



Financial Services Management

Anti-Discrimination Regulatory Framework

Cite

CFPB, Request for Information (RFI) on the Equal Credit Opportunity Act and Regulation B

Recommended Distribution:

Compliance, AI, Fintech, Policy, Legal, Government Relations

Websites:

https://files.consumerfinance.gov/f/documents/cfpb_rfi_equal-credit-opportunity-act-regulation-b.pdf

Impact Assessment

- Open review of critical compliance and innovation issues may lead to substantive regulatory change, but the nature of that change depends on political outcome as well as the CFPB's deliberative process.
- The CFPB appears to seek ways to expand AI/ML credit-underwriting use, perhaps leading to a new federal framework spurring innovation.
- Expanded federal preemption also seems to be contemplated, creating a more uniform but perhaps less restrictive consumer-finance construct.
- The Bureau may also contemplate less binding rules governing disparate impact.
- Flexibility to reach under- and un-served communities also seems likely.

Overview

The Bureau of Consumer Financial Protection has opened a sweeping inquiry into how credit discrimination occurs and could be averted, seeking comments and suggestions without indicating any possible policy responses. However, the issues on which it seeks comment are guideposts to the agency's near-term regulatory priorities, spelling out what could prove an ambitious agenda redefining consumer-finance regulation to speed artificial intelligence (AI) and machine learning (ML) adoption and increase the scope of federal preemption. The Department of Housing and Urban Development (HUD) has proposed what many see as a rollback in its disparate-impact standards to enhance AI/ML use;¹ any action by the CFPB to do so following comments on this RFI would be at least as controversial as it would apply across the spectrum of consumer-financial products, not just to HUD-backed mortgages.

¹ See **FAIRLEND6**, *Financial Services Management*, September 3, 2019.

Impact

Although other federal financial regulators retain authority to enforce the ECOA and its rules, the Dodd-Frank Act gave primary jurisdiction in this arena to the CFPB.² As a result, its standards have far-reaching implications for both banks and perhaps most especially nonbanks not otherwise subject to supervision or direct federal enforcement in this high-profile arena. However, going beyond enforcement to enhance fair access to credit, the CFPB now also views its mission as fostering innovation. As a result, any regulatory actions it may take in the wake of this inquiry could lead to more stringent enforcement of current standards, liberalizations some may contest as authorizing new forms of discrimination, or a new framework combining effective anti-discrimination standards with the increasingly technology-driven nature of retail finance. Given that this inquiry will likely not be finished until after the November election (see below), submissions to the Bureau now will frame debate and provide critical input to it, but not necessarily shape action along lines sometimes suggested in the RFI.

As discussed below, the RFI lays out questions without providing much insight into how the Bureau intends to answer them. However, one question does suggest that a longstanding controversy may await resolution until the Bureau decides how to proceed following review of RFI comments. The Dodd-Frank Act also requires the CFPB to establish a reporting system for small-business lending under the ECOA akin in some ways to those demanded for mortgages under the Home Mortgage Disclosure Act (HMDA). The Bureau has yet even to propose reporting standards despite ongoing calls in Congress for it to do so, but Director Kraninger has most recently indicated that reporting rules might be proposed later this year.³ This may be challenging if comments solicited in this RFI are taken into account.

Any federal standards expanding AI/ML use would have significant structural impact on credit underwriting and on the extent to which fintech and even bigtech entities could make use of their enormous troves of data to expand their financial-services footprint. So far, the banking agencies and the Bureau have taken a very cautious stand on the use of alternative data.⁴ Without like-kind action by the banking agencies, CFPB policy expanding AI/ML use and clarifying questions such as how adverse-action letters comply would open new frontiers for nonbanks and pose significant competitiveness challenges for more traditional consumer-finance companies.

As noted, the RFI also asks for views on the extent to which the ECOA and its implementing rules should preempt state law. This is permitted only when the Bureau determines that a state law is inconsistent with federal law. How this finding is made essentially determines whether the U.S. has a highest or lowest common denominator approach to consumer-finance anti-discrimination regulation based on whether the Bureau prefers states with more or less punitive standards. Regardless of its construct, expansive federal preemption could create legal certainty and uniformity providing considerable operational efficiency for consumer-finance companies operating in several states or across the country. Paired with the OCC's

² See **CONSUMER14**, *Financial Services Management*, July 19, 2010.

³ See *Client Report CONSUMER33*, February 6, 2020.

⁴ See **FCRA29**, *Financial Services Management*, December 11, 2019.

expansive view of federal interest-rate preemption,^{5,6} the agency's efforts to redesign and enhance the federal charter,^{7,8} a new federal consumer-finance construct could be established.

What's Next

This RFI was issued on July 28; comments are due sixty days after *Federal Register* publication. In the wake of a recent Supreme Court decision,⁹ the CFPB's director now serves at the president's will instead of being subject to dismissal only for cause. Director Kraninger appears likely to retain her position if President Trump wins re-election but would surely be replaced if Joe Biden were to do so. As a result, any proposals this CFPB determines to advance based on the RFI would surely be reviewed and perhaps retracted if Mr. Biden prevails. However, as noted, the questions posed in the RFI are those any Bureau would seek to answer in advancing new policies, making the positions and facts provided to the agency of considerable use regardless of the election's outcome.

Analysis

As noted, the CFPB seeks views on how to prevent credit discrimination; encourage responsible innovation; promote fair, equitable, and non-discriminatory credit access; address regulatory uncertainty; and solve compliance challenges. Questions on which views are specifically sought include:

- the need for more clarity on disparate impact;
- challenges to serving consumers with less English proficiency and how best to expand services to them;
- the need for additional guidance to expand credit to special-needs communities who are currently under-served or for which credit achieves social purposes;
- ways to expand affirmative advertising to disadvantaged groups;
- ways the CFPB could advance small-business lending to women and minorities;
- whether a recent Supreme Court decision affirming equal rights regardless of sexual orientation and gender identity can be applied to CFPB interpretations of discrimination on the basis of sex;
- the manner in which public-assistance income is measured for purposes of ensuring credit worthiness without violating ECOA;
- examples of inconsistencies with state law where ECOA should be viewed as preemptive; and
- the need for more regulatory clarity to facilitate AI and ML innovation and thus increase credit access. Views are also solicited on how best to ensure adverse-action notices are useful when decisions are made via AI or ML.

⁵ See **PREEMPT33**, *Financial Services Management*, July 1, 2020.

⁶ See **PREEMPT34**, *Financial Services Management*, July 23, 2020.

⁷ See **CHARTER26**, *Financial Services Management*, June 11, 2020.

⁸ See **DIGITAL5**, *Financial Services Management*, June 9, 2020.

⁹ See *Client Report STRUCTURE14*, June 30, 2020.