claims.[3]

In recognition of the Court's concerns in *Inclusive Communities*, the Bureau should seek to clarify the procedures it uses to assess disparate impact liability under ECOA in a fashion similar to HUD's final rule. The Court's decision in *Inclusive Communities* was expressed broadly enough to encompass applications of disparate impact liability arising in contexts other than the FHAct. At the heart of the Supreme Court's decision in *Inclusive Communities* was the concept of a robust

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[1] Department of Housing and Urban Development, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288 (October 26, 2020).
[2] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-2524 (2015).
[3]NAFCU Letter to the Department of Housing and Urban Development, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (Docket No. FR-6111-P-02), *available at* https://www.nafcu.org/letter-hud-disparate-impact-File.

causality requirement—an idea that transcends the differing consumer finance contexts of the FHAct and ECOA.

Currently, the Bureau relies upon the FFIEC Interagency Fair Lending Examination Procedures, but in applying those procedures the CFPB takes into account the FHAct. The Bureau also consults with HUD when disparate impact violations are found under the FHAct. The official commentary in Regulation B provides an example of how the Bureau will evaluate a creditor practice for disparate impact. It references the "effects test" (requirements for pleadings and burden of proof for disparate impact cases) and supporting documents to show congressional intent that disparate impact apply to the credit area.[4] Given that the robust causality requirements articulated in *Inclusive Communities* directly bears upon the application of the "effects test" cited in Regulation B's commentary, the Bureau must take steps to codify protections and guardrails the Supreme Court has implicitly recognized as broadly applicable to cases involving disparate impact liability.

Electronic Disclosures

Regulation B specifies that disclosures required to be given in writing may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the *Electronic Signatures in Global and National Commerce Act* (E-Sign Act).

NAFCU continues to recommend that the Bureau modernize its disclosure delivery rules to accommodate more streamlined processes for sending electronic documents. Regulation B does permit certain disclosures to be provided electronically when they accompany an application accessed by the applicant in electronic form "without regard to the consumer consent or other provisions of the E-Sign Act." However, certain documents, such as copies of appraisals required under 12 CFR § 1002.14(a)(5), must still conform to E-Sign's technologically dated demonstration of consent requirement, first conceived over two decades ago.

NAFCU recommends that the Bureau develop a modern electronic disclosure framework that allows financial institutions to provide documents and disclosure electronically when a consumer initiates a transaction through a digital channel. Requiring a consumer to go through the extra step of confirming via email, attachment or other process the ability to access information electronically no longer make sense in an increasingly digital banking environment where consumers expect streamlined interactions to process and approve applications for products and services.

Appraisal Requirements

NAFCU recommends the Bureau clarify and streamline appraisal notice requirements contained in Regulation B. Specifically, the Bureau should harmonize the term "business day" applicable to delivery of appraisals and other valuations in 12 CFR § 1002.14(a)(1) with the general business day definition found in 12 CFR 1026.2(a)(6) (i.e., " a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions."). Doing so would alleviate a common point of uncertainty given that the term business day is not defined in Regulation B's provisions regarding appraisal notice requirements.

[4] *See* 12 CFR 1002.6 Comment 6(a)—2

NAFCU also encourages the Bureau to consider granting a limited exception for providing the notice required in § 1002.14(a)(2). Section 1002.14(a)(2) generally provides that a creditor shall mail or deliver to an applicant, not later than the third business day after the creditor receives an application for credit that is to be secured by a first lien on a dwelling, a notice in writing of the applicant's right to receive a copy of all written appraisals developed in connection with the application. Credit unions have observed that a subset of applicants withdraw their applications prior to the third business day. NAFCU is also aware that certain systems have auto-denial processes that will operate within this timeframe. In such circumstances, sending the specific notice under (a)(2) makes little sense and could potentially confuse the applicant.

NAFCU recommends that the Bureau provide an exception to the disclosure requirement in § 1002.14(a)(2) for applications withdrawn or denied before the third business day. NAFCU would not regard such an exception as being in conflict with § 1002.14(a)(4), which narrowly governs the copy of the appraisal and other written valuations described separately in § 1002.14(a)(1). NAFCU believes adopting the proposed exception would help alleviate compliance burdens and would not risk any detriment to consumer understanding.

Limited English Proficiency (LEP)

As the Bureau has noted in various LEP-themed reports, the share of non-English speakers has been rising in the United States. Credit unions are committed to serving members of varied background and languages, and NAFCU has encouraged the Bureau to continue its work on expanding resources for non-English speakers, especially Spanish-speaking Americans. Consistent with our past recommendations, we are greatly supportive of the Bureau decision to make important financial education materials available in Spanish and other languages. The Bureau's "Guide to Economic Impact Payments" (EIP Guide), which is available in multiple language, is a prime example of why these resources are critical, particularly at a time when many consumers are grappling with the financial stresses caused by the COVID-19 pandemic.

NAFCU recommends the Bureau continue to make all its financial educational materials available in multiple languages and ensure that English updates to such materials are eventually reflected in foreign language versions. We note that the Bureau's most recent update to the EIP Guide on November 17, 2020 includes a note reminding individuals who don't file taxes that they have until November 21 to contact the Internal Revenue Service through a specialized portal to claim their EIP payment. As of this writing, the note is not yet highlighted in the foreign language versions of the guide. We encourage the Bureau to expedite translations of EIP-related updates, particularly when they are time-critical in nature.

NAFCU also recommends that the Bureau clarify how partial availability of foreign language disclosures might interact with ECOA's broad prohibition against discrimination in "any aspect" of a credit transaction. ECOA and Regulation B do not address LEP issues directly; however inconsistent use of foreign language documents has the potential to raise fair lending issues, particularly in the disparate impact context. Credit unions want to be sure that well-intentioned efforts to provide documents in other languages do not give rise to unintended liability. When providing documents in other languages, credit unions look to the parameters established by other regulators, such as HUD, as well as in other Bureau regulations. One example is Regulation Z, which states that financial institutions should maintain continuity in the language of advertisements with certain trigger terms.[5] However, this minor note does not meaningfully describe the concept of "continuity" in an environment where advertisements may appear in multiple variations, with content and formatting often dictated by the constraints of digital platforms.

The CFPB's Fall 2016 Supervisory Highlights provides more detailed observations regarding marketing practices aimed at LEP consumers. While the report does not provide specific detail about what non-problematic marketing to LEP consumers looks like, or what disclosures need to be made, the report could be read to suggest that it may be permissible to market products in non-English without having to service the product entirely in a foreign language. However, this is not stated explicitly. To reduce confusion regarding the risk of unfair, deceptive or abusive acts or practices (UDAAP), the Bureau should clarify the permissibility of such an arrangement or, at the very least, provide clearer expectations regarding what language continuity should entail within and across product lines.

At the same time, NAFCU would be apprehensive of any requirement or interpretation that requires servicing of products in countless languages other than English. Such a result would create substantial regulatory risks. Furthermore, credit unions do not have the depth and breadth of resources necessary to amend their processes and reprogram their systems to accommodate additional languages without incurring significant costs. Accordingly, the Bureau should seek to accommodate voluntary and incremental expansion of language availability in a way that does not necessitate sweeping changes or heightened UDAAP risk.

Affirmative Advertising

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." Many credit unions, particularly those that are CDFIs and MDIs, rely upon this accommodation to target credit advertisements to LMI communities. Doing so helps expand credit opportunities in areas that are historically underserved, have few or no bank branches, or otherwise lack access to traditional financial institutions.

One of the common frustrations expressed by credit unions—particularly those with community-based fields of membership (e.g., those that serve a geographic area)—relates to the ability to target affirmative advertising efforts effectively within a narrowly defined field of membership. Many credit unions rely on digital advertising platforms like Google and Facebook to geotarget ads in a way that increases the probability that whoever sees the advertisement will also be eligible to join the credit union. Advertisements that appear outside a credit union's field of membership amount to wasted marketing resources if the individual is not otherwise eligible to become a credit union member.

In this context, recent restrictions imposed by Facebook and Google on the ability to precisely geotarget credit advertisements by zip code has made it harder for credit unions to take advantage of affirmative advertising authorities and improve credit access within the communities they

[5] See 12 C.F.R. § 1026.24(i)(7).

serve.[6] An additional consequence of the policy changes has been to reduce the efficacy of marketing budgets when advertisements end up outside a credit union's field of membership. The consequences of this wasted spend is felt most acutely by the smallest credit unions, who tend to operate with limited advertising budgets.

The ability to target ad delivery by zip code is crucial to sustain the growth and vibrancy of mission-driven financial institutions who are committed to improving the financial wellbeing of communities that have faced historical disenfranchisement. Credit unions are part of this mission and play an important role in reaching underserved communities; however, they also face unique hurdles resulting from the interaction between field of membership rules and the geographic specificity needed for effective ad delivery. Accordingly, NAFCU recommends that the Bureau engage with digital advertising firms to educate and clarify, if necessary, the nature of affirmative advertising programs. While the Bureau cannot directly influence the policies of the largest and most frequently used digital advertising platforms, it can hopefully provide some degree of regulatory clarity and consistency that allows these firms to better accommodate affirmative advertising programs. Doing so will improve consumer outcomes by ensuring that credit unions can effectively and lawfully market responsible credit products in communities where predatory lenders have taken root.

NAFCU encourages the Bureau to conduct dialogues with both credit unions and digital advertising platforms to help promote affirmative advertising. Google, for its part, has already indicated that it has engaged in discussions with HUD. The CFPB needs to be part of these discussions as well and understand the unintended consequences of adopting an inflexible ban on credit advertisements targeting zip codes. To the extent that more significant guidance may be necessary to provide an appropriate advertising framework capable of facilitating ECOA's objectives, we encourage the Bureau to issue a more targeted request for information, host symposia, and solicit the views of credit union stakeholders affected by limits on affirmative advertising.

Section 1071 Implementation

Section 1071 of the Dodd-Frank Act amended ECOA and requires the Bureau to issue rules to require financial institutions to compile, maintain, and report to the CFPB certain information about applications for credit made by women-owned, minority-owned, and small businesses. The intent of section 1071 is to facilitate enforcement of fair lending laws and identify the credit needs of women-owned, minority-owned, and small businesses. Much like the *Home Mortgage Disclosure Act* (HMDA), section 1071 includes a list of statutorily required data items, many of which are not normally collected by financial institutions in the course of processing business loan applications. As a consequence, many credit unions expect the eventual implementation of section

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[6] In August 2019, Facebook announced that it would no longer permit ads involving "credit opportunities" to be targeted by zip code. *See* Facebook, "Updates To Housing, Employment and Credit Ads in Ads Manager" (August 26, 2019), available at https://www.facebook.com/business/news/updates-to-housing-employment-and-credit-ads-in-ads-manager. In June 2020, Google adopted a similar policy, prohibiting credit advertisers from targeting ads by zip code. See Google, "Upcoming update to housing, employment, and credit advertising policies," (June 11, 2020), available at https://www.blog.google/technology/ads/upcoming-update-housing-employment-and-credit-advertising-policies/.

1071 to coincide with a significant increase in compliance costs that could eventually translate into reduced credit options for small business owners who depend on credit unions to secure affordable lines of credit.

In September 2020, the Bureau released an outline of proposals (Outline) related to future implementation of section 1071. The release of the outline coincided with several panel discussions held pursuant to the *Small Business Regulatory Enforcement Fairness Act* (SBREFA), which requires the CFPB to seek the views of small business stakeholders regarding the impact of proposed rules on small entities. While NAFCU intends to comment separately in response to the Bureau's section 1071 Outline, we have collected preliminary impressions from our members regarding the expected impact of a 1071 rulemaking. In NAFCU's October 2020 Economic & CU Monitor Survey, NAFCU respondents ranked what actions they would most likely take if the core ideas in the Outline were finalized. To manage compliance costs, most respondents (89 percent) said that they would need to charge higher fees on business products, with a significant number (44 percent) saying that this would also be true for other credit products as well.

Members were also asked how the inclusion of discretionary elements would affect the overall cost of 1071 compliance, and the vast majority predicted a moderate (69 percent) or significant (23 percent) increase. The Bureau has even suggested that it may be desirable to have financial institutions verify certain data points, while simultaneously acknowledging that this could make ongoing reporting 125 percent more costly—an assessment that almost all (92 percent) NAFCU respondents agreed with, with some suggesting that costs would be even higher.[7]

Credit unions have also expressed concern about the extent of exemptive relief contemplated in the Outline. While NAFCU has maintained that credit unions should not be subject to requirements under section 1071 due to a variety of unique, statutory constraints related to field of membership and caps on aggregate member business loans, we also believe meaningful consideration of transactional or asset-based coverage thresholds must acknowledge current limitations in NCUA Call Report Data.

The NCUA Call Report captures data on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size.[8] As a result, the CFPB's modeling of the relief afforded under various exemption thresholds does not take into consideration the variance in loans that may be reportable to the CFPB for the purpose of applying 1071 data collection requirements versus what is reported to the NCUA using the $50,000 floor. As a result, far more credit union offering small business loans under $50,000 might be swept into a 1071 rulemaking with no reasonable means of offsetting significant one-time and ongoing compliance costs.

Congress' decision to exclude member loans under $50,000 from credit unions' business loan cap, as provided in 12 U.S.C. § 1757a, and the NCUA's corresponding decision to exclude such loans

[7] CFPB, Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking – Outline of Proposals Under Consideration and Alternatives Considered, 60 (September 15, 2020).
[8] See NCUA, Call Report Form 5300 (June 2020), https://www.ncua.gov/files/publications/ regulations/form-5300-june-2020.pdf.

from Call Reports reflect a general desire to reduce administrative and capital burdens which would otherwise frustrate credit union members' ability to obtain very small member business loans (MBLs). The CFPB should recognize that credit union lending on this scale serves an important role in terms of addressing main street credit needs, particularly among sole proprietorships. Accordingly, as the Bureau considers various methods for providing exemptive relief through transactional thresholds, it should exclude from any total calculation of small business loans credit union MBLs under $50,000.

In a more general sense, the Bureau should contextualize the burdens of 1071 implementation by considering the ever expanding universe of compliance duties credit unions have endured in the post-Dodd-Frank era. Respondents to NAFCU's *2020 Federal Reserve Meeting Survey* have said that, on average, 24 percent of their staff's time was devoted to regulatory compliance, and four out of five respondents expect to increase staffing in the next three years to better manage current and anticipated compliance burdens. The added burden of small business data collection risks imposing unsustainable regulatory costs for many credit unions—particularly the smallest—who play an important role providing credit to small business owners who are unable to secure credit elsewhere. Lingering economic uncertainty related to the pandemic could compound these burdens and force many credit unions to consider whether small business lending remains viable.

Given persistent anxiety related to the pandemic, NAFCU recommends that the Bureau delay its implementation of section 1071 until there are clear signs of an economic recovery and greater confidence regarding what the "new normal" will be going forward. Doing so will ensure that analysis of the benefits and costs of section 1071 are not distorted by the unusual stresses of the pandemic. NAFCU looks forward to providing additional comments regarding technical aspects of section 1071 implementation separately in response to the Outline.

Conclusion

NAFCU appreciates the opportunity to share comments in response to the Bureau's RFI regarding ECOA and Regulation B. Should you have any questions or require additional information, please do not hesitate to contact me at (703) 842-2266 or amorris@nafcu.org.

Sincerely,

Andrew Morris

Andrew Morris
Senior Counsel for Research and Policy