

**ACTION:** Final rule; correcting amendments.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is correcting changes to the definition of eligible retained income in the capital rule. This definition is used for calculating limitations on capital distributions and discretionary bonus payments and was adopted in an interim final rule published on March 18, 2020, and as a final rule published on October 8, 2020.

**DATES:** This correction is effective January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Benjamin McDonough, Associate General Counsel, (202) 452-2036; Mark Buresh, Senior Counsel, (202) 452-5270; or Andrew Hartlage, Counsel, (202) 452-6483, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. Users of Telecommunications Device for the Deaf (TDD) only, call (202) 263-4869.

**SUPPLEMENTARY INFORMATION:** The Board of Governors of the Federal Reserve System (Board) is issuing this correction to the definition of eligible retained income in the capital rule, 12 CFR part 217. This definition is used for calculating limitations on capital distributions and discretionary bonus payments and was adopted as an interim final rule published on March 18, 2020 (ERI interim final rule),<sup>1</sup> and as a final rule published on October 8, 2020 (ERI final rule).<sup>2</sup> In the ERI interim final rule, the Board, together with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC, and together with the Board and the OCC, the agencies), revised the definition of eligible retained income at section 217.11(a)(2)(i) of the capital rule on an interim basis and sought comment on the revisions. In the ERI final rule, the agencies adopted these changes to the definition of eligible retained income, introduced through the ERI interim final rule, without change.

On March 20, 2020, the Board published in the **Federal Register** a final rule, effective May 18, 2020, implementing the stress capital buffer requirement in the capital rule (SCB final rule), which revised section 217.11 of the Board's capital rule generally. The

SCB final rule revised the definition of eligible retained income in section 217.11 of the Board's capital rule in a manner inconsistent with the the Board's intent in the ERI interim final rule and the ERI final rule. The Board is issuing this notice to correct the definition of eligible retained income so that it is consistent with the definition established by the ERI interim final rule and affirmed by the ERI final rule.

**List of Subjects in 12 CFR Part 217**

Administrative practice and procedure; Banks, banking; Capital; Federal Reserve System; Holding companies.

*12 CFR Chapter II*

**Authority and Issuance**

For the reasons set forth in the Supplementary Information, chapter II of title 12 of the Code of Federal Regulations is amended as follows:

**PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q)**

■ 1. The authority citation for part 217 continues to read as follows:

**Authority:** 12 U.S.C. 248(a), 321-338a, 481-486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p-1, 1831w, 1835, 1844(b), 1851, 3904, 3906-3909, 4808, 5365, 5368, 5371, 5371 note; and Pub. L. 116-136, 134 Stat. 281.

■ 2. Section 217.11 is amended by revising paragraph (a)(2)(i) to read as follows:

**§ 217.11 Capital conservation buffer, countercyclical capital buffer amount, and GSIB surcharge.**

(a) \* \* \*

(2) \* \* \*

(i) *Eligible retained income.* The eligible retained income of a Board-regulated institution is the greater of:

(A) The Board-regulated institution's net income, calculated in accordance with the instructions to the FR Y-9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter, net of any distributions and associated tax effects not already reflected in net income; and

(B) The average of the Board-regulated institution's net income, calculated in accordance with the instructions to the FR Y-9C or Call Report, as applicable, for the four calendar quarters preceding the current calendar quarter.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, acting

through the Secretary of the Board under delegated authority.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2021-00906 Filed 1-14-21; 8:45 am]

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**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Part 1002**

**Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Advisory opinion.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing this Advisory Opinion (AO) to address regulatory uncertainty regarding Regulation B, which implements the Equal Credit Opportunity Act, as it applies to certain aspects of special purpose credit programs designed and implemented by for-profit organizations to meet special social needs. Specifically, this AO clarifies the content that a for-profit organization must include in a written plan that establishes and administers a special purpose credit program under Regulation B. In addition, this AO clarifies the type of research and data that may be appropriate to inform a for-profit organization's determination that a special purpose credit program is needed to benefit a certain class of persons.

**DATES:** This advisory opinion is effective on January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** Christopher Davis, Attorney-Advisor; Office of Fair Lending and Equal Opportunity, at [CFPB\\_FairLending@cfpb.gov](mailto:CFPB_FairLending@cfpb.gov) or 202-435-7000. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:** The Bureau is issuing this AO through the procedures for its Advisory Opinions Policy.<sup>1</sup> Refer to those procedures for more information.

**I. Advisory Opinion**

**A. Background**

Congress enacted the Equal Credit Opportunity Act (ECOA or the Act) in 1974, initially prohibiting discrimination in credit on the basis of

<sup>1</sup> Regulatory Capital Rule: Eligible Retained Income, 85 FR 15909 (March 20, 2020).

<sup>2</sup> Regulatory Capital Rule and Total Loss-Absorbing Capacity Rule: Eligible Retained Income, 85 FR 63423 (October 8, 2020). The final rule is effective January 1, 2021.

<sup>1</sup> 85 FR 77987 (Dec. 3, 2020).

sex or marital status.<sup>2</sup> Two years later, Congress expanded the prohibition against discrimination in credit transactions to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Federal Consumer Credit Protection Act.<sup>3</sup> At the same time, under section 701(c) of the ECOA, Congress clarified that it does not constitute discrimination under the Act for a creditor to “refuse to extend credit offered pursuant to” “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].”<sup>4</sup>

By permitting the consideration of a prohibited basis such as race, national origin, or sex in connection with a special purpose credit program, Congress protected a broad array of programs “specifically designed to prefer members of economically disadvantaged classes” and “to increase access to the credit market by persons previously foreclosed from it.”<sup>5</sup> Congress provided examples of such programs—e.g., government sponsored housing credit subsidies for the aged or the poor and programs offering credit to a limited clientele such as credit union programs and educational loan programs.<sup>6</sup>

The Board of Governors of the Federal Reserve System (Board)—which exercised rulemaking authority under the ECOA at the time—promulgated regulations implementing the Act’s special purpose credit program provision.<sup>7</sup> In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress transferred primary rulemaking authority over the ECOA to the Bureau,<sup>8</sup> which subsequently republished the Board’s existing regulations without material change.<sup>9</sup> The Bureau has addressed special purpose credit programs in a previous edition of *Supervisory Highlights*<sup>10</sup> and a blog,<sup>11</sup> explaining

that special purpose credit programs may be one tool available to creditors to “meet the credit needs of underserved communities.”<sup>12</sup>

In recent months, stakeholders have expressed interest in developing special purpose credit programs but have also raised questions about how to do so in a manner consistent with Regulation B, indicating that regulatory uncertainty may inhibit broader creation of these programs by creditors. Many comments to the Bureau’s recent *Request for Information on the Equal Credit Opportunity Act and Regulation B*<sup>13</sup> from a variety of external stakeholders, including both consumer and civil rights advocates and industry representatives, indicate that special purpose credit programs may be one way to promote fair and responsible access to credit, but that there is a need for further guidance on compliant implementation of these programs.

The Bureau is issuing this AO to address this regulatory uncertainty in the hope that broader creation of special purpose credit programs by creditors will help expand access to credit among disadvantaged groups and will better address special social needs that exist today. Bureau stakeholders have called attention to the problem of unmet credit needs among minority communities and the role that discrimination may have played in creating and exacerbating those deficits. Research from the Federal Reserve Bank of New York has shown that inequities in credit availability and in the terms and conditions of credit appear to have led to income inequality.<sup>14</sup> For consumers who own a home, moreover, home equity represents a significant share of household net worth,<sup>15</sup> but Home Mortgage Disclosure Act (HMDA) data show that in 2019, Black, Hispanic White, and Asian borrowers had notably higher mortgage loan denial rates than non-Hispanic White borrowers,

continuing a trend from years prior.<sup>16</sup> For example, the denial rates for conventional home-purchase loans were 16.0 percent for Black borrowers, 10.8 percent for Hispanic White borrowers, and 8.6 percent for Asian borrowers; in contrast, denial rates for such loans were 6.1 percent for non-Hispanic White borrowers.<sup>17</sup> Black and Hispanic White borrowers were also more likely to have higher-priced conventional and nonconventional loans in 2019.<sup>18</sup>

According to some studies, these types of racial and ethnic differences in access to credit perpetuate wealth inequality.<sup>19</sup> The Board’s 2019 Survey of Consumer Finances, for example, indicates that the typical White family has \$188,200 in median family wealth, which is eight times the wealth of the typical Black family (\$24,100), and five times the wealth of the typical Hispanic family (\$36,100).<sup>20</sup> Other families—including Asian families—also “have lower wealth than White families.”<sup>21</sup> The economic fallout from the ongoing COVID-19 pandemic appears to be exacerbating these racial and ethnic disparities in wealth.<sup>22</sup>

Bureau stakeholders have also noted that racial and ethnic disparities in access to credit extend beyond the mortgage market. For example, a report from the Board documented disparities in both mortgage and non-mortgage credit denials among White, Black, and Hispanic credit applicants.<sup>23</sup>

<sup>16</sup> Consumer Fin. Prot. Bureau, *Data Point: 2019 Mortgage Market Activity and Trends* (June 2020), at 36, [https://files.consumerfinance.gov/f/documents/cfpb\\_2019-mortgage-market-activity-trends\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 47.

<sup>19</sup> See, e.g., Fed. Reserve Bank of N.Y., *supra* note 14.

<sup>20</sup> Board of Governors of the Fed. Reserve Sys., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm#fig1>.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., Fed. Reserve Bank of N.Y., *Double Jeopardy: COVID-19’s Concentrated Health and Wealth Effects in Black Communities* (Aug. 2020), [https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy\\_COVID19andBlackOwnedBusinesses](https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses) (“Black businesses experienced the most acute decline, with a 41 percent drop. Latinx business owners fell by 32 percent and Asian business owners dropped by 26 percent. In contrast, the number of white business owners fell by 17 percent.”); Fed. Reserve Bank of Minn., *COVID-19 and Indian Country: Early snapshot reveals disproportionate economic exposure and uncertainty* (Apr. 10, 2020), <https://www.minneapolisfed.org/article/2020/covid-19-and-indian-country-early-snapshot-reveals-disproportionate-economic-exposure-and-uncertainty>.

<sup>23</sup> Board of Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S.*

<sup>2</sup> See Public Law 93–495, sec. 701(a), 88 Stat. 1500, 1521 (1974).

<sup>3</sup> See ECOA Amendments Act, Public Law 94–239, sec. 701(a), 90 Stat. 251, 251 (1976).

<sup>4</sup> See Public Law 94–239, sec. 701(c)(3), 90 Stat. 251, 251 (1976).

<sup>5</sup> S. Rept. 94–589, 94th Cong., 2nd Sess., at 7, reprinted in 1976 U.S.C.C.A.N. 403, 409.

<sup>6</sup> See *id.*

<sup>7</sup> See 42 FR 1242 (Jan. 6, 1977).

<sup>8</sup> See Public Law 111–203, tit. X, sec. 1085, 124 Stat. 1376, 2084.

<sup>9</sup> 76 FR 79442 (Dec. 21, 2011) (promulgating 12 CFR pt. 1002 & supp. I).

<sup>10</sup> See 81 FR 46652, 46656 (July 18, 2016).

<sup>11</sup> See Susan M. Bernard and Patrice Alexander Ficklin, *Expanding Access to Credit to Underserved Communities* (July 31,

2020), <https://www.consumerfinance.gov/about-us/blog/expanding-access-credit-underserved-communities/>.

<sup>12</sup> See *id.*

<sup>13</sup> 85 FR 46600 (Aug. 3, 2020).

<sup>14</sup> Fed. Reserve Bank of N.Y., *Credit, Income and Inequality* (June 2020), at 1 [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr929.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr929.pdf) (“[C]redit-constrained individuals often have limited wealth, and their exclusion from credit can hinder economic mobility and fuel persistent income inequality.”).

<sup>15</sup> U.S. Census Bureau, *Gaps in the Wealth of Americans by Household Type* (Aug. 27, 2019), [https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html?utm\\_campaign=20190827\\_msacos1ccstors&utm\\_medium=email&utm\\_source=govdelivery%](https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html?utm_campaign=20190827_msacos1ccstors&utm_medium=email&utm_source=govdelivery%).

Specifically, White credit applicants reported being denied for credit—including, but not limited to, mortgage credit—at a rate of 17.3 percent; Black credit applicants reported being denied for credit at a rate of 41.3 percent; and Hispanic credit applicants reported being denied for credit at a rate of 34.6 percent.<sup>24</sup> In the small business lending context, a report by the Board showed that “[o]n average, Black- and Hispanic-owned firm applicants received approval for smaller shares of the financing they sought compared to White-owned small businesses that applied for financing. This same report noted that larger shares of Black-, Hispanic-, and Asian-owned firm applicants did not receive any of the financing they applied for—38%, 33%, and 24%, respectively—compared to 20% of White-owned business applicants.”<sup>25</sup>

In recent months, multiple financial institutions have publicly committed to making billions of dollars available to addressing racial wealth disparities.<sup>26</sup>

*Households in 2016*, at 33–34 (May 2017), <https://www.federalreserve.gov/publications/files/2016-report-economic-well-being-us-households-201705.pdf>.

<sup>24</sup> See *id.* at 34.

<sup>25</sup> Fed. Reserve, *Report on Minority-Owned Firms* (Dec. 2019), <https://www.fedsmbusiness.org/medialibrary/fedsmbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf>.

<sup>26</sup> See, e.g., Press Release, BMO, *BMO Commits \$5 Billion to Advance Inclusive Economic Recovery in the U.S.* (Nov. 10, 2020), <https://newsroom.bmo.com/2020-11-10-BMO-Commits-5-Billion-to-Advance-Inclusive-Economic-Recovery-in-the-U-S>; Press Release, Am. Express, *American Express Announces \$1 Billion Action Plan to Promote Racial, Ethnic and Gender Equity for Colleagues, Customers and Communities* (Oct. 29, 2020), <https://about.americanexpress.com/all-news/news-details/2020/American-Express-Announces-1-Billion-Action-Plan-to-Promote-Racial-Ethnic-and-Gender-Equity-for-Colleagues-Customers-and-Communities/default.aspx>; Press Release, JPMorgan Chase & Co., *JPMorgan Chase Commits \$30 Billion to Advance Racial Equity* (Oct. 8, 2020), <https://www.jpmorganchase.com/news-stories/jpmc-commits-30-billion-to-advance-racial-equity>; Press Release, Citigroup Inc., *Citi Launches More Than \$1 Billion in Strategic Initiatives to Help Close the Racial Wealth Gap* (Sept. 23, 2020), <https://www.citigroup.com/citi/news/2020/200923a.htm>; Press Release, Huntington Bancshares, *Huntington Announces \$20 Billion Community Plan to Help Boost Economic Opportunity Throughout its Seven-State Footprint* (Sept. 1, 2020), <http://huntington-ir.com/ne/news/hban09012020.pdf>; Press Release, PNC, *PNC Commits More Than \$1 Billion To Help End Systemic Racism and Support Economic Empowerment of African Americans and Low- and Moderate-Income Communities* (June 18, 2020), <https://pnc.mediaroom.com/2020-06-18-PNC-Commits-More-Than-1-Billion-To-Help-End-Systemic-Racism-And-Support-Economic-Empowerment-Of-African-Americans-And-Low-And-Moderate-Income-Communities>; Press Release, U.S. Bank, *U.S. Bank to rebuild in Minneapolis; Announces multiple investments and initiatives to address social and economic inequities* (June 5, 2020), <https://www.usbank.com/newsroom/stories/us-bank-to-rebuild-in-minneapolis-announces->

Bureau stakeholders have indicated that investments in special purpose credit programs may allow for better expansion of credit access to underserved communities.

## B. Coverage

This AO applies solely to certain aspects of special purpose credit programs (*i.e.*, those described in part I.C below) designed and implemented by for-profit organizations to meet special social needs under the Regulation B requirements identified below. This AO does not apply to any credit assistance program expressly authorized by Federal or State law for the benefit of an economically disadvantaged class of persons, or to any credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons.<sup>27</sup> This AO has no application to any other circumstance and does not offer a legal interpretation of any other provisions of law.

## C. Applicable Regulatory Provisions

It is not discrimination under the ECOA for a creditor to refuse to extend credit offered pursuant to a legally compliant special purpose credit program.<sup>28</sup> Regulation B, which implements the ECOA, sets forth compliance standards and general rules for special purpose credit programs. A for-profit organization that offers or participates in a special purpose credit program to meet special social needs must establish and administer the special purpose credit program pursuant to a “written plan” that identifies the class of persons the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.<sup>29</sup> In addition, a for-profit organization that offers or participates in a special purpose credit program to meet special social needs must establish and administer the special purpose credit program to extend credit to a class of persons who, under the organization’s customary standards of creditworthiness, probably would not receive such credit or would

*multiple-investments-and-initiatives-to-address-social-and-economic-inequities.html*; Press Release, Bank of Am., *Bank of America Announces \$1 Billion/4-Year Commitment to Support Economic Opportunity Initiatives* (June 2, 2020), <https://newsroom.bankofamerica.com/press-releases/bank-america-announces-four-year-1-billion-commitment-supporting-economic>.

<sup>27</sup> See 12 CFR 1002.8(a)(2), (3).

<sup>28</sup> 15 U.S.C. 1691(c).

<sup>29</sup> 12 CFR 1002.8(a)(3)(i).

receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.<sup>30</sup>

Regulation B is clear that a special purpose credit program qualifies as such only where the program was established and is administered so as not to discriminate against an applicant on any prohibited basis.<sup>31</sup> All program participants may be required, however, to share one or more common characteristics (for example, race, national origin, or sex) so long as the program is not established and is not administered with the purpose of evading the requirements of the ECOA or Regulation B.<sup>32</sup> If participants in a special purpose credit program are required to possess one or more common characteristics and if the program otherwise satisfies the applicable requirements of Regulation B, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant’s eligibility for the program.<sup>33</sup>

The Bureau does not determine whether individual programs qualify for special purpose credit status.<sup>34</sup> The creditor administering or offering the special purpose credit program must make these decisions regarding the status of its program.<sup>35</sup> It follows that a creditor may initiate a special purpose credit program without the approval of the Bureau.

## D. Legal Analysis

### 1. Written Plan

A for-profit organization must establish and administer a special purpose credit program pursuant to a written plan.<sup>36</sup> The plan must contain information that supports the need for the program, including:

- The class of persons that the program is designed to benefit;
- The procedures and standards for extending credit pursuant to the program;
- Either (i) the time period during which the program will last or (ii) when the program will be reevaluated to

<sup>30</sup> 12 CFR 1002.8(a)(3)(ii).

<sup>31</sup> 12 CFR 1002.8(b)(2); see, e.g., *United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 180 (3d Cir. 1984) (explaining that a creditor is “prohibited from discriminating on the basis of race, sex or marital status in a credit program designed to extend credit to the group of persons between the ages of 18 and 21”).

<sup>32</sup> 12 CFR 1002.8(b)(2).

<sup>33</sup> 12 CFR 1002.8(c).

<sup>34</sup> See Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–1.

<sup>35</sup> See *id.*

<sup>36</sup> See 12 CFR 1002.8(a)(3)(i).

determine if there is a continuing need for it; and

- A description of the analysis the organization conducted to determine the need for the program.<sup>37</sup>

Each of these required components is discussed in further detail below. For-profit organizations that draft written plans containing the necessary elements as set forth in Regulation B and herein will satisfy the requirement of 12 CFR 1002.8(a)(3)(i).

#### a. Class of Persons

The class of persons that a special purpose credit program is designed to benefit must consist of those “who would otherwise be denied credit or would receive it on less favorable terms.”<sup>38</sup> A written plan must explain whether the class of persons will be required to demonstrate a financial need and/or share a common characteristic.<sup>39</sup> Such a class could be defined with or without reference to a characteristic that is otherwise a prohibited basis under the ECOA. For example, if need is determined in accordance with part I.D.2 below, a for-profit organization’s written plan might identify a class of persons as minority residents of low-to-moderate income census tracts, residents of majority-Black census tracts, operators of small farms in rural counties, minority- or woman-owned small business owners, consumers with limited English proficiency, or residents living on tribal lands.

#### b. Procedures and Standards

A written plan must also set forth the procedures and standards for extending credit pursuant to the special purpose credit program.<sup>40</sup> Those procedures and standards must be designed to increase the likelihood that a class of persons “who would otherwise be denied credit” will receive credit pursuant to the program, or that a class of persons who “would receive [credit] on less favorable terms” will receive credit on more favorable terms pursuant to the program.<sup>41</sup> To accomplish these goals a creditor may, for example, introduce a new product or service, modify the terms and conditions or certain eligibility requirements for an existing product or service, or modify policies and procedures related to certain loss mitigation programs, such as loan modifications. For example, a creditor

may offer a new small business loan product for woman-owned businesses by relaxing its customary standard of requiring three years of experience in the industry to one year, if the creditor has determined that this requirement would probably prevent woman-owned businesses from qualifying for small business financing. The written plan must describe the procedures and standards adopted and explain how they will increase credit availability with respect to the identified class of persons. If the class of persons the program is designed to benefit will be required to share a common characteristic, the written plan may also explain whether the organization will request and consider information that would otherwise be prohibited under the ECOA.<sup>42</sup>

#### c. Program Duration/Reevaluation

The written plan must provide “a specific period of time for which the program will last” or “contain a statement regarding when the program will be reevaluated to determine if there is a continuing need for it.”<sup>43</sup> If an organization opts for the latter approach, reevaluation could be made contingent on a certain set of circumstances or simply a set date. The written plan could also adopt a combined approach—for example, the special purpose credit program could end on a set date, or when a pre-established origination volume has been reached, whichever occurs earlier. If an organization extends the program beyond what is set forth in its written plan, it must document the terms of that extension in order to ensure the program continues to be administered pursuant to a written plan.

#### d. Description of Analysis

A special purpose credit program must be “established and administered”<sup>44</sup> to benefit a class of people who would otherwise be denied credit or would receive it on less favorable terms, as determined by a “broad analysis,”<sup>45</sup> and it must be “established and administered pursuant to a written plan.”<sup>46</sup> The Official Interpretations to Regulation B further provide that a written plan “must contain information that supports the need for the particular program.”<sup>47</sup>

Thus, a for-profit organization’s written plan must describe or incorporate the analysis that supports the need for the program.

#### 2. Determination of Need for a Special Purpose Credit Program

##### a. Permissible Sources of Data and Research

In designing a special purpose credit program, a for-profit organization must determine that the program will benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms. This determination can be based on a broad analysis using the organization’s own research or data from outside sources, including governmental reports and studies.<sup>48</sup> The Official Interpretations to Regulation B provide two examples: First, “a creditor might design new products to reach consumers who would not meet, or have not met, its traditional standards of creditworthiness due to such factors as credit inexperience or the use of credit sources that may not report to consumer reporting agencies”; and second, “a bank could review [HMDA] data along with demographic data for its assessment area and conclude that there is a need for a special purpose credit program for low-income minority borrowers.”<sup>49</sup>

For-profit organizations may rely on a wide range of research or data to analyze whether a special purpose credit program is needed to benefit a class of persons who would otherwise be denied credit or would receive it on less favorable terms.<sup>50</sup> A for-profit organization’s analysis might consider research or data that are already in the public domain. The Official Interpretations to Regulation B cite HMDA data as one example.<sup>51</sup> In the case of small business lending, the Small Business Administration or the Board’s Small Business Credit Surveys are possible sources of information. Other governmental or academic reports and studies exploring the historical and societal causes and effects of discrimination may also be considered. Finally, the for-profit organization’s own data or research—if available—may be a helpful source for conducting an

<sup>37</sup> 12 CFR 1002.8(a)(3)(i)–(ii); Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

<sup>38</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

<sup>39</sup> See 12 CFR 1002.8(b)(2), (d).

<sup>40</sup> 12 CFR 1002.8(a)(3)(i).

<sup>41</sup> See 12 CFR 1002.8(a)(3)(ii).

<sup>42</sup> See 12 CFR 1002.8(b)(2), (c).

<sup>43</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

<sup>44</sup> 12 CFR 1002.8(a)(3)(ii).

<sup>45</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

<sup>46</sup> 12 CFR 1002.8(a)(3)(i) (emphasis added).

<sup>47</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–6.

<sup>48</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

<sup>49</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

<sup>50</sup> The Official Interpretations to Regulation B expressly provide that a for-profit organization is permitted to conduct a “broad analysis.” 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5 (emphasis added).

<sup>51</sup> Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.

analysis to determine if there is a need for a special purpose credit program.

#### b. Nexus to the Organization's Customary Credit Standards

While a for-profit organization may permissibly rely on a broad range of research or data—including historical and societal information—in determining whether a special purpose credit program is needed, the organization's analysis must show how “a class of people [] would otherwise be denied credit or would receive it on less favorable terms” under the *organization's* customary credit standards.<sup>52</sup> The for-profit organization must be able to show a connection between the research or data informing its analysis and the fact that, under the organization's customary standards of creditworthiness, a class of persons probably would not receive credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit. For example, a creditor who identifies a class of certain applicants who do not have sufficient savings to meet mortgage loan requirements (or who receive such loans on less favorable terms) could offer such applicants down payment assistance funds pursuant to a special purpose credit program. In this example, the creditor could demonstrate that under its own standards of creditworthiness, *e.g.*, either (1) “insufficient cash” is listed as a principal reason for the denial of similar mortgage loan applications among the identified class of applicants frequently enough to indicate that they probably would not receive credit; or (2) requirements regarding minimum amounts of cash to close or liquid assets will probably impair credit access for the identified class of applicants.<sup>53</sup>

<sup>52</sup> 12 CFR 1002.8(a)(3)(ii).

<sup>53</sup> The fact that a for-profit organization identifies a need for a special purpose credit program based on an analysis of its own data does not, by itself, create an inference or presumption that the organization has engaged in unlawful credit discrimination. Of course, the adoption of a special purpose credit program does not absolve a creditor of its ordinary obligations under the ECOA and Regulation B; the Bureau strongly encourages creditors to evaluate their fair lending risk using an effective compliance management system. Finally, Regulation B does not require a creditor to show that a special purpose credit program is established and administered to extend credit to a class of persons who *definitely* would not receive such credit or would receive it on less favorable terms than other applicants—the regulation only requires a showing that the class of persons “*probably*” would not receive such credit or would receive it on less favorable terms. 12 CFR 1002.8(a)(3)(ii) (emphasis added).

#### c. Requests For and Use of Information

Lastly, the Bureau notes that pursuant to Regulation B, “[i]f participants in a special purpose credit program . . . are required to possess one or more common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirements of [Regulation B], a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.”<sup>54</sup> If no special purpose credit program has yet been established, however, a creditor may use statistical methods to estimate demographic characteristics but it cannot request demographic information that it is otherwise prohibited from collecting, even to determine whether there is a need for such a program. Moreover, while a for-profit organization may rely on a broad swath of research and data to determine the need for a special purpose credit program—including the organization's own lending data—it may not violate Regulation B's prohibitions on the collection of demographic information exclusively to conduct this preliminary analysis before establishing a special purpose credit program.<sup>55</sup>

Once a special purpose credit program has been established, a creditor may then request and consider information regarding common characteristic(s) if needed to determine the applicant's eligibility for the program. For example, if a creditor establishes a special purpose credit program that requires that an applicant resides in an area that is designated as a low-to-moderate income census tract and is Black, Hispanic, or Asian, a creditor could request race or ethnicity information from applicants to confirm eligibility for the program.

## II. Regulatory Matters

This advisory opinion is an interpretive rule issued under the Bureau's authority to interpret the ECOA and Regulation B, including under section 1022(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes

<sup>54</sup> 12 CFR 1002.8(c); *see also* Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.6, ¶ 6(b)–1 (“In a special purpose credit program, a creditor may consider a prohibited basis to determine whether the applicant possesses a characteristic needed for eligibility.”).

<sup>55</sup> *See* 12 CFR 1002.5(b), 1002.6(b).

and objectives of Federal consumer financial laws.<sup>56</sup>

By operation of the ECOA section 706(e), no provision of the ECOA imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.<sup>57</sup>

As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.<sup>58</sup> Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.<sup>59</sup> The Bureau also has determined that this interpretive rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.<sup>60</sup>

Pursuant to the Congressional Review Act,<sup>61</sup> the Bureau will submit a report containing this interpretive rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a “major rule” as defined by 5 U.S.C. 804(2).

## III. Signing Authority

The Director of the Bureau, Kathleen L. Kraninger, having reviewed and approved this document, is delegating the authority to electronically sign this document to Grace Feola, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

Dated: December 21, 2020.

### Grace Feola,

*Federal Register Liaison, Bureau of Consumer Financial Protection.*

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<sup>56</sup> 12 U.S.C. 5512(b)(1). The relevant provisions of the ECOA and Regulation B form part of Federal consumer financial law. 12 U.S.C. 5481(12)(D), (14).

<sup>57</sup> 15 U.S.C. 1691e(e).

<sup>58</sup> 5 U.S.C. 553(b).

<sup>59</sup> 5 U.S.C. 603(a), 604(a).

<sup>60</sup> 44 U.S.C. 3501–3521.

<sup>61</sup> 5 U.S.C. 801 *et seq.*