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),1 and as a final rule published on October 8, 2020 (ERI final rule).2 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 in a manner inconsistent with 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:

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) * * *
   (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]
BILLING CODE 6210–01–P

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 or 202–435–7000. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION: The Bureau is issuing this AO through the procedures for its Advisory Opinions Policy.1 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

sex or marital status. 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. 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].”

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.” 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.

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. In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress transferred primary rulemaking authority over the ECOA to the Bureau, which subsequently republished the Board’s existing regulations without material change. The Board has addressed special purpose credit programs in a previous edition of Supervisory Highlights and a blog, explaining that special purpose credit programs may be one tool available to creditors to “meet the credit needs of underserved communities.”

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 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. For consumers who own a home, moreover, home equity represents a significant share of household net worth, 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. 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. Black and Hispanic White borrowers were also more likely to have higher-priced conventional and nonconventional loans in 2019. According to some studies, these types of racial and ethnic differences in access to credit perpetuate wealth inequality. 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). Other families—including Asian families—also “have lower wealth than White families.”

The economic fallout from the ongoing COVID–19 pandemic appears to be exacerbating these racial and ethnic disparities in wealth.

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.

Continued
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.\textsuperscript{24} In the small business lending
category, 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." This same report noted that larger shares of Black,-
Hispanic-, and Asian-owned firm
applicants did not receive any part of
the financing they applied for—38%, 33%,
and 24%, respectively—compared to
20% of White-owned business
applicants."\textsuperscript{25}

In recent months, multiple financial
institutions have publicly committed to
making billions of dollars available to
addressing racial wealth disparities.\textsuperscript{26}

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.\textsuperscript{27}

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.\textsuperscript{28} Regulation B, which
implies 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.\textsuperscript{29} 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
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.\textsuperscript{30}

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.\textsuperscript{31} 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
avoiding the requirements of the ECOA
or Regulation B.\textsuperscript{32} 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.\textsuperscript{33}

The Bureau does not determine
whether individual programs qualify for
special purpose credit status.\textsuperscript{34}

The creditor administering or offering the
special purpose credit program must
make these decisions regarding the
status of its program.\textsuperscript{35} 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.\textsuperscript{36} 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

\textsuperscript{26} 10 CFR 1002.8(a)(3)(i).

\textsuperscript{27} 12 CFR 1002.8(a)(3)(ii).

\textsuperscript{28} 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”).

\textsuperscript{29} 12 CFR 1002.8(b)(2).

\textsuperscript{30} 12 CFR 1002.8(c).

\textsuperscript{31} 12 CFR 1002.8(b)(2).

\textsuperscript{32} See Official Interpretations, 12 CFR pt.
1002 (supp. 1), sec. 1002.8 (§ 8(a)–1).

\textsuperscript{33} See id.

\textsuperscript{34} 12 CFR 1002.8(a)(3)(i).
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.

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. 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.”

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. 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 governmental reports and studies. 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

39 See 12 CFR 1002.8(b)(2), (d).
41 See 12 CFR 1002.8(a)(3)(ii).
43 Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5.
44 12 CFR 1002.8(a)(3)(ii).
45 Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5 (emphasis added).
46 Official Interpretations, 12 CFR pt. 1002 (supp. I), sec. 1002.8, ¶ 8(a)–5 (emphasis added).
50 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).
52 See 12 CFR 1002.8(b)(2), (c).
53 See 12 CFR 1002.8(b)(2), (c).
54 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).
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 [that] would otherwise be denied credit or would receive it on less favorable terms” under the organization’s customary credit standards. 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.

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.” 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.

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 and objectives of Federal consumer financial laws. 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.

As an interpretive rule, this advisory opinion is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 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.

Pursuant to the Congressional Review Act, 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.


Grace Feola,
Federal Register Liaison, Bureau of Consumer Financial Protection.

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BILLING CODE 4810–AM–P

52 12 CFR 1002.8(a)(3)(ii).
53 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 the organization has engaged in unlawful credit discrimination. 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 determined by judicial or other authority to be invalid for any reason.”).