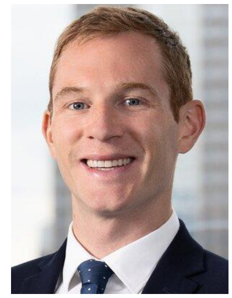
What CFPB Disparate Impact Proposal Means For Lenders

By **Tom Laser, Francis Riley and Jason McElroy** (November 26, 2025)



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On Nov. 12, the Consumer Financial Protection Bureau issued a proposed rule to modify various provisions of the Equal Credit Opportunity Act.

The proposed rule, if adopted, would eliminate lender liability for disparate impact inflicted as a result of a lender's lending-related activities; would refine the scope of what it means to "discourage" an individual from applying for a mortgage loan; and would prohibit, or at least restrict, the creation of special purpose credit programs, or SPCPs, that target loan applicants on the basis of race, color, national origin, sex or certain other characteristics.

The proposed rule was officially published in the Federal Register on Nov. 13 and — following a 30-day comment solicitation period — could go into effect as early as Feb. 11, 90 days from publication.

This article highlights the methodology by which the proposed rule contemplates making these changes, analyzes the CFPB's stated rationale for the changes, and explores how the proposed rule could affect lenders and other covered persons.

Elimination of ECOA Disparate Impact Liability

ECOA makes it unlawful for

> any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under [the Consumer Credit Protection Act].

Providing interpretive guidance to this statute, ECOA's regulations provide what is commonly known as the "effects test."

Taken together, these clauses have been construed to prohibit intentional discriminatory actions, facially neutral actions used as proxies to pursue further discriminatory motives, and otherwise nondiscriminatory actions that have discriminatory effects, even if not intended.

The CFPB now proposes to delete the second sentence of this ECOA provision and replace it with language stating that ECOA does not recognize the effects test.

The CFPB asserts various rationales for its proposed change. First, the CFPB posits that the legislative history of ECOA — which it sees as the primary reason for the original addition of the effects test — cannot override the statutory text and engraft onto it prohibitions that do not exist.

Indeed, looking to various U.S. Supreme Court decisions addressing the Age Discrimination in Employment Act and Title VII, the CFPB surmises that in the absence of an express effects test in the language of the statute itself, statutes have only been construed to include an effects test where the statute includes more general language regarding the potential for discriminatory impact.

For example, where the Age Discrimination in Employment Act and Title VII expressly included a prohibition on actions that "would otherwise affect" a protected person in a discriminatory way, the U.S. Supreme Court in 2005 in Smith v. City of Jackson was correct in holding that Congress intended a similar effects test be enacted.

With no such language in ECOA, the CFPB concludes that the statute was not intended to include an effects test.

Further, even when confronted with the fact that the Supreme Court has determined that other discrimination-related statutes without similar "would otherwise affect" language did warrant including disparate impact liability, the CFPB still concludes that ECOA's wording, structure and context all differ from those statutes in ways that support a different conclusion.

Second, the CFPB determined that authorizing disparate impact liability would be inconsistent with ECOA's purpose ensuring that credit is made available in a fair, impartial and nondiscriminatory way.

As the CFPB observed

> [u]nder a regime with disparate-impact liability, creditors may believe that they are required not only to consider the impact of facially neutral policies and procedures on protected classes, but to adjust those policies with the goal of achieving particular protected class outcomes, in order to avoid potential disparate-impact claims.

This concern of discouraging the use of overt discrimination in an attempt to avoid disparate impact liability further supports the CFPB's rationale.

To implement this change, the CFPB proposes not only to remove the effects test language from the regulation, but to also modify certain comments to the regulation that explain or provide guidance on the regulation, including Comments 6(a)-2 and 2(p)-4.

Limitation of Scope of Applicant "Discouragement"

ECOA prohibits lenders from making statements that would discourage potential credit applicants from submitting an application.

The specific ECOA provision, Title 15 of the U.S. Code, Section 1691a(b), defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."

The corresponding regulation for that provision, Title 12 of the Code of Federal Regulations, Section 1002.4(b), states that a "creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application."

The CFPB proposes to make several changes concerning these provisions.

First, and while neither the text of ECOA nor the regulation itself defines what constitutes an "oral or written statement," Comment 4(b)-1 to the regulation states that the regulation covers "acts and practices" as included within the purview of an "oral or written statement."

The CFPB, having determined that inclusion of the phrase "acts or practices" results in an overly broad interpretation of the statute and regulation, proposes to add language to the regulation clarifying that "oral or written statement" means only spoken or written words, or visual images such as symbols, photos or videos.

Second, according to the CFPB, the regulation itself has been interpreted to not only prohibit discouragement of applicants, but to also simultaneously prohibit encouragement of select applicants on the basis that this encouragement could discourage other applicants from applying for credit.

The CFPB finds this interpretation overly broad and proposes to remedy the apparent overbreadth by making several changes, including modifying the regulation so that it provides that prohibited discouragement only occurs when a creditor makes an oral or written statement "directed at" an applicant or prospective applicant, and proposing to amend the regulation such that prohibited discouragement only occurs if a creditor "knows or should know" that the statement would cause a reasonable person to be discouraged.

Prohibition of SPCPs Exclusively Targeted at Protected Classes

ECOA presently permits certain for-profit lenders to make lending decisions based on an applicant's protected characteristics — including race, national origin, color, sex and others — through the use of SPCPs.

The specific ECOA statutory provision permits "any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau."

Under the CFPB's proposed rule, a for-profit organization lending to consumers through an SPCP would be prohibited from using race, color, national original or sex as eligibility criteria, and restricted from using religion, marital status, age or the fact that an applicant receives income from a public assistance program as eligibility criteria.

According to the CFPB, the use of these criteria in making lending decisions in the SPCP context could arguably violate the constitution's guarantee of equal protection, though the CFPB expressly declines to declare such practice unconstitutional.

Moreover, the CFPB concludes in its proposed rule that the changes in societal circumstances and trends since ECOA was enacted, including changes in the legal landscape and credit market, further warrant eliminating these characteristics in the lending eligibility analysis — even for SPCPs.

Indeed, the CFPB remarks that when ECOA was enacted in 1974, discrimination was far more woven into the fabric of society than it is today, such that protectionary statutes like those applying to SPCPs are no longer necessary.

The CFPB's proposed rule therefore seeks to eliminate the use of these characteristics as the sole or primary reason for extending credit.

To that end, an SPCP can still decide to extend credit to an applicant with a protected characteristic if the SPCP lender can demonstrate that the use of this criteria is necessary and that without consideration of this criteria, the applicant would be unable to obtain similar credit elsewhere in the marketplace.

The proposed rule also places certain procedural and data retention requirements on lenders in the SPCP space, whereby they must gather and maintain evidence regarding their applicants and their need for the SPCP.

Insights and Takeaways

From our perspective, the CFPB's rationale for this proposed rule and the changes described therein goes beyond those expressly discussed in the proposed rule itself.

Indeed, it is clear that these proposed changes are part of a larger societal trend focused on disarming the CFPB and reducing emphasis on protected characteristics.

The CFPB this year has taken several actions that demonstrate an arguable disinterest in regulating the consumer finance space, including the withdrawal of the Fair Credit Reporting Act data broker rule, consenting to withdraw its final rule barring medical debt from inclusion in credit reports or use in credit decisions, and most recently, clarifying that the FCRA preempts state law addressing credit reporting at large (and thereby preventing states from passing legislation aimed at credit reporting).

Moreover, following the Supreme Court's landmark 2023 decision in Students for Fair Admissions v. Harvard that race-based considerations in higher education are no longer constitutional, as well as the present executive administration's stance on diversity, equity and inclusion initiatives in both the public and private sector, the nation has experienced a dramatic shift toward discouraging the use of protected characteristics across education, finance and other industries.

Putting aside the larger forces at play that could be influencing the CFPB's adoption of this proposed rule, the proposed rule could be rendered a nullity if the CFPB cannot stay financially afloat before the rule goes into effect.

Indeed, the proposed rule could go into effect as early as Feb. 11. In a recent court filing in the case of National Treasury Employees Union v. Vought in the U.S. District Court for the District of Columbia, however, the CFPB disclosed that it may run out of funds in early 2026.

The CFPB's funding mechanism is unique in many ways, in that it is funded through the Federal Reserve and outside the congressional appropriations process.

This unique funding scheme puts the CFPB in a position where it could actually run out of funds and be forced to cease operations. This proposed rule would be but one of many regulatory casualties that flow as a result.

Should the CFPB survive and the proposed rule go into effect, however, participants in the consumer finance industry may expect to see various changes.

First, industry participants subject to ECOA may need to revise their existing lending policies and procedures in order to maintain ECOA compliance. While the proposed rule notes that it is intended to reduce compliance costs in the long term, it may require the expenditure of considerable initial compliance costs through updating lending applications, updating application review policies and criteria, training compliance staff and taking other measures.

Second, in light of the proposed changes to what constitutes "discouragement" in the loan application process, lenders may wish to revisit their marketing materials, office or branch locations, or other aspects of their business that could be affected by a less stringent regulation of these practices.

Finally, and while the CFPB's proposed rule describes the SPCP lending space as small in comparison to the lending industry at large, any lenders for whom SPCP lending constitutes a substantial portion of their business may face challenges. Indeed, those lenders would likely see reduced revenues and need to decide whether to consolidate or merge with other lenders in order to stay afloat.

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