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Office of Regulations
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

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

Dear Ms. Bacon,

The National Women's Law Center (the "Center") takes this opportunity to comment in response to the Consumer Financial Protection Bureau (CFPB) Request for Information (RFI) on the Equal Credit Opportunity Act (ECOA) and Regulation B.

The Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone – especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

The comments below address questions 1, 5, 6, 8, and 9 from the RFI. More generally, the Center urges CFPB to focus on protecting consumers from discriminatory lending practices and engaging in outreach and education, both of which will help reduce gender and racial disparities in access to credit and, in turn, reduce gender and racial wealth and homeownership gaps.

I. Fair access to credit for women

Fair access to credit is important to women. Especially because women, on average, are paid less than men, discriminatory lending policies and practices lead to lost economic opportunity for individual consumers and contribute to the gender and racial wealth divide that plagues this nation. Median wealth for single men age 18 to 64

(“working-age”) was \$10,150 in 2013—more than three times the median wealth of \$3,210 for single working-age women.¹ The gaps are even greater for women of color:

- In 2016, the median wealth of white households was almost 10 times greater than that of Black households (\$171,000 vs \$17,600) and over eight times greater than that of Latinx households (\$171,000 vs \$20,700).²
- White households living near the poverty line typically have about \$18,000 in wealth, while Black households in similar economic conditions typically have a median wealth close to zero.³
- Single women of color face a staggering gap in wealth because of the compounded effects of race and gender—the median net wealth of single, working-age, white, non-Hispanic men was \$28,900 in 2013, compared to \$100 for single, working-age Latinx women and \$200 for single, working-age Black women.⁴

One contributor to the gender and racial wealth divides are gaps in homeownership, for which access to credit is essential. In 2007, 50 percent of single white, non-Hispanic men owned homes; whereas only 33 percent of single Black women and 28 percent of single Latinx women owned homes.⁵ Leading up to the Great Recession, women of color faced a higher chance of being steered into subprime mortgages, and many lost their homes and have not yet recovered. Moreover, households of color saw the values of their homes decrease the most during the Great Recession,⁶ and the values of men’s homes tend to be worth more, and appreciate more, compared to women’s homes.⁷ (The value of a home impacts the owner’s ability to access a second mortgage or home equity line of credit.) Single women, especially women of color, could be expected to be even less likely to own homes, or have homes that have decreased in value, as a result of the current economic downturn.

¹ See, e.g., MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH: INSIGHTS FOR GRANTMAKERS 5 (2015), available at https://assetfunders.org/wp-content/uploads/Women_Wealth_-_Insights_Grantmakers_brief_15.pdf.

² JESSE BRICKER ET AL., FED. RESERVE, CHANGES IN U.S. FINANCES FROM 2013 TO 2016: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES, (2017), available at <https://www.federalreserve.gov/publications/files/scf17.pdf>.

³ WILLIAM DARITY, JR. ET AL., SAMUEL DUBOIS COOK CTR. ON SOCIAL EQUITY, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP (Apr. 2018), available at https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/FINAL%20COMPLETE%20REPORT_.pdf.

⁴ CHANG, *supra* note 1, at 6.

⁵ MARIKO CHANG, LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA’S FUTURE, INSIGHT CTR. FOR COMMUNITY ECON. DEV., 1, 12 tbl.4 (2010), available at https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCCED_2010.pdf. Fifty-seven percent of single white women owned homes. *Id.*

⁶ SARAH BURD-SHARPS & REBECCA RASCH, IMPACT OF THE U.S. HOUSING CRISIS ON THE RACIAL WEALTH GAP ACROSS GENERATIONS, SOC. SCI. RES. COUNCIL, 1, 4 (2015), available at https://www.aclu.org/sites/default/files/field_document/discrimlend_final.pdf.

⁷ See AMY CASTRO BAKER, FOLOSADÉ FAMAKINWA & STACIA MARTIN-WEST, ON SHAKY GROUND, ASSET FUNDERS NETWORK 1, 4 (2019), <https://assetfunders.org/wp-content/uploads/AFN-Shaky-Ground-Brief-2018.pdf>.

In addition, women business owners face disparities in their access to credit. Women business owners seeking loans in 2019 received, on average, nearly \$30,000 less than the average loan for men business owners (\$40,513 compared to \$69,596).⁸ In the context of the current COVID-19 crisis, it has been reported that many women-owned and minority-owned businesses have been unable to access loans from the Paycheck Protection Program.⁹ Fair access to credit through enforcement of the ECOA's discrimination prohibitions based on sex, race, color, and national origin are clearly more important than ever.

Most consumers struggle to navigate the financial marketplace in the United States, but the financial marketplace has historically underserved, and sometimes even excluded, women, people of color, and other communities. Before the ECOA was passed in 1974, lenders frequently denied credit opportunities to women, especially to single women applicants and married women applying for a separate account from their spouse.¹⁰ Lenders who did approve credit for women often subjected them to blatant and egregious discrimination—for example, requiring women to have higher incomes and more consistent employment than men, refusing to consider sources of income such as child support and alimony, considering married employed women to be solely dependent on their husbands' incomes (even if they earned more than their husbands did), requiring married women to have their husband's formal approval for a loan, asking invasive questions about a woman applicant's birth control practices, and more.¹¹ Discriminatory practices like these led Congress in 1974 to pass the ECOA, which declared that "[i]t shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction."¹²

Members of Congress also debated whether they should amend the ECOA to include, for example, protections against discrimination based on race, color, and national origin. At the time, the Civil Rights Act of 1866 and the Fair Housing Act protected against discrimination on these grounds in some credit transactions. However, the Civil Rights Act of 1866 required proof of intentional discrimination,¹³ and under the Fair Housing

⁸ BIZ2CREDIT, WOMEN-OWNED BUSINESS STUDY 2020: CREDIT SCORES AND REVENUE OF WOMEN-OWNED BUSINESSES ROSE, BUT REVENUE GAP GREW IN 2019, ACCORDING TO BIZ2CREDIT'S ANNUAL STUDY (Mar. 13, 2020), <https://www.biz2credit.com/research-reports/women-owned-business-study-2020>.

⁹ MEGAN CERULLO, UP TO 90% OF MINORITY AND WOMEN OWNERS SHUT OUT OF PAYCHECK PROTECTION PROGRAM, EXPERTS FEAR, CBS NEWS (Apr. 22, 2020), <https://www.cbsnews.com/news/women-minority-business-owners-paycheck-protection-program-loans/>; COURTNEY CONNLEY, SHUT OUT OF PPP LOANS, STRUGGLING WITH NO CHILD CARE: HOW COVID-19 IS IMPACTING WOMEN-OWNED SMALL BUSINESSES, CNBC (May 19, 2020), <https://www.cnbc.com/2020/05/07/how-covid-19-is-impacting-women-owned-small-businesses.html>; STEPHEN BABCOCK, PPP LOANS AREN'T REACHING WOMEN AND MINORITY-OWNED BUSINESSES. BALTIMORE ENTREPRENEURS TELL THEIR STORIES, TECHNICAL.LY (May 12, 2020), <https://technical.ly/baltimore/2020/05/12/sole-proprietors-women-minority-owned-businesses-shut-out-federal-aid-entrepreneurs-ppp-loans/>.

¹⁰ See, e.g., ANDREW A. CUOMO, EQUAL CREDIT OPPORTUNITY ACT: HOW MUCH CAN WOMEN EXPECT, 8 J. LEGISLATION 121, 124-125 (1981).

¹¹ *Id.*; Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, 93rd Cong., 1st Sess., 17 (1973).

¹² Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1500 § 701(a) (codified as amended at 15 U.S.C. § 1691 (2018)).

¹³ DUBRAVKA RITTER, DO WE STILL NEED THE EQUAL CREDIT OPPORTUNITY ACT?, FED. RESERVE BANK OF PHILADELPHIA, 8-9 (2012), available at <https://www.philadelphiafed.org/-/media/consumer-finance->

Act, the government could only bring actions related to housing financing and not other consumer credit areas.¹⁴ Because the scope of these statutes was insufficient to eliminate credit discrimination, Congress expanded the ECOA in 1976 to provide protections against discrimination based on race, color, national origin, age, source of income from public assistance, and religion.¹⁵

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) placed primary authority for ECOA oversight and compliance, including Regulation B to implement the ECOA, with the CFPB. The CFPB has a critical role in protecting consumers, engaging in outreach and education, and oversight. CFPB's actions should focus on strengthening protections against credit discrimination.

II. Disparate Impact

Disparate impact liability applies when a policy or practice has a disproportionately harmful effect on protected classes—for example, on women, people of color, or immigrants. As CFPB notes in the RFI, Regulation B includes a provision about disparate impact analysis under ECOA through an “effects test” concept.¹⁶

Thanks in part to the ECOA, lending practices have changed since 1974, with fewer egregious examples of sex discrimination like the ones described above, or racially discriminatory lending policies like redlining. But discrimination continues, though it may be harder to detect. Policies and practices with a discriminatory effect include discriminatory mark-ups in auto lending,¹⁷ minimum loan and minimum value amount policies,¹⁸ maternity leave policies,¹⁹ and targeting for subprime mortgages.²⁰ These

[institute/payment-cards-center/publications/discussion-papers/2012/D-2012-equal-credit-opportunity-act.pdf](#).

¹⁴ *Id.* at 8.

¹⁵ Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 § 2 (codified as amended at 15 U.S.C. § 1691 (2018)).

¹⁶ 12 CFR 1002.6(a).

¹⁷ See, e.g., NAT'L CONSUMER LAW CTR., Case Index – Closed Cases: Auto Finance Discrimination <https://www.nclc.org/litigation/case-index-closed-cases.html> (last accessed June 1, 2020) (discriminatory effect on Black and Latinx customers).

¹⁸ See, e.g., *Briceno v. United Guaranty Residential Insurance Co.*, No. 3:89 CV 7325 (N.D. Ohio) (discriminatory effect on people of color); JOVAN BURTON, PARTNERSHIP FOR HOUSING AFFORDABILITY, SENIOR HOUSING STUDY (2018), available at <https://pharva.com/wp-content/uploads/2018-Senior-Housing-Study.pdf> (discriminatory effect based on age).

¹⁹ See, e.g., *Williams v. Countrywide Home Loans, Inc.*, No. L-01-1473, 2002-Ohio-5499 (Ohio Ct. App. 2002) (filed under an Ohio statute with an anti-discrimination provision similar to the ECOA provisions). See also ALLISON TAIT, CTR. FOR WORKLIFE LAW, UC HASTINGS COLLEGE OF THE LAW, DISCRIMINATION IN MORTGAGE LENDING ON THE BASIS OF PREGNANCY AND MATERNITY LEAVE, (2010), available at <http://worklifelaw.org/publications/WLLMortgageDiscriminationBrief.pdf>.

²⁰ ALLEN J. FISHBEIN & PATRICK WOODALL, WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET, CONSUMER FED'N OF AM. (Dec. 2006), available at <https://consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>; WOODSTOCK INST., HER LONGER ROAD HOME: DISPARITIES IN MORTGAGE LENDING TO WOMEN IN THE CHICAGO REGION (Jun. 2015), available at https://woodstockinst.org/wp-content/uploads/2015/06/140619_longerroadhome_cowan_factsheet.pdf; NIKITRA S. BAILEY, PREDATORY LENDING: THE NEW FACE OF ECONOMIC INJUSTICE, 32 AM. BAR ASS'N HUMAN RIGHTS MAGAZINE (2005),

policies may not appear discriminatory to the average credit applicant who does not have access to information about how the policy affects similarly-situated consumers who do not share their protected characteristics. Testing and other investigations by fair lending groups or a regulatory fair lending examination, however, can reveal discriminatory effects.²¹ That is why the availability of disparate impact liability under the ECOA is so important.

Full enforcement of the ECOA is necessary to tackle systemic barriers women, people of color, and other protected classes face in accessing credit. Research from the Urban Institute revealed that more reasonable lending standards would have led to 6.3 million more mortgages from 2009 to 2015.²² Disparate impact liability under the ECOA is thus a critical tool in protecting against discrimination in lending. Moreover, disparate impact liability is key to protecting civil rights in the context of employment, housing, education, health care, and more.

CFPB must not take any action that would make it harder for plaintiffs to bring or prove disparate impact under the ECOA. The current burden-shifting framework, including the legitimate business need prong, already provides checks and balances to prevent unsubstantiated claims. Existing regulatory standards, decades of guidance, and case law interpreting the disparate impact standards under ECOA and related civil rights statutes like the Fair Housing Act (FHA) and Title VII provide enough clarity to apply to the credit market. If CFPB makes any changes in its approach to disparate impact analysis, then those changes should focus on helping creditors reduce the disparate impact their policies may have.

III. Small Business Lending

Federal Reserve Board data released in 2017 shows that banks denied credit to about 53 percent of Black small business owners, about 40 percent of Latinx small business owners, and more than 30 percent of women-owned businesses.²³ Unfortunately, as the Federal Reserve notes, “[U]p-to-date and comprehensive information about the universe of small businesses is sparse, with most evidence about financing needs and sources derived from surveys.²⁴” To create more comprehensive and timely data sets, the CFPB must prioritize rulemaking to implement the small business lending data collection and reporting required under Section 1071 of the Dodd-Frank Act. This data

available at

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_predator/.

²¹ See, e.g., LISA RICE & ERICH SCHWARTZ, JR., NAT’L FAIR HOUSING ALLIANCE, DISCRIMINATION WHEN BUYING A CAR: HOW THE COLOR OF YOUR SKIN CAN AFFECT YOUR CAR-SHOPPING EXPERIENCE (2018), available at <https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

²² LAURIE GOODMAN, URBAN INST., OVERLY TIGHT CREDIT KILLED 1.1 MILLION MORTGAGES IN 2015 (Nov. 20, 2016), <https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015>.

²³ BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE AVAILABILITY OF CREDIT TO SMALL BUSINESSES (Sept. 2017), <https://www.federalreserve.gov/publications/2017-september-availability-of-credit-to-small-businesses.htm>.

²⁴ *Id.*

collection will help the CFPB and other agencies address discriminatory lending practices.

IV. Sexual Orientation and Gender Identity Discrimination

Unfortunately, LGBTQ+ people often experience credit discrimination.²⁵ The CFPB issued a letter in 2016 interpreting the ECOA's prohibition on sex discrimination to include prohibiting discrimination based on sexual orientation and gender identity.²⁶ This falls in line with the recent Supreme Court decision in *Bostock v. United States*,²⁷ which held that Title VII's protections against sex discrimination necessarily include protections against discrimination based on sexual orientation and gender identity. While in 2016, CFPB outlined multiple routes to achieve these protections, including through sex stereotyping, *Bostock* made clear that these protections are per se.

The *Bostock* rationale should guide the construction of all civil rights statutes prohibiting sex discrimination, including the ECOA. As the CFPB noted in the 2016 letter, courts' ECOA analysis often follows Title VII precedents, including regarding the scope of sex discrimination. Consequently, *Bostock* confirms that the CFPB should continue its position that the ECOA provides protections against discrimination based on sexual orientation and gender identity.

V. Public Assistance Income

The ECOA prohibits discrimination against credit applicants "because all or part of the applicant's income derives from any public assistance program."²⁸ Public programs provide critical assistance to women, children, and families to help them meet basic needs such as food, shelter, and health care. The CFPB must help families receiving public assistance gain fair access to credit by protecting them from intrusive and unnecessary document requests such as medical records related to disability income.

VI. Artificial Intelligence and Machine Learning

Artificial Intelligence (AI) and Machine Learning (ML) models can process great and diverse quantities of data, and financial institutions are increasingly using them to

²⁵ See, e.g., NAT'L CMTY. REINVESTMENT COAL., MORTGAGE DATA REVEALS DISPARITIES IN SAME-SEX LENDING (June 29, 2020), https://ncrc.org/mortgage-data-reveals-disparities-in-same-sex-lending/?mc_cid=30ceab89fc&mc_eid=b6388c8c93; HUA SUN & LEI GAO, LENDING PRACTICES TO SAME-SEX BORROWERS, 116 PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. 9293, 9293-9302 (May 7, 2019), available at <https://www.pnas.org/content/116/19/9293>; FREDDIE MAC, THE LGBT COMMUNITY: BUYING AND RENTING HOMES (2018), http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf.

²⁶ Letter from Consumer Fin. Prot. Bureau to Servs. & Advocacy for GLBT Elders (Aug. 30, 2016), available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/09/SAGE-Letter.pdf>.

²⁷ 140 S. Ct. 1731 (2020).

²⁸ 15 U.S.C. 1691.

decide the creditworthiness of potential borrowers. While these models offer some benefits, they threaten to replicate human biases in computerized systems, perpetuating and exacerbating discriminatory lending practices. The CFPB, along with other regulators, should closely oversee and supervise the use of AI/ML models to address and prevent discrimination.

VII. Conclusion

The COVID-19 pandemic has triggered an economic recession with financial stresses that will last for months and even years for some families. Women of color, who faced significant economic precarity before the public health emergency, are especially devastated by the COVID-19 crisis both because they face health disparities and because they are overrepresented in low-paid jobs like retail, restaurant, cleaning, and caregiving that are being lost in high numbers or designated as essential without commensurate protections and pay. The CFPB should honor people on the front lines of this pandemic by maintaining and strengthening ECOA protections from discrimination in lending.

The CFPB has played a critical role in uncovering discriminatory policies and practices and providing remedies in the form of requiring institutions to change their policies and practices so they are fair and non-discriminatory – providing nearly \$12 billion in total fiscal relief to about 29 million borrowers in its first six years of operation.²⁹ The CFPB can and must build upon these successes to increase access to credit for women, people of color, and other communities facing barriers to accessing credit.

Sincerely,



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²⁹ CONSUMER FIN. PROTECTION BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (July 2017), *available at* https://files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf.