Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1002

[Docket No. CFPB–2025–0039]

RIN 3170–AB54

Equal Credit Opportunity Act (Regulation B)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is issuing a proposed rule for public comment that amends provisions related to disparate impact, discouragement of applicants or prospective applicants, and special purpose credit programs under Regulation B, the regulation implementing the Equal Credit Opportunity Act (ECOA or Act). The amendments would facilitate compliance with ECOA by clarifying the obligations imposed by the statute.

DATES: Comments must be received on or before December 15, 2025.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2025–0039 or RIN 3170–AB54, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. A brief summary of this document will be available at *https://www.regulations.gov/docket/CFPB-2025-0039.*
- *Email: 2025-NPRM-ECOA@cfpb.gov.* Include Docket No. CFPB–2025–0039 or RIN 3170–AB54 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—2025 NPRM ECOA, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.*

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Dave Gettler, Paralegal Specialist, Office of Regulations, at 202–435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary

Pursuant to its authority under ECOA, 15 U.S.C. 1691b(a), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5512(b), the Bureau is proposing to amend provisions in Regulation B, 12 CFR part 1002, pertaining to: whether disparate impact is cognizable under the Act; under what circumstances a creditor may be deemed to be discouraging an applicant or prospective applicant; and under what conditions may a creditor offer special purpose credit programs.

In 2020, the Bureau issued a Request for Information on ECOA and Regulation B (RFI).[1] The RFI solicited information about disparate impact, prospective applicants, and special purpose credit programs, among other topics. The Bureau reviewed the comments submitted in response to the RFI and obtained other information in the course of carrying out its statutory responsibilities.

In order to carry out the purposes of ECOA, the Bureau proposes changes to Regulation B to provide that ECOA does not authorize disparate-impact liability (effects test), further define discouragement, and add prohibitions and restrictions for special purpose credit programs.

II. Background

A. Introduction

Congress enacted ECOA in 1974 (1974 Act) ''to insure that various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.'' To that end, section 701(a) of ECOA made it ''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.'' The Board of Governors of the Federal Reserve System (Board) promulgated regulations implementing ECOA. In 1976, Congress reenacted ECOA in its entirety, amending ECOA to add additional categories of prohibited discrimination (1976 Act). Since 1976, 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]'' (prohibited basis).[2] The Board, which at the time had exclusive rulemaking authority under ECOA, promulgated regulations, after notice-and-comment, to implement the 1976 Act.

In 2011, the Dodd-Frank Act transferred responsibility for ECOA from the Board to the Bureau.[3] It granted primary authority to the Bureau to supervise and enforce compliance with ECOA and Regulation B for entities within the Bureau's jurisdiction and to issue regulations and guidance to implement and interpret ECOA.[4] The

[1] 85 FR 46600 (Aug. 3, 2020).

[2] 15 U.S.C. 1691(a).

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] Dodd-Frank Act section 1029 generally excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the

Continued

Bureau's Regulation B substantially duplicates the Board's Regulation B making only certain non-substantive, technical, formatting, and stylistic changes.[5]

In 2020, the Bureau published an RFI seeking comments and information to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under ECOA and Regulation B.[6] The RFI requested information related to disparate impact, prospective applicants, and special purpose credit programs (SPCPs), among other issues. In response to the RFI, the Bureau received and reviewed over 35 comment letters. In addition, the Bureau has obtained pertinent information in the course of carrying out its supervisory and enforcement responsibilities.

In 2025, the President issued several Executive Orders relevant to the Bureau's administration of ECOA. Executive Order 14173, entitled ''Ending Illegal Discrimination and Restoring Merit-Based Opportunity,'' states in part that ''[t]he Federal Government is charged with enforcing our civil-rights laws. The purpose of this order is to ensure that it does so by ending illegal preferences and discrimination.'' [7] Executive Order 14281, entitled ''Restoring Equality of Opportunity and Meritocracy,'' states in part that ''[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.'' [8]

Consistent with these actions, the Bureau proposes this rule to (i) provide that ECOA does not authorize disparate impact claims; (ii) amend the prohibition on discouraging applicants or prospective applicants to clarify that it prohibits statements of intent to discriminate in violation of ECOA and is not triggered merely by negative consumer impressions, and to clarify that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements; and (iii) amend the standards for SPCPs offered or participated in by for-profit organizations to include new standards and related restrictions. The proposed rule is discussed further below. The Bureau seeks comments on the entire proposal.

B. Disparate Impact

In *Griggs* v. *Duke Power Co.*[9] and subsequent cases, the Supreme Court held that certain provisions in antidiscrimination statutes may authorize disparate-impact claims. Under a disparate-impact claim, a plaintiff may challenge as unlawful discrimination facially neutral policies that have a disproportionate effect along prohibited basis lines. The Supreme Court has noted that ''[i]n contrast to a disparate-treatment case, . . . a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.'' [10]

In *Griggs,* the Supreme Court held that disparate impact claims are cognizable under section 703(a)(2) of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices. In *Smith* v. *City of Jackson,*[11] a plurality of the Supreme Court held that the Age Discrimination in Employment Act (ADEA) authorizes disparate-impact claims. Most recently, in *Texas Department of Housing & Community Affairs* v. *The Inclusive Communities Project, Inc.,*[12] the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act (FHA). However, the Supreme Court has not held that disparate-impact claims are necessarily available under all antidiscrimination statutes. Instead, the Court has reviewed each statutory provision, when challenged, to determine whether it authorizes disparate-impact claims, whether disparate-impact claims are consonant with the intended operation of the statute, and in particular whether the statutory provisions have ''effects-based'' language that indicates that Congress intended for the statutory provision to permit disparate-impact claims.

The Supreme Court has not determined whether a disparate-impact claim is permitted under ECOA. As noted above, section 701(a) of ECOA, as enacted in 1974, made it ''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.'' In the 1976 Act, 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].'' [13]

The text of ECOA does not state that disparate-impact claims are cognizable under ECOA, nor does it contain effects-based language of the type that has been found in other statutes to invoke disparate-impact liability. However, in promulgating Regulation B, the Board relied on legislative history to support authorizing disparate-impact liability. For example, the Senate Report accompanying the 1976 Act stated:

> In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs* . . . and *Albemarle Paper Company* v. *Moody,* are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.[14]

A House Report similarly provides evidence that ECOA authorizes disparate-impact claims.[15]

The Board's regulations to implement the 1976 Act explicitly and solely relied on this legislative history to conclude that Congress intended for ECOA to permit an ''effects test concept,'' *i.e.,* disparate-impact proof of liability.[16] Although there have been minor amendments to the relevant language in Regulation B since 1977, Regulation B has continued to point to the legislative history of ECOA to support the

sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

[5] 76 FR 79442 (Dec. 21, 2011).

[6] 85 FR 46600 (Aug. 3, 2020).

[7] 90 FR 8633 (Jan. 31, 2025).

[8] 90 FR 17537 (Apr. 28, 2025).

[9] 401 U.S. 424 (1971).

[10] *Texas Dep't of Hous. & Cmty. Affairs* v. *The Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 524 (2015).

[11] 544 U.S. 228 (2005) (plurality op.).

[12] 576 U.S. 519 (2015).

[13] 15 U.S.C. 1691(a).

[14] S. Rep. No. 94–589, at 4–5 (1976).

[15] H. Rep. No. 94–210, at 5 (1975).

[16] 42 FR 1242, 1255 n.7 (Jan. 6, 1977) (''The legislative history of the Act indicates that the Congress intended an ''effects test'' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness.''). This footnote was later moved to the text of § 1002.6 when the Bureau republished Regulation B after responsibility for the rule was transferred from the Board to the Bureau. *See* 76 FR 79442 (Dec. 21, 2011).

conclusion that disparate-impact claims are cognizable under ECOA.[17]

Current Rule

Regulation B currently provides in § 1002.6 that the legislative history of ECOA indicates that the Congress intended an ''effects test'' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness. Comment 6(a)–2 explains the ''effects test,'' cites to the legislative history of ECOA, and provides an example. Comment 2(p)–4, which relates to the definition of ''empirically derived and other credit scoring systems,'' refers to the ''effects test,'' noting that neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test and cross-referencing comment 6(a)–2.

Section III.A below discusses the ways in which this proposed rule would change the current rule regarding disparate impact.

C. Discouragement

Regulation B § 1002.4(b) currently provides 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.'' [18] Current comments 4(b)–1 and (b)–2 provide additional details about conduct prohibited or permitted under the provision.

The Board adopted a precursor to current § 1002.4(b) in its 1975 final rule implementing the 1974 Act.[19] The 1974 Act did not specifically mention discouragement of applicants or prospective applicants. To adopt the provision, the Board thus relied on its authority under ECOA section 703(a)—authority that the Dodd-Frank Act subsequently transferred to the Bureau—to make adjustments in Regulation B that, in its judgment, were necessary or proper to effectuate ECOA's purposes.[20] Specifically, ECOA section 703(a) provides that the Bureau (previously the Board) ''shall prescribe regulations to carry out the purposes of [ECOA],'' and that such regulations:

> [M]ay contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

In its rulemaking, the Board stated that it believed that a prohibition against discouragement was ''necessary to protect applicants against discriminatory acts occurring before an application is initiated.'' [21]

In 1975, ECOA applied only to discrimination based on sex or marital status, and the discouragement prohibition as initially adopted was limited accordingly. In 1977, consistent with the 1976 Act that expanded ECOA to prohibit discrimination based on protected characteristics beyond sex or marital status, the Board revised the discouragement provision to its current phrasing, prohibiting discouragement ''on a prohibited basis.'' [22] The Board later added commentary providing examples of prohibited conduct.[23] In 1991, Congress amended ECOA to require enforcing regulatory agencies to refer to the Department of Justice cases that the agencies believed involved a pattern or practice of one or more creditors *discouraging* or denying applications for credit in violation of ECOA section 701(a).[24]

In 2011, the Bureau republished Regulation B's discouragement provision without material change in what is now § 1002.4(b) and the commentary thereto. In 2024, the U.S. Court of Appeals for the Seventh Circuit held that Regulation B's prohibition against discouragement is consistent with the plain text of the ECOA. In so holding, the court observed that the discouragement provision had been adopted pursuant to the Board's (now the Bureau's) broad authority to ''prescribe regulations to carry out the purposes of [ECOA],'' and to ''provide for such adjustments and exceptions'' that, in the Bureau's judgment, ''are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.'' [25]

Section III.B below discusses the ways in which this proposed rule would change the current rule regarding discouragement.

D. Special Purpose Credit Programs

As noted above, ECOA prohibits a creditor from discriminating on a prohibited basis regarding any aspect of a credit transaction. At the same time, ECOA section 701(c)(3) (15 U.S.C. 1691(c)(3)) states 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].'' [26]

The intent of ECOA section 701(c)(3), as reflected in the legislative history, is as follows:

> [I]n the case of special purpose credit programs offered by profit-making organizations, the Conferees approved the language common to both the House bill and the Senate amendment exempting such programs from the restrictions of the Act so long as they conform to Board regulations. The intent of this section of the statute is to authorize the Board to specify standards for the exemption of classes of transactions when it has been clearly demonstrated on the public record that without such exemption the consumers involved would effectively be denied credit.[27]

The Board promulgated regulations implementing the 1976 Act's special purpose credit program (SPCP) provision in what was then § 202.8.[28] As noted above, the Dodd-Frank Act transferred ECOA rulemaking authority to the Bureau, which in 2011 republished Regulation B's SPCP provision without material change in what is now § 1002.8 and the commentary thereto. More recently, the Bureau in January 2021 issued an advisory opinion (AO) addressing SPCPs implemented by for-profit organizations to meet special social needs.[29] The AO clarified the content that a for-profit organization must include in a written plan that

[17] *See, e.g.,* 50 FR 48018, 48050 (Nov. 20, 1985) (adopting official staff commentary, including comment 6(a).2, which explains that the ''effects test'' is a ''judicial doctrine'' that Congress intended to ''apply to the credit area'').

[18] Regulation B § 1002.2(z) defines ''prohibited basis'' as ''race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the Bureau.''

[19] 40 FR 49298 (Oct. 22, 1975).

[20] 15 U.S.C. 1691b(a). For ease of reference, the Bureau refers to this authority herein as ''adjustment'' authority.

[21] 40 FR 49298, 49299 (Oct. 22, 1975).

[22] 42 FR 1242 (Jan. 6, 1977).

[23] 50 FR 48018 (Nov. 20, 1985).

[24] 15 U.S.C. 1691e(g) (emphasis added).

[25] *Consumer Fin. Prot. Bureau* v. *Townstone Fin., Inc.,* 107 F.4th 768, 774, 777 (7th Cir. 2024).

[26] *See* Public Law 94–239, section 701(c)(3), 90 Stat. 251, 251 (1976).

[27] *Joint Explanatory Statement of the Committee of the Conference,* Cong. Rec. H5493 (daily ed. Mar. 4, 1976) (text appears in House and Senate Reports).

[28] *See* 42 FR 1242 (Jan. 6, 1977).

[29] 86 FR 3762 (Jan. 15, 2021).

establishes and administers an SPCP under Regulation B.[30]

Current Rule

Under Regulation B, a for-profit organization that offers or participates in an SPCP to meet special social needs must establish and administer the SPCP 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.[31] In addition, the for-profit organization must establish and administer the SPCP 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.[32]

A for-profit organization's SPCP qualifies as such only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis.[33] However, the SPCP may require its participants to share one or more common characteristics that would otherwise be ECOA prohibited bases so long as the program does not evade the requirements of ECOA or Regulation B.[34] If the SPCP does require its participants to share one or more common characteristics, and if the program otherwise complies with Regulation B, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.[35]

The Bureau discusses the ways in which this NPRM would change the current rule regarding SPCPs provided by for-profit organizations in section III.C below.

E. Consultation

Consistent with section 1022(b)(2)(B) of the CFPA, the Bureau offered to consult with the appropriate agencies, including regarding consistency with any prudential, market, or systemic objectives administered by these agencies.

[30] *Id.*

[31] 12 CFR 1002.8(a)(3)(i).

[32] 12 CFR 1002.8(a)(3)(ii).

[33] 12 CFR 1002.8(b)(2).

[34] *Id.*

[35] 12 CFR 1002.8(c).

III. Discussion of the Proposed Rule

A. Disparate Impact

The Bureau is proposing changes to § 1002.6(a) and its accompanying commentary. Consistent with Executive Order 14281, the Bureau has examined Regulation B and considered whether disparate-impact claims may be cognizable under ECOA. The Bureau has preliminarily determined that, under the best reading of the statute, disparate-impact claims are not applicable under ECOA. As a result, the Bureau is proposing to delete language in § 1002.6(a) and its accompanying commentary indicating that disparate-impact liability, which is referred to in the rule as the ''effects test,'' may be applicable under ECOA, and add language stating that the Act does not recognize the ''effects test.'' The Bureau is also proposing to delete the language in comment 2(p)–4 referring to the effects test. The Bureau is requesting comment on these proposed changes and on its preliminary determination that disparate-impact claims are not applicable under ECOA.

ECOA and Disparate Impact

The Bureau has preliminarily determined that Regulation B's conclusion that disparate-impact claims may be cognizable under ECOA is not the best interpretation of ECOA. In particular, the Bureau has preliminarily determined that the Board (and later the Bureau) relied solely on the legislative history of ECOA to support its conclusion and failed to consider whether ECOA's statutory language authorized disparate-impact liability. The Bureau has preliminarily determined that ECOA's statutory language does not authorize disparate-impact liability and that the application of disparate impact liability in the credit context may undermine ECOA's purposes.

The Board's regulations to implement the 1976 Act relied solely on the legislative history to support its conclusion that Congress intended for ECOA to permit an ''effects test concept'' (*i.e.,* disparate-impact) proof of liability. Section 202.6(a), the precursor to § 1002.6(a), provided in a footnote that the legislative history of the Act indicates that the Congress intended an ''effects test'' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs,* 401 U.S. 424, and *Albemarle Paper Co.,* 422 U.S. 405, to be applicable to a creditor's determination of creditworthiness.[36] Further discussion of the effects test was later added to the commentary to what is now § 1002.6(a).[37] Although there have been minor revisions to what is now § 1002.6(a), that provision has continued to provide, based solely on the legislative history, that disparate-impact liability may apply to ECOA.

Since *Griggs,* the Supreme Court has closely examined the relevant statutory language of other antidiscrimination laws to determine whether disparate-impact liability is authorized by those laws. In particular, the Supreme Court has examined whether the statute in question includes language focused on the effects of the action rather than the motivation for the action. For example, in *Smith* v. *City of Jackson,* the Supreme Court emphasized that section 4(a)(2) of the ADEA and section 703(a)(2) of Title VII—which was found to authorize disparate-impact claims in *Griggs*—both contain language that ''prohibit[s] such actions that deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age.'' [38] In *Inclusive Communities,* the Supreme Court concluded that ''*Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.'' [39] The Supreme Court held in *Inclusive Communities* that the language ''otherwise make unavailable'' in section 804(a) of the FHA refers to the consequences of an action rather than the actor's intent and therefore supports recognizing disparate-impact claims.[40]

In contrast, the relevant language of ECOA does not include similar effects-based language supporting disparate-impact liability. Section 701(a)(1) of ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or

[36] 42 FR 1242, 1255 n.7 (Jan. 6, 1977). As noted in part II, this footnote was later moved to the text of § 1002.6(a) when the Bureau republished Regulation B after responsibility for the rule was transferred from the Board to the Bureau. *See* 76 FR 79442 (Dec. 21, 2011).

[37] *See* 50 FR 48018 (Nov. 20, 1985).

[38] 544 U.S. 228, 235 (2005) (citation omitted).

[39] 576 U.S. 519, 533 (2015).

[40] *Id.* at 534. Section 804(a) provides that it shall be unlawful ''[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.'' 42 U.S.C. 3604(a).

marital status, or age.[41] ECOA does not contain any language like ''otherwise make unavailable'' or ''otherwise adversely affect'' that suggests that disparate impact claims are cognizable.

The Bureau recognizes that in *Inclusive Communities,* the Supreme Court held that, like section 804(a), section 805(a) of the FHA also authorizes disparate-impact claims, even though section 805(a) does not include effects-based language. Section 805(a) provides that it is unlawful ''for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.'' [42] The Supreme Court provided limited explanation for concluding that section 805(a) authorizes disparate-impact claims, noting only that it has construed statutory language similar to section 805(a) to include disparate-impact liability, citing *Bd. of Educ. of City Sch. Dist. of New York* v. *Harris,* 444 U.S. 130 (1979).[43] Because the Supreme Court provided no meaningful analysis of the statutory language of section 805(a) in *Inclusive Communities,* it provides little insight into how that holding should apply to ECOA, if at all. In the absence of such guidance, the Bureau relies on the analysis in *Harris* to inform the interpretation of ECOA, consistent with the Court's approach in *Inclusive Communities.*

The statute in *Harris,* section 706(d)(1) of the Emergency School Aid Act (ESAA), made an agency ineligible for assistance if it ''had in effect any practice, policy or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation . . . or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees.'' [44] The Supreme Court noted that the first portion of the statute ''clearly speaks in term of effect or impact'' but that the second portion (otherwise engaged in discrimination) ''might be said to possess an overtone of intent.'' [45] The Court noted, however, that the use of the word ''otherwise'' in the second portion suggests that the disparate-impact standard should also apply to that provision. The Court noted that absent a good reason, ''one would expect that for such closely connected statutory phrases, a similar standard'' would apply. The Supreme Court noted that ESAA's language ''suffers from imprecision of expression and less than careful draftsmanship'' and therefore found it necessary to consider other factors to interpret the statutory language.[46] The Court looked to the structure, context and legislative history of the statute to conclude that disparate-impact liability also applied to the second portion of the provision.

In contrast to the statute at issue in *Harris,* section 701(a) of ECOA does not suffer from ESAA's less than careful draftsmanship that would render it similarly ambiguous and therefore require additional consideration of the structure, history, and purpose to interpret its meaning. ECOA does not include any effects-based language supporting disparate-impact liability, nor any ''otherwise'' language, as in ESAA, that may cloud the directness of its prohibition. ECOA section 701(a) is a straightforward, plainly stated prohibition against discrimination on the basis of certain characteristics. As a result, the Bureau preliminarily determines that section 701(a) does not authorize disparate-impact claims.

Even if it were necessary to resort to other considerations to interpret section 701(a), the wording (discussed above), structure, and context all differ from the statutory provisions at issue in *Harris* and *Inclusive Communities* in ways that counsel reaching a different conclusion. (As discussed below, the Bureau does not find the legislative history to be a sufficient basis to override the conclusions drawn from the other factors.) After balancing these factors, giving the most weight to the language of the statute, the Bureau preliminarily determines that the best interpretation of ECOA is that section 701(a) does not authorize disparate-impact claims. In terms of its structure, ECOA differs from both ESAA and FHA. As noted above, the Supreme Court in *Inclusive Communities* carefully analyzed the statutory language of section 804(a), along with other factors, to determine that section 804(a) authorized disparate-impact liability. However, the Supreme Court provided no meaningful analysis of the statutory language of section 805(a) and cited to *Harris* to support the principle that the Court had found similar language to support disparate-impact liability. Read together, *Harris* and *Inclusive Communities* suggest that a statutory provision without effects-based language may be ambiguous as to whether it authorizes disparate-impact liability when there is closely connected statutory language that provides for disparate-impact liability.

Unlike the statutory provisions at issue in *Harris* and *Inclusive Communities,* however, neither section 701(a) of ECOA nor any closely connected statutory provisions include any effects-based language supporting disparate-impact liability. In the absence of such closely connected effects-based language, the best interpretation of the text of section 701(a) is that it does not provide for disparate-impact liability.

The Bureau also preliminarily determines that interpreting ECOA as not authorizing disparate-impact claims is consistent with the statutory purposes of ECOA, suggesting that the credit market context of ECOA also militates against the statute encompassing disparate impact. As noted in part II, ECOA was adopted to ensure that various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of prohibited characteristics. The Bureau, in exercising its expertise, is concerned that disparate-impact liability may lead some creditors to consider prohibited characteristics in developing policies and procedures, contrary to ECOA's purposes, in order to minimize potential liability. Under 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 may even involve policy changes that disadvantage certain protected classes in an effort to reduce the disadvantages for others. That the application of disparate-impact liability may promote, rather than prohibit, such intentional protected class discrimination further indicates that interpreting ECOA as not permitting disparate-impact claims is the most

[41] 15 U.S.C. 1691(a)(1).

[42] 42 U.S.C. 3605(a).

[43] *Inclusive Communities,* 576 U.S. at 534.

[44] Emergency School Aid Act, Public Law 89–10, section 706(d)(1)(B), 86 Stat. 354, 358 (1972) (emphasis added) (original version at 20 U.S.C. 1606(d)(1)(B) (1976)), *repealed by and reenacted* by Public Law 95–561, tit. VI, section 601(b)(2), Nov. 1, 1978, 92 Stat. 2268 (1978); *see also Bd. of Educ. of City Sch. Dist. of New York* v. *Harris,* 444 U.S. 130, 130 (1979).

[45] *Harris,* 444 U.S. at 138–39.

[46] *Id.* at 138.

appropriate reading of the statute.[47] Moreover, the Bureau is concerned that creditors may be deterred from pursuing innovative and/or cost-reducing policies and procedures because they are uncertain about the impact on protected classes. The Bureau requests comment on its preliminary determination that interpreting ECOA as not authorizing disparate-impact liability is consistent with the statutory purpose.

The Bureau recognizes that Regulation B currently relies on the legislative history of ECOA for evidence of congressional intent that disparate-impact claims may be cognizable under ECOA. If ECOA contained effects-based language or if the statutory language were ambiguous—as with the FHA and the since-repealed ESAA—then the legislative history would provide stronger evidence to support an interpretation that disparate-impact liability is permitted under ECOA. However, consistent with Supreme Court precedent, the most important consideration is the statutory language.[48] The Bureau preliminarily determines, therefore, that the evidence from the legislative history is insufficient to support an effects test given the statutory language and the absence of effects-based language in section 701 or anywhere else in ECOA. The Bureau requests comment on this preliminary determination.

The Bureau preliminarily concludes that any reliance interests in the existing regulatory interpretation permitting disparate-impact liability would not outweigh revising Regulation B to bring it into closer alignment with the statutory text. Consumers who may be affected by creditors' facially neutral policies that have disparate effects may have reliance issues in the existing framework. Creditors may have developed compliance systems consistent with the existing framework. However, consumers would remain protected under ECOA from disparate treatment, including facially neutral policies and procedures that creditors adopt as proxies for intentional discrimination. Creditors would have greater flexibility to adopt facially neutral policies and procedures. The Bureau requests comment on this preliminary determination.

Notwithstanding *Griggs* and its progeny, there may be serious concerns about the constitutionality of disparate-impact liability as to certain ECOA-protected classes. The Supreme Court has recently emphasized that policies and procedures that attempt to achieve certain outcomes for protected classes may run afoul of the Constitution's guarantee of equal protection, noting that ''[o]utright racial balancing is patently unconstitutional.'' [49] To the extent ECOA, if read as encompassing disparate impact, would functionally require creditors to engage in such deliberate balancing of protected class outcomes (as described above), this recent jurisprudence would cast substantial doubt on its consistency with equal protection. The Bureau makes no conclusion as to these constitutional questions, but notes that its finding that ECOA does not encompass disparate impact liability appropriately avoids such potential constitutional defects.

The Bureau notes that, alternatively, it could remove the provisions relating to disparate impact, given the statutory text and based on the fact that neither the Supreme Court nor any other court has made a specific holding with respect to this theory and ECOA. As the Supreme Court made clear in *Loper Bright Enterprises* v. *Raimondo,*[50] courts are the ultimate arbiters of statutory meaning. The Bureau requests comment on this alternative rationale for removing the provisions related to disparate impact.

The specific proposed changes to the rule with respect to disparate-impact liability are discussed below.

Section 1002.6(a)—General Rule Concerning Use of Information

Current § 1002.6(a) provides in the first sentence that, except as otherwise provided in the Act and this part, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis. The second sentence provides that the legislative history of the Act indicates that the Congress intended an ''effects test,'' (disparate impact) to apply to a creditor's determination of creditworthiness. For the reasons explained above, the Bureau is proposing to delete the second sentence and add a new sentence stating that the Act does not provide that the ''effects test'' applies for determining whether there is discrimination in violation of the Act.

Current comment 6(a)–2 explains the effects test and states that the Act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. The comment also provides an example. The Bureau is proposing to delete the current text of comment 6(a)–2 for the reasons explained above and to add a new title ''Disparate treatment'' and new language providing as follows: The Act prohibits practices that discriminate on a prohibited basis regarding any aspect of a credit transaction. The Act does not provide for the prohibition of practices that are facially neutral as to prohibited bases, except to the extent that facially neutral criteria function as proxies for protected characteristics designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

Section 1002.2(p)—Definition of Empirically Derived and Other Credit Scoring Systems

Current comment 2(p)–4 to the definition of empirically derived and other credit scoring system is entitled ''Effects test and disparate treatment.'' The comment states that neutral factors used in credit scoring systems could nonetheless be subject to challenge under the effects test and refers to comment 6(a)–2 for a discussion of the effects test. The Bureau is proposing to delete ''effects test'' from the title and

[47] As Justice Alito noted in his dissenting opinion in *Inclusive Communities,* where disparate-impact liability frustrates the purposes of the statute, this also demonstrates congressional intent. *See* 576 U.S. at 585–86 (''No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress surely did not mean to put local governments in such a position.'').

[48] *See Bostock* v. *Clayton Cnty., Georgia,* 590 U.S. 644, 673–74 (2020) (''This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.''). Some are critical of using legislative history to interpret statutory language. ''The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.' '' *Conroy* v. *Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting *Aldridge* v. *Williams,* 44 U.S. (3 How.) 9, 24 (1844)); see also Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 68 (1994) (''Intent is elusive for a natural person, fictive for a collective body.'').

[49] *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.,* 600 U.S. 181, 223–24 (2023) (internal quotations omitted).

[50] 603 U.S. 369 (2024).

delete the sentence discussing the effects test and the reference to comment 6(a)–2.

B. Discouragement

The Bureau is proposing changes to § 1002.4(b) and its accompanying commentary. These Regulation B provisions prohibit creditors from making oral or written statements to applicants or prospective applicants that would discourage a reasonable person from applying for credit. As noted in part II, the Board first adopted a precursor to current § 1002.4(b) in its 1975 final rule implementing ECOA, as an exercise of its adjustment authority under ECOA section 703(a).

In its 1975 final rule, the Board determined that prohibiting discouragement was ''necessary to protect applicants against discriminatory acts occurring before an application is initiated.'' [51] Indeed, ECOA section 701(a) prohibits creditors from discriminating on a prohibited basis against applicants for credit,[52] a term the statute defines as a ''person who *applies* to a creditor'' for credit.[53] In the absence of a discouragement provision, creditors could sidestep this prohibition entirely by discouraging prospective applicants from applying for credit in the first place. For example, in the absence of a discouragement provision, a creditor could post a sign outside its office stating, ''Credit available only to applicants under age 65,'' arguably without violating ECOA as to individuals who choose not to apply for credit because of the sign. A well-tailored discouragement provision that prohibits such practices protects ECOA's purpose of making credit available on a non-discriminatory basis.

However, the Bureau has preliminarily determined in its expertise that, in the years since the Board first adopted the discouragement provision, the provision has been interpreted to prohibit conduct that it is not necessary or proper to prohibit to prevent the circumvention or evasion of ECOA's purposes. The Bureau is concerned that this, in turn, has had an unnecessarily chilling effect on creditors' business practices and exercise of their rights to speak about matters of public interest. Pursuant to its authority under ECOA section 703(a), and in consideration of what it preliminarily finds is necessary and proper given the purposes of ECOA and facilitating compliance therewith, the Bureau therefore proposes to revise § 1002.4(b) and its commentary as described below.[54]

Furthermore, and independent of the above, the Bureau is concerned that the overbroad coverage of the regulation and its potential interpretations may constrain free speech and commercial activity in ways that are unwarranted. The Bureau preliminarily determines that, given this potential impact, and in consideration of its expertise as a regulator in the marketplace, the proposed revisions would continue to prohibit illegal discouragement of potential applicants without exceeding that purpose in ways that may impose unnecessary constraints in the marketplace. The Bureau requests comment on its preliminary determinations.

The proposed revisions would address several different aspects of § 1002.4(b): (1) what constitutes an oral or written statement, (2) what constitutes a statement to an applicant or prospective applicant, and (3) the standard for showing prohibited discouragement. As described below, the Bureau proposes to revise all these aspects of § 1002.4(b) together. The Bureau requests comment, however, on the merits of an alternative approach in which the Bureau would revise only one or two of these three aspects of § 1002.4(b) and, if such an approach were adopted, which aspects of § 1002.4(b) should be revised.

Oral or Written Statement

Current § 1002.4(b) prohibits creditors from making ''any oral or written statement'' to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application for credit. The regulation text itself does not define ''oral or written statement.'' Comment 4(b)–1, which the Board added to Regulation B in 1985 without substantive explanation, states, in part, that § 1002.4(b) covers ''acts or practices'' by creditors that could discourage on a prohibited basis a reasonable person from applying for credit.

The Bureau preliminarily determines that the inclusion of the phrase ''acts or practices'' in comment 4(b)–1 has resulted in § 1002.4(b) being interpreted overly broadly to apply to business practices that, though they may have some communicative effect, do not reflect the circumvention or evasion of ECOA's prohibition against discrimination that the discouragement provision was designed to address. Such practices include, for example, business decisions about where to locate branch offices, where to advertise, or where to engage with the community through open houses or similar events. In the Bureau's view, such practices do not constitute ''oral or written statements'' to applicants or prospective applicants within the meaning of § 1002.4(b) and do not, in and of themselves, demonstrate prohibited discouragement. The Bureau proposes to revise § 1002.4(b) to reflect this interpretation.

Specifically, the Bureau proposes to add language to § 1002.4(b) clarifying that ''oral or written statement'' means spoken or written words, or visual images such as symbols, photographs, or videos. This would include any visual images used in advertising or marketing campaigns. The Bureau also proposes to align the text of comment 4(b)–1 with the text of current § 1002.4(b) by replacing current references in the comment to ''acts or practices'' or ''practices'' with references to ''oral or written statements'' or ''statements,'' respectively.

Under the proposed revisions, the business practices noted above would not constitute prohibited discouragement even if they had some communicative effect that some consumers could arguably find discouraging. Instead, the discouragement provision would cover only actual oral or written statements by creditors to applicants or prospective applicants. The Bureau has preliminarily determined that clarifying the discouragement provision as described would facilitate compliance with ECOA and Regulation B and result in more targeted and effective enforcement of conduct designed to circumvent the statute's prohibition against discrimination. The Bureau requests comment on the proposed revisions.

Statement to Applicants or Prospective Applicants

As noted, § 1002.4(b) prohibits creditors from making any oral or written statement to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application for

[51] 40 FR 49298, 49299 (Oct. 22, 1975).

[52] 15 U.S.C. 1691(a).

[53] 15 U.S.C. 1691a(b) (emphasis added).

[54] In addition to the revisions discussed below, the Bureau proposes to make two non-substantive changes to comment 4(b)–1. The Bureau proposes to revise the heading of comment 4(b)–1 from ''prospective applicants'' to ''discouragement'' to conform with the current heading of § 1002.4(b) and to reflect the fact that the text of current comment 4(b)–1 refers to both applicants and prospective applicants. Similarly, the Bureau proposes to revise the introductory text of comment 4(b)–1 to provide that prohibited discouraging statements are those that ''would'' discourage (rather than ''could'' discourage) a reasonable person, on a prohibited basis, from applying for credit. Again, this change would conform commentary text to current text of § 1002.4(b).

credit. Section 1002.4(b) has been interpreted to prohibit the selective encouragement of certain applicants or prospective applicants (for example, geographically targeted advertising) on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it.

The Bureau has preliminarily determined that this interpretation is overbroad relative to the intended purposes of the discouragement prohibition. The purpose of ECOA is to make credit available to all applicants on a non-discriminatory basis, and § 1002.4(b) helps to achieve that purpose by prohibiting creditors from *discouraging* applicants or prospective applicants. The Bureau proposes that, when a creditor directs *encouraging* statements to certain applicants or prospective applicants, this is not an action intended to (or even likely to) discourage *other* applicants or prospective applicants, who did not receive the statements and might, in fact, have been entirely unaware of them, from applying for credit. Such conduct is not typically an evasion of ECOA's prohibitions, nor is prohibiting it necessary or proper to achieve the purposes of ECOA. As such, the Bureau preliminarily determines that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements.

Under this interpretation, any person whom a creditor could reasonably expect to receive a particular statement would be an intended recipient of the statement. Factors that could help determine a statement's intended recipients include the method or mechanism used to communicate it. For example, the intended recipients of a statement made by a creditor on a public television or radio broadcast would be anyone within the area of that broadcast. The intended recipients of a mailer would be those to whom the mailer is sent.

The Bureau proposes to revise § 1002.4(b) and its accompanying commentary in several ways to reflect the suggested limitation. First, § 1002.4(b) would provide that prohibited discouragement occurs when a creditor makes any oral or written statement ''directed at'' applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from applying for credit.

Comment 4(b)–1 would be revised to provide that encouraging statements directed at one group of consumers cannot discourage applicants or prospective applicants who were not the intended recipients of the statements. In addition, the example in current comment 4(b)–1.ii (which would be redesignated as comment 4(b)–1.i.B under the proposed rule) [55] would be narrowed to provide an example of a statement that would constitute prohibited discouragement under the proposed limitation. The revised example would provide that prohibited discouragement includes statements directed at the public that express a discriminatory preference or policy of exclusion against consumers based on one or more prohibited basis characteristics.

Finally, comment 4(b)–1.ii.A would be added to provide an example of a statement that would *not* constitute prohibited discouragement under the proposed rule. The example would provide that statements directed at a particular group of consumers, encouraging that group of consumers to apply for credit, do not constitute prohibited discouragement. The Bureau requests comment on the proposed revisions, including on whether additional or different regulatory language or commentary examples would facilitate compliance with the proposed interpretation.

Standard for Discouragement

As noted, the prohibition against discouragement was adopted to prevent creditors from circumventing ECOA's prohibition against discrimination by deterring prospective applicants from even applying for credit. While this is an appropriate goal, the Bureau preliminarily concludes that § 1002.4(b) has been interpreted to apply to scenarios that should not be characterized as prohibited discouragement under ECOA. These are scenarios that—though they may involve potentially controversial statements by creditors—do not involve statements that an objective creditor would know, or should know, would cause a reasonable person to believe that the creditor would deny them credit or offer them credit on less favorable terms than other borrowers. That is, the Bureau believes that there is a difference between a statement by a creditor that an applicant or potential applicant may not like or may disagree with, and a statement that would cause a reasonable person to be discouraged from applying for credit with that creditor. The Bureau believes that difference should be better reflected in Regulation B and accordingly proposes the following revisions.

First, the Bureau proposes to revise § 1002.4(b) and its accompanying commentary to provide that a statement is prohibited discouragement only if a creditor ''knows or should know'' that the statement would cause a reasonable person to be discouraged.

Second, the Bureau proposes to revise § 1002.4(b) and its accompanying commentary to clarify that the standard is not whether a creditor's statement ''would discourage on a prohibited basis a reasonable person,'' but rather that discouragement occurs only if the creditor's statement ''would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristic(s).'' Under this revision, prohibited discouragement would occur only when the creditor's statement was the proximate cause of the applicant's or prospective applicant's belief about their ability to obtain credit on non-discriminatory terms. The revision thus would narrow the prohibition to cover only statements that *themselves* would cause a reasonable person to believe that the creditor would make a different decision about credit terms or availability based on the applicant or prospective applicant's prohibited basis characteristic(s).

Consistent with the proposed revision, the Bureau would narrow current comment 4(b)–1.ii (proposed comment 4(b)–1.i.A). The comment currently provides that prohibited discouraging statements include those that ''express, imply, or suggest'' a discriminatory preference or policy of exclusion in violation of ECOA. The Bureau proposes to narrow the comment to refer only to statements that express a discriminatory preference or policy of exclusion.[56]

To facilitate compliance, the Bureau also proposes to add three examples to the commentary of the types of statements that a creditor would not (or should not) know would cause a reasonable person to believe that the creditor would deny (or would grant on less favorable terms) credit to an applicant or prospective applicant based on their prohibited basis characteristic(s). These are illustrative

[55] The other two examples in current comment 4(b)–1 would be redesignated under the proposed rule as comments 4(b)–1.i.A and 4(b)–1.i.C, without substantive change.

[56] The Bureau discusses other proposed changes to the text of current comment 4(b)–1.ii in part III.B, ''Statement to applicants or prospective applicants.''

examples of non-prohibited statements that a creditor may make, directed at an applicant or prospective applicant: (1) in support of local law enforcement, (2) recommending that, before buying a home in a particular neighborhood, consumers investigate, for example, the neighborhood's schools, its proximity to grocery stores, and its crime statistics, and (3) encouraging consumers to seek out resources to develop their financial literacy. The Bureau requests comment on the proposed revisions, including on whether additional or different examples would be helpful in clarifying the types of statements that would be permissible if the proposed rule were adopted.

Comment 4(b)–2

Current comment 4(b)–2 provides that creditors may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor. The Bureau proposes to strike this comment as unnecessary; no substantive change is intended. The Bureau requests comment on the proposed revision.

Technical Revision Related to Prospective Applicants

Consistent with ECOA section 704A, Regulation B § 1002.15 sets forth incentives for creditors to self-test for compliance with ECOA and Regulation B and to correct any issues found.[57] Section 1002.15(d)(1)(ii) currently states that the report or results of a privileged self-test may not be obtained or used ''[b]y a government agency or an applicant (including a prospective applicant who alleges a violation of § 1002.4(b)) in any proceeding or civil action in which a violation of the Act or this part is alleged.'' The Bureau proposes to strike from § 1002.15(d)(1)(ii) the current reference to prospective applicants. This revision would conform the language of § 1002.15(d)(1)(ii) with the statutory language of ECOA sections 704A(a)(2) and 706.[58] No substantive change is intended. The Bureau requests comment on the proposed revision.

C. Special Purpose Credit Programs

Pursuant to its authority under 15 U.S.C. 1691(c)(3) and 15 U.S.C. 1691b(a), the Bureau proposes changes to the Regulation B provisions governing SPCPs offered by for-profit organizations. As noted above, that 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.*'' (emphasis added). Further, as noted above, ECOA authorizes the Bureau to write regulations to carry out ECOA's purposes and also provides the Bureau with adjustment authority to effectuate those purposes.[59] ECOA's purpose is to require that firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to prohibited bases.[60] In sum, just as ECOA authorized the Board's initial regulatory promulgation setting the standards for permissible SPCPs offered or participated in by for-profit organizations, the Bureau has preliminarily determined that it also authorizes the revision of those standards to carry out and more closely align them with the statutory purpose, including appropriate, necessary, or proper additional prohibitions and restrictions in the standards for such SPCPs to prevent unlawful discrimination, as the Bureau now proposes.

More specifically, the Bureau proposes to prohibit an SPCP offered or participated in by a for-profit organization from using the prohibited basis of race, color, national origin, or sex, or any combination thereof, of the applicant, as the common characteristic in determining eligibility for the SPCP. See proposed § 1002.8(b)(3). In addition, the Bureau also proposes in § 1002.8(a) and (b) several new restrictions (discussed in more detail below) on such an SPCP that uses any permissible common characteristic that would otherwise be a prohibited basis as eligibility criteria. Under the Bureau's proposal, these prohibitions and restrictions would become effective if and when a Bureau rule finalizing the proposal were to become effective. Thus, at that time, an SPCP offered or participated in by a for-profit organization would be (1) *prohibited* from using race, color, national origin, or sex as eligibility criteria and (2) *restricted,* as discussed below, in using religion, marital status, age, or income derived from a public assistance program as eligibility criteria. The Bureau proposes the restrictions independently of and in addition to the prohibitions. That is, under the Bureau's proposal, if the Bureau's proposed prohibitions were to not be finalized or to otherwise become inoperative, the proposed restrictions would then be operative with respect to an SPCP offered or participated in by a for-profit organization that uses race, color, national origin, or sex as eligibility criteria, and would continue to be operative with respect to such an SPCP that uses religion, marital status, age, or income derived from a public assistance program as eligibility criteria. In other words, the Bureau independently proposes *both* the prohibitions and the restrictions such that, were the prohibitions to become inoperative, any SPCP offered or participated in by a for-profit organization that uses any otherwise prohibited basis (as defined in § 1002.2(z)) as eligibility criteria would be subject to the restrictions the Bureau now proposes. The Bureau is proposing the above-described prohibitions and restrictions at the present time for the following reasons.

While the Bureau declines in this proposal to reach a conclusion about whether ECOA's SPCP provision permitting discrimination in favor of groups with special social needs—typically minority groups—is unconstitutional, the Bureau is mindful of recent Supreme Court decisions highlighting the legal infirmity under the Fifth and Fourteenth Amendments of laws that enable such discrimination.[61] The constitutional guarantee of equal protection generally prohibits the government from discriminatory treatment on the bases of race, color, national origin, or sex; where those categories are implicated, it requires a thorough examination of the purported need for such discrimination and whether it is appropriately limited. Consistent with that precedent and the purposes of ECOA, and pursuant to its authority provided by 15 U.S.C. 1691(c)(3) to set standards for SPCPs offered or participated in by for-profit organizations to meet special social needs, the Bureau has reexamined the provisions of Regulation B that allow such SPCPs to use a prohibited basis—including but not limited to race, color, national origin, or sex—as common characteristics.

Additionally, the Bureau preliminarily concludes that significant changes in the legal landscape and in credit markets mean that such SPCPs

[57] 15 U.S.C. 1691c–1 (Incentives for self-testing and self-correction).

[58] 15 U.S.C. 1691c–1(a)(2), 1691e.

[59] 15 U.S.C. 1691b(a).

[60] Public Law 93–495, tit. V, section 502, 88 Stat. 1521 (1974).

[61] *See, e.g., Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.,* 600 U.S. 181 (2023). *Cf. Ames* v. *Ohio Dep't of Youth Servs.,* 605 U.S. 303 (2025) (affirming that there is no exception to civil rights laws (*e.g.,* Title VII) that allows for discrimination against majority groups). *See also Nuziard* v. *Minority Bus. Dev. Agency,* 721 F. Supp. 3d 431, 465 (N.D. Tex. 2024), appeal dismissed, No. 24–10603, 2024 WL 5279784 (5th Cir. July 22, 2024); *Strickland* v. *United States Dep't of Agric.,* 736 F. Supp. 3d 469, 480 (N.D. Tex. 2024).

based on certain prohibited bases no longer serve the particular social needs envisioned in the 1976 Act. When Congress enacted ECOA, the legal framework and the market environment as to credit discrimination were rapidly evolving. The FHA was enacted in 1968. The Home Mortgage Disclosure Act (HMDA) was enacted in 1975 to enable data collection on mortgage lending in order to address ongoing concerns about redlining and credit shortages in certain neighborhoods. The Community Reinvestment Act (CRA), intended to promote the availability of financial services in areas that had been underserved, had not yet been enacted, but was enacted in 1977. State laws addressing credit discrimination, for the limited number of states that had enacted them, were typically only a few years old.[62] In general, the legal framework was in the course of transforming from one in which credit discrimination was condoned, and was sometimes official policy, to one in which it was—and remains—prohibited.

Robust data regarding the nature and extent of credit discrimination at the time of ECOA's passage are sparse. HMDA data were not yet available. Assessing the prevalence and effect of credit discrimination was typically done through individual academic, government, or nonprofit research projects, or personal narratives, all with limited scope. Nonetheless, it is clear that at that time market-wide intentional credit discrimination was a fact of the then-recent past and a matter of ongoing concern.[63]

Further, the congressional record accompanying ECOA's adoption reflects the problems Congress sought to address. A National Commission's report on credit availability that informed ECOA's drafting found widespread sex discrimination in credit.[64] The Senate Committee Report accompanying the 1976 Act noted that the legislative record included ''instances of discrimination against racial minorities'' and that ''studies conducted by federal agencies have indicated the strong probability of race discrimination in mortgage credit.'' [65] Another report at the time recounts the experiences of black businessmen being effectively shut out from small business lending.[66] ECOA's purpose was to prevent and prohibit such discrimination.

But also at that time, some organizations sought to fill the gap by making credit available especially to individuals who had been otherwise excluded from the credit marketplace.[67] Through ECOA's provision for SPCPs (15 U.S.C. 1691(c)), Congress sought to enable these programs that served then-extant special social needs to continue.[68] To accomplish this objective, at the same time that Congress broadly prohibited credit discrimination, Congress added provisions allowing the continued operation of credit assistance programs ''expressly authorized by law for an economically disadvantaged class of persons'' [69] or ''administered by a nonprofit organization for its members or an economically disadvantaged class of persons.'' [70] Congress additionally ''authorize[d] the Board to prescribe standards [by which] profit-making organizations (commercial creditors)'' could offer programs, with the expectation that they be ''designed to increase access to the credit market by persons previously foreclosed from it'' [71] and that, ''without such exemption the consumers involved would effectively be denied credit.'' [72]

In its reexamination of the use of race, color, national origin, and sex as participant eligibility criteria for SPCPs offered or participated in by for-profit organizations, the Bureau has preliminarily determined that, to the extent the current Regulation B standards for such SPCPs authorize credit programs beyond what is necessary to meet the expressly limited congressional intent for such SPCPs, the standards are working counter to ECOA's purpose of preventing discrimination and are potentially inconsistent with constitutional guarantees of equal protection. The Bureau preliminarily finds that fifty years of legal prohibitions against credit discrimination—at the Federal and State level and across multiple laws working in concert—have substantially reshaped credit markets relative to what Congress, the Board, and consumers would have encountered in 1976. Regardless of whether instances of credit discrimination continue to occur in the marketplace, the Bureau is not aware of any credit markets in which consumers would be ''effectively denied credit'' because of their race, color, national origin, or sex in the absence of SPCPs offered or participated in by for-profit organizations. The Bureau requests comment on whether and the extent to which there may remain any such credit markets. For comparison purposes, the Bureau also requests comment on the nature and extent of credit discrimination at the time of ECOA's passage. The Bureau particularly requests quantitative data in these respects.

For these reasons, the Bureau has preliminarily determined that it is no longer appropriate (in light of ECOA's purpose of preventing discrimination) or that it is no longer necessary or proper (in light of changed circumstances and ECOA's purposes) for the SPCP standards in Regulation B to permit such SPCPs to use the common characteristics of race, color, national origin, or sex as eligibility criteria. Accordingly, pursuant to the Bureau's authority provided by ECOA, including its authority to set standards, and as applicable its ''adjustment and exception'' authority, the Bureau proposes to prohibit them from doing so. As noted, the Bureau sets forth this

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[62] *See Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency,* 93d Cong. at 509 (reprinting Sylva L. Beckey, *Woman and Credit: Available Legal Remedies Against Discriminatory Practices,* Cong. Res. Serv. (Mar. 13, 1974)) (surveying state credit antidiscrimination laws). The report, included in the congressional record, finds that fourteen states and the District of Columbia had statutes prohibiting credit discrimination against women (and, in some cases, on other bases). Of those fifteen laws, twelve are identified as having been enacted in 1973, and six appear to have provisions covering race, color, or national origin.

[63] *See, e.g.,* Linda Charlton, *2-to-1 Turndown of Minorities For Mortgage Loans is Found,* N.Y. Times (July 26, 1975) (describing the results of a government survey of 185 lenders across six metropolitan areas in 1974).

[64] *See, e.g.,* Senate Comm. on Banking, Housing and Urban Affairs, Truth in Lending Act Amendments, S. Rep. No. 93–278, at 16–18 (1973) (citing the National Commission on Consumer Finance's 1972 report, which found widespread barriers to credit access for women).

[65] S. Rep. No. 94–589, at 3 (1976). *See also Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency,* 93d Cong. 5, 63 (1974) (describing a lending institution that assigned point values for race and national origin).

[66] *Credit Discrimination: Hearing on H.R. 14856 and H.R. 14908 Before the H. Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency,* 93d Cong., at 150–51 (reprinting *Obstacles to Financing Minority Enterprises,* D.C. Advisory Committee to the U.S. Comm'n on Civil Rights, Feb. 1974).

[67] Among other examples, this included municipal programs for minority business lending, s*ee* 121 Cong. Rec. 16743 (1975) (statements of Congressman Wylie) (describing a City of Columbus program for minority business lending), banks establishing minority-focused urban affairs lending divisions, *see* U.S. Comm'n on Civil Rights, *Greater Baltimore Commitment: A Study of Urban Minority Economic Development,* at 31 (Apr. 1983), as well as the establishment of Feminist Federal Credit Unions, *see* Michael Knight, *Feminists Open Own Credit Union,* N.Y. Times (Aug. 27, 1974); Anne Sinila, *Feminist Federal: Economic Self-Help,* Ann Arbor Sun (July 15, 1976).

[68] H. Rep. No. 94–879, at 8 (Mar. 4, 1976). *See also* 121 Cong. Rec. 16743 (1975) (statements of Congressman Wylie).

[69] 15 U.S.C. 1691(c)(1).

[70] 15 U.S.C. 1691(c)(2).

[71] S. Rep. No. 94–589, at 7 (1976).

[72] H. Rep. No. 94–879, at 8 (Mar. 4, 1976).

prohibition in proposed § 1002.8(b)(3), which is discussed in the section-by-section analysis below. The Bureau seeks comment on this proposed prohibition and on whether the proposed SPCP restrictions would, if finalized in the absence of the prohibition, better serve ECOA's purposes and the purposes of ECOA's SPCP provision.

Proposed SPCP Restrictions

Independent from and in addition to the above-described prohibitions, the Bureau has also preliminarily determined that additional restrictions in the Regulation B standards for SPCPs offered or participated in by for-profit organizations are necessary and appropriate; these restrictions are also discussed in the section-by-section analysis below. As part of its basis for the proposed restrictions, the Bureau incorporates by reference here the justifications set forth above in this section III.C, including but not limited to the Bureau's concerns regarding recent Supreme Court decisions highlighting the constitutional infirmity of laws that enable discrimination and, independently, the Bureau's finding that fifty years of legal prohibitions against credit discrimination have reshaped credit markets relative to 1976.

More specifically, the Bureau preliminarily determines as a matter of its policy discretion provided by 15 U.S.C. 1693b(a) to adopt regulations proper to effectuate the purposes of ECOA that the proposed additional restrictions—independent of the proposed prohibitions described above—would appropriately bring the regulation's standards for such SPCPs—as expressly authorized by 15 U.S.C. 1691(c)(3)—into closer alignment with congressional intent, as indicated in the legislative history (quoted above). That is, the Bureau preliminarily determines that the proposed additional restrictions would appropriately increase the likelihood that such SPCPs provide credit to consumers who would otherwise be denied the credit and that the for-profit organizations that offer or participate in such SPCPs will have and provide evidence that supports the need for the SPCPs. The Bureau also preliminarily determines that this increase in likelihood would appropriately help ensure that such SPCPs are not inconsistent with ECOA's purpose of preventing credit discrimination. The Bureau's reasoning follows.

In light of changed circumstances (discussed in more detail above), the Bureau preliminarily finds that the current Regulation B SPCP standards applicable to for-profit organizations have become inappropriately permissive. The current standards permit for-profit organizations to offer or participate in SPCPs even when there has been no showing that discrimination based on protected class membership is what is causing program participants to be unable to obtain credit. That is, the regulation's SPCP standards may have been appropriate when the Board promulgated them, given societal circumstances at that time. But in light of changed circumstances, and because an SPCP that bases eligibility on protected class membership inherently discriminates against excluded individuals, the Bureau has preliminarily determined that the regulation's standards should be amended to require any such SPCP to be predicated on formal (and regulatorily required) evidence and documentation by the creditor that it is the fact of protected class membership that is causing program participants to be unable to obtain credit. If considerations *other* than that fact are what is causing the inability to obtain credit, then an SPCP based on protected class membership is not necessary to address the inability. Further, the Bureau preliminarily finds that in such cases it also is not appropriate to use an SPCP to address the inability. Any protected-class SPCP that is not necessary—and which unavoidably discriminates against ineligible individuals—is inconsistent with ECOA's purpose of making credit equally available to all without regard to prohibited bases. The Bureau requests comment on whether there are existing SPCPs that would no longer qualify for SPCP status under the Bureau's proposed additional restrictions, and on what new credit programs could qualify for SPCP status, if any.

The following section-by-section analysis discusses in more detail the Bureau's proposed prohibitions and restrictions in the Regulation B standards for SPCPs in § 1002.8.[73]

Section 1002.8(a)(3)—Special Purpose Credit Programs Offered by For-Profit Organizations

Section 1002.8(a)(3) governs any SPCP offered by a for-profit organization, or in which such an organization participates, to meet special social needs.[74] The Bureau observes, as an initial matter, that the provisions of § 1002.8(a)—*i.e.,* the provisions discussed immediately below—are subordinate to the provisions of § 1002.8(b) (discussed farther below).[75] As noted, the prohibitions described above are set forth in proposed § 1002.8(b)(3). Thus, all of the following proposed restrictions in § 1002.8(a)(3) are subordinate to the proposed prohibitions in § 1002.8(b)(3).

i. SPCPs Offered by For-Profit Organizations, Written Plan (§ 1002.8(a)(3)(i))

Under current § 1002.8(a)(3)(i), a for-profit organization must establish and administer an SPCP pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program.[76] The Bureau proposes to separate this current provision into § 1002.8(a)(3)(i)(A) and (B). Proposed § 1002.8(a)(3)(i)(A) would retain the current requirement that the written plan identify the class of persons that the program is designed to benefit; proposed § 1002.8(a)(3)(i)(B) would retain the current requirement that the written plan set forth the procedures and standards for extending credit pursuant to the program. The Bureau also proposes to add new requirements for the written plan in § 1002.8(a)(3)(i)(C), (D), and (E) as follows.

In new § 1002.8(a)(3)(i)(C) the Bureau proposes to require the SPCP's written plan to provide evidence of the need for the SPCP. The Bureau preliminarily determines that this proposed new restriction would more closely align the regulation's written-plan standard with ECOA's purposes and the congressional intent expressed in the legislative history. Although, as noted above, legislative history is limited in its value when statutory text, context, and purpose provide sufficient meaning, the SPCP provision in ECOA as to for-profit entities is deliberately open-ended, referring to ''special social needs'' and expressly granting the Bureau discretion to set relevant standards. The Bureau therefore finds it appropriate to look to Congress's stated goals, as a means of ensuring that this exercise of discretion is appropriately cabined and

[73] A few Regulation B provisions outside § 1002.8 refer to the SPCP provisions in § 1002.8. The Bureau has preliminarily determined that no changes are necessary to these cross references. *See* § 1002.11(b)(1)(v) and comments 5(a)(2)–3, 6(b)(1)–1, 6(b)(2)–1, and 11(a)–1 and (a)–2.

[74] 12 CFR 1002.8(a)(3).

[75] *See* § 1002.8(a) introductory text (emphasis added): ''(a) Standards for programs. *Subject to the provisions of paragraph (b) of this section,* the Act and this part permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under the following types of credit programs:'').

[76] 12 CFR 1002.8(a)(3)(i).

directionally consistent with the statute. In enacting the SPCP provision, Congress indicated its expectation that the exemption for SPCPs by for-profit organizations would allow for lending where ''it has been clearly demonstrated on the public record that without such exemption the consumers involved would effectively be denied credit.'' [77] The Bureau preliminarily interprets *effectively* in the legislative history to mean ''in effect.'' [78] Pursuant to that interpretation, the Bureau preliminarily finds that the consumers involved would *effectively* be denied credit if in the absence of the SPCP they ''would not receive'' such or similar credit, irrespective of whether the consumers had actually applied for such credit or actually been denied such credit by a creditor. The Bureau requests comment on this interpretation.

In new § 1002.8(a)(3)(i)(D) the Bureau proposes to require the SPCP's written plan to explain why, under the for-profit organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program. As with (a)(3)(i)(C), this new proposed restriction for the written plan would apply irrespective of whether the SPCP requires its participants to share a common characteristic that would otherwise be a prohibited basis. The Bureau preliminarily determines that this proposed new restriction would more closely align the regulation's written-plan standard with ECOA's purposes and the congressional intent expressed in the legislative history.

Proposed new § 1002.8(a)(3)(i)(E) would apply, in addition to § 1002.8(a)(3)(i)(A), (B), (C), and (D), to SPCPs that require the persons in the class served by the program to share one or more common characteristics that would otherwise be a prohibited basis. The provision's proposed new restrictions would require the written plan of such an SPCP to explain why meeting the special social needs addressed by the program necessitates that its participants share the specific common characteristic that would otherwise be a prohibited basis and cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria. As is discussed in more detail above, the Bureau has preliminarily determined that these proposed new restrictions in the standards for SPCPs would more closely align the regulation with the statutory purpose of ''mak[ing] . . . credit equally available to all credit-worthy customers without regard to [prohibited bases].'' Specifically, the Bureau has preliminarily determined that it is inconsistent with ECOA's purpose—preventing discrimination—for an SPCP that uses an otherwise prohibited basis to discriminate against ineligible individuals, unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics.

ii. SPCPs Offered by For-Profit Organizations, Class of Persons (§ 1002.8(a)(3)(ii))

Current § 1002.8(a)(3)(ii) requires that a for-profit organization offering an SPCP establish and administer the 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. This provision applies irrespective of whether the SPCP requires its participants to share a common characteristic that would otherwise be a prohibited basis. The Bureau proposes three changes to this standard, as follows.

First, the Bureau proposes to strike the clause that begins with ''or would receive it on less favorable terms . . . .'' This change would restrict permissible SPCPs offered by a for-profit organization to those that are established and administered to extend credit to a class of persons who would otherwise not receive the type and amount of credit, as opposed to those who would receive it on less favorable terms. Second, the Bureau proposes to strike the term ''customary;'' and, third, the Bureau proposes to strike the term ''probably.'' These latter two changes would restrict permissible SPCPs offered by a for-profit organization to those that are established and administered to extend credit to a class of persons who *actually* (in lieu of ''probably'') would not receive such credit under the organization's *actual* (in lieu of ''customary'') credit standards. In sum, the three proposed changes would restrict a for-profit organization to offering an SPCP to a class of persons to whom, under the organization's actual credit standards, the organization would actually deny credit in the absence of the SPCP.[79] The Bureau requests comment on this standard of ''actual'' for establishing and administering an SPCP offered or participated in by a for-profit organization and, in particular, on whether there might be an another standard that would better facilitate compliance while achieving the Bureau's objective of a standard that is more than a mere probability.

The Bureau has preliminarily determined that each of the three proposed restrictions, and the three proposed restrictions in combination, would more closely align the regulatory standards for an SPCP offered by a for-profit organization with ECOA's purposes and with the congressional intent expressed in the legislative history: that without the SPCP ''the consumers involved would effectively be denied credit.'' [80] Furthermore these proposed restrictions, as a preliminary matter, are appropriate, necessary, and proper to carry out the purposes of ECOA, for the reasons above.

iii. SPCPs Offered By For-Profit Organizations, Determining Need (Comment 8(a)–5)

Current comment 8(a)–5 addresses SPCPs offered by for-profit organizations. Under the Bureau's proposal, the comment would continue to clarify that a for-profit organization's determination of the need for an SPCP ''can be based on a broad analysis using the organization's own research or data from outside sources, including governmental reports and studies.'' [81]

For the reasons set forth above, the Bureau proposes changes to comment 8(a)–5 that would conform the comment's text to the proposed changes to the regulatory text of § 1002.8(a)(3), as follows. For precision, and because the comment addresses only SPCPs provided by for-profit organizations, the Bureau proposes to change the comment's citation to the regulatory text from ''§ 1002.8(a)'' to ''§ 1002.8(a)(3),'' which is the paragraph that addresses such SPCPs. The Bureau also proposes to strike the phrase ''or would receive it [credit] on less favorable terms,'' for the same reasons that the Bureau is

[77] *Joint Explanatory Statement of the Committee of the Conference,* Cong. Rec. H5493 (daily ed. Mar. 4, 1976).

[78] Effectively, *Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/effectively* (defining ''effectively'' as ''in effect: virtually'' ''by withholding further funds they effectively killed the project.'') (last visited Aug. 19, 2025).

[79] In combination, textually, the three proposed changes would revise § 1002.8(a)(3)(ii) to require that a for-profit organization offering an SPCP establish and administer the program to extend credit to a class of persons who, under the organization's standards of creditworthiness, would not receive such credit.

[80] *Joint Explanatory Statement of the Committee of the Conference,* Cong. Rec. H5493 (daily ed. Mar. 4, 1976).

[81] Regulation B comment 8(a)–5.

proposing to strike the corresponding phrase from the regulatory text of § 1002.8(a)(3)(ii), discussed above.

The third and fourth sentences of comment 8(a)–5 set forth two examples of the types of research or data that a for-profit organization may use for the analysis on which it bases its determination of the need for the SPCP. The Bureau proposes edits to the examples' text to conform to the proposed regulatory changes discussed above. The proposed edits would neither intend nor effect any change to the types of research or data that a for-profit organization may use.

The Bureau requests comment on the restrictions that the Bureau proposes in § 1002.8(a)(3) and, in particular, on the proposed evidentiary requirements and on whether there might be another standard(s) that would better facilitate compliance while achieving the Bureau's objective of ensuring that any SPCP offered or participated in by a for-profit organization provides credit only to participants who would not receive such credit in the absence of the SPCP.

Section 1002.8(b)(2)—Common Characteristics

Current § 1002.8(b)(2) provides that a credit program qualifies as an SPCP only if the program was established and is administered so as not to discriminate against an applicant on any prohibited basis. It also provides that all program participants may be required 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 ECOA or Regulation B. The Bureau proposes to amend the section to make it subordinate to the new proposed prohibitions and restrictions in § 1002.8(b)(3) and (4), which are discussed below.

For clarity, the Bureau proposes to strike the parenthetical in § 1002.8(b)(2)—''(for example, race, national origin, or sex)''—and replace it with the text ''that would otherwise be a prohibited basis.'' The Bureau would neither intend nor effect any change in substance with this proposed change, because § 1002.2(z) defines ''prohibited basis'' to include race, national origin, and sex. Also for clarity, the Bureau also proposes to add new comment 8(b)–2 to explain the § 1002.8(b)(2) regulatory text. In 1977, when the Board promulgated what was then § 202.8(b)(2) to implement the 1976 Act, the Board's section-by-section analysis of the regulatory text stated:

> Section 202.8(b)(2) provides that a creditor may determine eligibility for a special purpose credit program using one or more of the prohibited bases; but, once the characteristics of the class of beneficiaries are established, a creditor may not discriminate among potential beneficiaries on a prohibited basis. For example, a creditor might establish a credit program for impoverished American Indians. If the program met the requirements of § 202.8(a), the creditor could refuse credit to non-Indians but could not discriminate among Indian applicants on the basis of sex or marital status.[82]

The Bureau proposes to incorporate the substance of the Board's section-by-section analysis in new comment 8(b)–2. Specifically, the proposed comment would clarify that § 1002.8(b)(2)—subject to the prohibitions and restrictions in § 1002.8(b)(3) and (4), as well as the other requirements of 12 CFR part 1002—permits a creditor to determine eligibility for an SPCP using one or more common characteristics that would otherwise be a prohibited basis. The proposed comment would also clarify that under § 1002.8(b)(2), once the characteristics of the program's class of participants are established, the creditor is prohibited from discriminating among potential participants on a prohibited basis.

Proposed New § 1002.8(b)(3)—Prohibited Common Characteristics

The Bureau proposes to add to the regulation new § 1002.8(b)(3), which would prohibit an SPCP offered or participated in by a for-profit organization from using the common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the program. For the reasons discussed above, the Bureau has preliminarily determined that it is no longer necessary (in light of changed circumstances) or appropriate (in light of ECOA's purpose of preventing discrimination) for the SPCP standards in Regulation B to permit such SPCPs to use the common characteristics of race, color, national origin, or sex as eligibility criteria.

The Bureau requests comment on the prohibitions that the Bureau proposes in § 1002.8(b)(3).

Proposed New § 1002.8(b)(4)—Otherwise Prohibited Bases in For-Profit Programs

The Bureau proposes to add to the regulation new § 1002.8(b)(4), which, for characteristics not prohibited under proposed § 1002.8(b)(3), would apply when an SPCP offered or participated in by a for-profit organization requires its participants to share one or more common characteristics that would otherwise be a prohibited basis. The new proposed section (subject to § 1002.8(b)(3)) would require the organization to provide evidence for each participant who receives credit through the program that, in the absence of the program, the participant would not receive such credit as a result of those specific characteristics.

As is discussed in more detail above, the Bureau has preliminarily determined that these proposed new restrictions in the standards for SPCPs would more closely align the regulation with the statutory purpose of ''mak[ing] . . . credit equally available to all credit-worthy customers without regard to [prohibited bases].'' Specifically, because an SPCP that bases eligibility on protected class membership inherently discriminates against ineligible individuals, the Bureau has preliminarily determined that it is inconsistent with ECOA's purpose (preventing discrimination) for an SPCP to use an otherwise prohibited basis (and thereby discriminate against ineligible individuals) unless the SPCP's use of the otherwise prohibited basis is necessary to overcome an inability to access credit that is specifically based on those same characteristics.

The Bureau requests comment on the restrictions that the Bureau proposes in § 1002.8(b)(4) and, in particular, on the standard of requiring a for-profit organization to provide evidence for each participant; and, on whether there might be an another standard that would better facilitate compliance while achieving the Bureau's objective of ensuring that any SPCP offered or participated in by a for-profit organization that uses one or more prohibited-basis common characteristics provides credit only to participants who in the absence of the SPCP would not receive such credit as a result of the participants' specific characteristics.

Section 1002.8(c)—Special Rule Concerning Requests and Use of Information

In § 1002.8(c) and the commentary thereto the Bureau proposes nonsubstantive changes for clarity. The Bureau proposes to strike the section's parenthetical—''(for example, race, national origin, or sex)''—and replace it with the text ''that would otherwise be a prohibited basis.'' This proposed change would neither intend nor effect any change in substance, because § 1002.2(z) defines ''prohibited basis'' to include race, national origin, and sex. The Bureau also proposes to make explicit that § 1002.8(c) is subordinate to § 1002.8(b), including its newly proposed prohibitions and restrictions,

[82] 42 FR 1242, 1248 (Jan. 6, 1977).

discussed above. This proposed change would neither intend nor effect any change in substance because current § 1002.8(c) is expressly subordinate to § 1002.8(a) and current § 1002.8(a) is expressly subordinate to § 1002.8(b); thus, § 1002.8(c) is subordinate to § 1002.8(b). Finally, the Bureau proposes to delete one of the examples from comment 8(c)–2 regarding programs under a Minority Enterprise Small Business Investment Corporation. This proposed deletion would neither intend nor effect any change in substance because as a general matter examples do not carry legal force.

The Bureau requests comment on the changes that the Bureau proposes in § 1002.8(c) and its commentary.

IV. Proposed Effective Date

The Bureau proposes that a final rule relating to this proposal would have an effective date of [90 days after publication in the **Federal Register**]. This would provide creditors sufficient time to evaluate existing SPCPs to ensure compliance with the final rule for extensions of credit on or after the effective date. Where creditors have already extended credit prior to the effective date under existing SPCPs, those credit extensions would be grandfathered and their programs must qualify as SPCPs under the rule in effect at the time of the credit extensions. The Bureau does not anticipate as much time, if any, would be needed for creditors to comply with a final rule relating to disparate impact and discouragement. The Bureau seeks comment on the proposed effective date, including whether it should be at a different time, and if so, when and why.

V. CFPA Section 1022(b) Analysis

A. Overview

The Bureau is considering the potential benefits, costs, and impacts of the proposed rule.[83] The Bureau requests comments on the preliminary discussion presented below, as well as submissions of additional information and data that could inform the Bureau's consideration of the benefits, costs, and impacts of the proposed rule. As discussed in greater detail elsewhere in this NPRM, the Bureau is proposing to amend provisions related to disparate impact, discouragement, and SPCPs under Regulation B, which implements ECOA.

The Bureau believes that the amendment to the provisions related to disparate impact and discouragement are largely deregulatory in nature and therefore are expected to reduce burden for the covered persons. The Bureau also has reason to believe that the current number of SPCPs is small and therefore proposed changes to SPCPs as part of this proposed rule would have limited impacts. The discussion below further considers the benefits, costs, and impacts of the proposed provisions to consumers and covered persons in detail.

B. Statement of Purpose

The purpose of Regulation B is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[84] The Bureau is proposing to amend the regulation as follows: (1) provide that ECOA does not authorize disparate impact claims; (2) amend the prohibition on discouraging applicants or prospective applications to clarify that it prohibits statements of intent to discriminate in violation of ECOA and is not triggered merely by negative consumer impressions, and to clarify that encouraging statements by creditors directed at one group of consumers is not prohibited discouragement as to applicants or prospective applicants who were not the intended recipients of the statements; and (3) amend the standards for SPCPs offered or participated in by for-profit organizations to include new standards and related restrictions.

C. Baseline for Consideration of Analysis

The Bureau has discretion in any rulemaking to choose an appropriate scope of consideration with respect to potential benefits and costs and an appropriate baseline. Accordingly, this analysis considers the benefits, costs, and impacts of the proposed provisions against Regulation B prior to its amendment as a baseline, *i.e.,* the current state of the world before the Bureau's proposed provisions are implemented. Under this baseline, the Bureau assumes that institutions are complying with regulations that they are currently subject to. The Bureau believes that such a baseline will provide the public with better information about the benefits and costs of the proposed amendment.

D. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on data that the Bureau has obtained from publicly available sources. However, limitations on what data are available restrict the Bureau's ability to quantify the potential costs, benefits, and impacts of the proposed rule. Therefore, the discussion below generally provides a qualitative consideration of the benefits, costs, and impacts of the proposed rule. General economic principles, together with the limited data available, provide insights into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the available data. The Bureau seeks comments on the appropriateness of the approach described below, including submissions of additional data relevant to the benefits and costs to consumers and covered persons.

Benefits to Covered Persons

As discussed further below, most provisions of the proposal would benefit covered persons. Quantifying and monetizing the benefits to covered institutions would require identifying costs of compliance under the baseline and quantifying the magnitude of the covered persons' cost savings arising from the proposed provisions. For example, the Bureau believes that the proposed provisions are deregulatory in nature and hence would benefit covered persons in the long run by reducing compliance burden. The Bureau anticipates these cost savings to vary with the covered person's size and the complexity of operations. However, the Bureau is unaware of any data that would enable reliable quantitative estimation of these benefits. Therefore, the Bureau seeks comment and data regarding the benefits to covered persons of the proposed provision. The Bureau is particularly interested in the number of employee hours, or estimates of total costs that covered persons anticipate saving as a result of the proposed rule.

Costs to Covered Persons

Certain costs to covered persons are difficult to quantify. For example, the Bureau anticipates that covered persons would incur costs associated with implementing changes to their internal

[83] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[84] *See* § 1002.1(b).

processes that result from the proposed provisions. The Bureau categorizes costs required to comply with the proposed provision into ''one-time'' and ''ongoing'' costs. ''One-time'' costs refer to expenses that the covered persons would incur only once to implement operational changes arising from the proposal. On the other hand, ''ongoing'' costs refer to expenses incurred as a result of the ongoing compliance of the rule. The Bureau also expects both of these types of costs to vary with a covered person's size and complexity of operations. The Bureau is unaware of any data that would help to quantify such costs and seeks data from available sources to quantify the costs to covered persons and seeks comment or data that may help quantify these types of costs.

Benefits to Consumers

Due to the deregulatory nature of the proposed provisions, covered persons can potentially pass on the saved compliance costs to consumers by offering lower prices or better products. However, the Bureau is unable to quantify these potential benefits because it lacks relevant data. The Bureau seeks additional comments, including submissions of relevant data, that would help quantify the benefits of the proposed provisions to consumers.

Costs to Consumers

According to economic theory, in a perfectly competitive market where covered persons are profit maximizers, reductions in the marginal cost of operation would be passed on to consumers, and firms would absorb one-time fixed costs of compliance. However, covered persons' response likely varies with supply, demand, and competitive conditions. Moreover, in addition to any costs that covered persons may pass onto consumers, the proposed provisions concerning disparate impact and discouragement may potentially limit legal protections for consumers and affect consumers' access to credit. Because of the lack of data to quantify such costs, the Bureau seeks information on the number of consumers potentially affected by the proposed rules as well as the data that would allow quantification of costs to consumers.

E. Potential Benefits and Costs of the Proposed Rule to Consumers and Covered Persons

Covered Persons Under the Proposed Rule

The three categories of proposed changes to Regulation B would apply to all covered persons that meet the definition of creditor under Regulation B. To estimate the total number of persons covered by the proposed changes, the Bureau relies on the total number of entities subject to Regulation B as estimated in the approved Paperwork Reduction Act supporting statement (OMB Control Number 3170–0013) last updated in 2024.[85] The Bureau estimates that there are about 12,000 depository institutions and 482,000 non-depository institutions that are subject to Regulation B.

Provisions Concerning Disparate Impact

i. Benefits to Covered Persons

The proposed provisions would likely allow covered persons to save on ongoing compliance costs. For example, covered persons may save time and resources presently spent on creating, testing, validating, and auditing models for potential disparate impact risks in their lending strategy or portfolio. Resources dedicated to statistical testing, documenting business necessities of policies and evaluating alternative lending strategies may be saved or redirected to other uses. Covered persons may also save costs by reducing spending associated with fair lending exams and training loan officers, compliance staff, contractors, and modelers of disparate impact risks. Lastly, the proposed change can reduce the potential litigation risks to the extent lenders would have otherwise had to defend against lawsuits under a disparate impact theory of discrimination. Fewer enforcement actions and private claims premised on disparate impact theories as a result of the proposed provisions would reduce defense burden and any financial costs related to remediation. The compliance cost saving from the proposed provisions likely varies by the size and complexity of the operational structure of the institutions.

Covered persons' profitability could increase as a result of the proposed provisions by improving operational flexibility and spurring innovation in the credit application process. For example, covered persons could more freely experiment with risk-based pricing and automated underwriting with reduced risk of facially neutral policies with disproportionate effects triggering liability without intent. The proposed provisions may result in an adoption of new modeling techniques that use additional data sources. These benefits, however, may be limited by the ongoing need to comply with other State and Federal fair lending laws. Due to lack of available data, the Bureau cannot provide quantitative estimates of potential cost savings and increased profits by covered persons and seeks comment and data that would allow quantification of these cost savings.

ii. Costs to Covered Persons

Covered persons may incur one-time adjustment costs resulting from these proposed provisions. These one-time costs include updating policies, practices, procedures, and control systems; verifying, updating and reviewing compliance; and training staff and third parties. In addition, covered persons already incur ongoing compliance costs associated with the current Regulation B. Therefore, the Bureau expects the one-time cost and any ongoing costs that may arise from the proposed provisions to be small.

The Bureau does not have the data to provide quantitative estimates of the one-time costs that covered persons may incur but can propose a rough estimate based on one-time costs estimated for other rules. For example, the Bureau recently estimated a one-time cost of each covered small non-depository entity for implementing the Automated Valuation Models (AVM) Rule to be $23,000: $7,000 for drafting and developing policies, practices, procedures, and control systems, $10,000 for verifying compliance, and $6,000 for training.[86] Furthermore, the Bureau estimated the ongoing costs to be one-third of the one-time costs (*i.e.,* $7,667). Since the proposed provisions involves updating existing policies rather than implementing new policies, the Bureau expects the cost of the proposed provisions to be closer to the AVM Rule's total ongoing cost of $7,667.

The one-time costs of updating policies and procedures and training personnel likely vary with the size and the type of covered person. For example, the Bureau recently in the Small Business Lending (1071) Rule estimated that the one-time cost of developing policies and procedures to range between $2,500 and $4,300 while the cost of training staff and third parties to range between $3,100 and $5,300 depending on the size and the type of institutions.[87] Given that these estimates are for implementing a new rule, whereas the proposed provisions only updates an existing rule, the Bureau expects the total one-time cost associated with the proposed provisions

[85] *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202402-3170-001.*

[86] 12 CFR part 1026 AVM Final Rule, 89 FR 64538, 64569 (Aug. 7, 2024).

[87] 1071 Final Rule, 88 FR 35150, 35507–35510 (May 31, 2023).

to be smaller than the estimated one-time costs for implementing the 1071 Rule. In other words, the Bureau expects the upper bound of the cost to vary between $5,600 and $9,600, which is consistent with what was estimated from the AVM Rule.

The Bureau emphasizes that it lacks data with which to estimate implementation costs for the proposed provisions concerning disparate impact, and that the cost estimates above are based on costs that were estimated for other rules. As such, these estimates may not be close to the actual costs that covered persons would incur as a result of the proposed provisions. The Bureau seeks comments and data related to the one-time costs that covered persons would incur to implement the proposed provisions.

iii. Benefits to Consumers

Covered persons may pass on compliance cost savings to consumers, who may benefit as a result. According to standard economic theory, the degree to which consumers would benefit from lower prices would depend on competitive market conditions and the shapes of market demand and supply, as well as firm characteristics. In addition, some consumers may experience a faster credit application process and greater product variety as some covered persons would reallocate cost savings arising from proposed provisions to improving operational efficiency and developing new products and services. The Bureau lacks data with which to estimate these benefits to consumers and seeks comments and data that would allow quantifying these benefits.

iv. Costs to Consumers

To the extent that legal liability discourages covered persons from implementing policies that lead to disparate impact, removing such liability could potentially have a negative impact on some consumers. Consumers who are adversely affected by neutral policies would lose legal options and opportunities for redress. Some consumers may be more likely to be denied credit or to pay higher prices without effects-based legal protection. However, such costs to consumers may be limited; covered persons are still liable under other antidiscrimination statutes such as the FHA and state laws similar to ECOA, so the incentives for covered persons to implement policies or engage in practices that lead to disparate impact may be limited.

The Bureau has also considered the possibility of one-time costs that covered persons incur because of the proposed provisions being passed on to consumers in the form of higher prices. The Bureau believes that this is unlikely to occur since economic theory generally views changes in fixed costs as unrelated, all other things equal, to changes in price.

Provisions Concerning Discouragement

v. Benefits to Covered Persons

The proposed provisions would limit legal liability for covered persons and can reduce compliance burden as a result. For example, covered persons may reduce spending related to limiting liability as to prospective applicants by decreasing the amount of time and resources spent monitoring marketing strategies and materials, and by adjusting marketing to focus on areas where they expect the greatest return on investment. In addition, covered persons may spend less on training loan officers, compliance staff, contractors, and other employees on legal and compliance risks related to prospective applicants. Lastly, the proposed change would limit potential litigation risks from enforcement actions based on allegations of discouragement of prospective applicants. The proposed change would reduce legal exposure to the extent lenders would have had to defend against lawsuits under broader legal liability in the baseline. As a result, covered persons may save costs related to legal counsel.

The proposed provisions would potentially increase covered persons' profitability by allowing additional operational flexibility. For example, lenders who under the baseline choose not to focus on offering certain products to certain groups of consumers would be able to potentially increase their revenues by offering products that are better tailored to the demands of different groups of consumers. In other words, under this proposal, some covered persons would be able to conduct more targeted advertising campaigns and offer certain products to subsets of consumers (when they otherwise would not have been able to under the baseline). Covered persons may choose to relocate branch locations that are less profitable and reallocate resources that were previously spent on oversight of marketing materials and interactions with prospective applicants at call centers and branches to other uses. On the other hand, requirements to serve community credit needs under the CRA would still be in effect and could mitigate such business decisions. The benefits to covered persons that arise as a result of these proposed provisions likely vary with the size and type of each covered person. However, the Bureau lacks data with which to reliably estimate these benefits, and seeks comment and data that may help quantify these benefits to covered persons.

vi. Costs to Covered Persons

Covered persons may incur adjustment costs associated with the proposed change in liability for discrimination against prospective applicants. Covered persons may need to update their policies, procedures, and systems to accommodate changes resulting from the proposed provisions. However, these adjustment costs would be incurred only once and are unlikely to have a significant long-term impact on covered entities. The one-time costs associated with these proposed provisions would be similar in scope to the one-time costs associated with the change to the disparate impact provisions above. The Bureau lacks data with which to reliably estimate the potential cost to covered persons arising from these proposed provisions and seeks comments and data that would help quantify these costs.

vii. Benefits to Consumers

The proposed provisions on discouragement limits may result in ongoing cost savings for covered entities, which could be passed on to consumers through lower prices. The rate of pass through generally varies with demand and supply conditions, as well as firm characteristics. The Bureau lacks data with which to reliably estimate the benefits to consumers arising from the proposed provisions and seeks comments and data that would help quantify these benefits.

viii. Costs to Consumers

The proposed provisions may result in consumers not applying for credit and facing greater barriers to accessing credit than they otherwise would have under the existing rule. For example, covered persons may exclude certain groups of consumers from advertising campaigns or may choose to engage less with certain groups of consumers. As a result, some consumers may not be aware of credit products from all available covered persons. Moreover, some consumers may lose convenient access to financial services if covered persons alter their branch location decisions as a result of these proposed provisions. In particular, elderly, minority, and low-income consumers are more likely to rely on brick-and-mortar branch services instead of online or mobile banking. If covered persons alter their branch location decisions, then these customers may no longer be

able to easily access financial services and products. As before though, requirements to serve community credit needs under the CRA could mitigate such impacts.

Consumers would have less protection against discouragement at a pre-application stage under the proposed provisions compared to the baseline. Under a narrower standard of liability, lenders may be more likely to discourage or informally reject certain consumers, among other things, before credit is formally sought.[88] The proposed provisions could lead to some consumers being discouraged in ways not captured by the proposed prohibition, constituting a cost to these consumers. The Bureau lacks data with which to reliably estimate such costs to consumers arising from the proposed provisions and seeks comments and data that would help quantify these costs.

While the proposed provisions limit covered persons' liability on discouragement, it does not eliminate it. Covered persons will remain prohibited by the proposed discouragement prohibition from expressing to applicants or prospective applicants an intention to discriminate against them on a prohibited basis. Moreover, covered persons would still be subject to other statutes such as the FHA and state laws similar to ECOA. While the proposed provisions reduce legal liability for covered persons under ECOA, the legal risk under other statutes remains unchanged and therefore the incentives for covered persons to significantly change their policies as a result from the proposed provisions may be limited. Thus, the costs to consumers may be limited. The Bureau seeks comments on the potential costs of the proposed provisions to consumers.

Provisions Concerning Special Purpose Credit Programs

The Bureau also proposes changes to Regulation B's provisions regarding SPCPs. The proposed changes can be grouped into two categories for the purposes of discussing their potential impacts. First, the Bureau proposes to prohibit an SPCP offered or participated in by a for-profit organization from using a common characteristic of race, color, national origin, or sex, or any combination thereof, as a factor in determining eligibility for the SPCP. Second, the Bureau also proposes several new restrictions on such SPCPs that use *any* prohibited basis common characteristic as eligibility criteria. Among these new restrictions are additional requirements that a for-profit organization establish the fact that applicants with common characteristics that would otherwise be a prohibited basis would not receive credit under the organization's current standards due to the common characteristic and that providing credit of the type and amount sought could not be accomplished through a program that does not use an otherwise prohibited basis as eligibility criteria.

Compared to the baseline, the overall effect of these two categories of proposed changes is to place additional restrictions on the design of lenders' existing SPCPs and the development of new SPCPs. The Bureau considers the costs and benefits of these restrictions below.

ix. Benefits to Covered Persons

At baseline, Regulation B permits creditors to create SPCPs and prescribes the procedures for doing so but does not require any creditor to create an SPCP. The Bureau, consistent with standard economic theory, assumes that creditors only decide to create SPCPs if the incremental benefits from doing so outweigh the incremental costs from creating and administering the SPCP. Since the proposed changes to Regulation B may make it more difficult or costly to create an SPCP, the Bureau does not expect the proposed changes to the SPCP provisions to generate benefits to covered persons from credit provided or not provided under the revised SPCP provisions.

x. Costs to Covered Persons

At baseline, Regulation B permits creditors to create SPCPs and prescribes the procedures for doing so but does not require any creditor to create an SPCP. Under standard economic theory, a creditor would only create an SPCP if the expected benefit of doing so is greater than the costs of creating and administering the program. Creditors may benefit, for example, from the public relations value that such a program may provide. Owners of a for-profit credit provider may also derive some non-monetary benefit from the creation of an SPCP. Setting up an SPCP involves ''significant effort'' in following the proper procedures for doing so.[89] Many existing SPCPs also involve the creditor taking on additional risk because they may involve providing credit to applicants the creditor would have otherwise denied or providing credit at terms that would have otherwise been more favorable to the creditor. The Bureau assumes that, if a creditor implements an SPCP, they do so because the benefits outweigh the costs.

The effects of the proposed Regulation B provisions affecting SPCPs are to impose restrictions on creditors' ability to create an SPCP and, therefore, reduce the expected net benefit of the programs relative to the baseline. In some cases, the proposed changes would prohibit some types of SPCPs. For example, an SPCP that currently uses race as a common characteristic would be prohibited under the proposed changes. In other cases, the proposed changes would impose additional costs on creditors' who attempt to develop an SPCP. Such would be the case when a creditor must establish the fact that members of a protected class would otherwise be unable to receive credit in the absence of an SPCP. Imposing such restrictions could make it difficult to achieve the intended effect of an SPCP or otherwise reduce the net benefit of doing so. This change imposes a cost on affected creditors who either have an SPCP or would otherwise create an SPCP in the absence of the proposed changes to Regulation B. As a result, fewer SPCPs may exist under the NPRM relative to the baseline.

However, such costs could be mitigated to the extent that creditors could redesign programs to use criteria that are not prohibited under the proposed changes to Regulation B. For example, if a creditor has an existing SPCP that uses race as a common characteristic determining eligibility to reach a certain segment of socioeconomically disadvantaged borrowers, it may be able to preserve much of its program in a form that is open to such socioeconomically disadvantaged borrowers without regard to prohibited basis characteristics. In this case, the creditor would incur both the one-time cost of the program redesign and any costs arising if the redesigned program is unable to achieve the intended results as effectively.

While the Bureau is unaware of data that could be used to comprehensively measure the scale of existing SPCPs, the Bureau does have reason to believe that the overall market effect of these proposed limits is likely to be small. Historically, few SPCPs existed prior to

[88] *See, e.g.,* Andrew Hanson et al., *Discrimination in mortgage lending: Evidence from a correspondence experiment,* 92 J. Urban Econ. 48–65 (2016); Neil Bhutta et al., *How much does racial bias affect mortgage lending? Evidence from human and algorithmic credit decisions,* 80(3) J. Fin. 1463–1496 (2025).

[89] Comment from the JPMorgan Chase & Co., OCC–2022–0002–0252 (June 6, 2022), *https://www.regulations.gov/comment/OCC-2022-0002-0252.*

the Bureau's advisory opinion in January 2021, when the Bureau last assessed the market.[90] In August 2020, the Bureau issued a Request for Information on the Equal Credit Opportunity Act and Regulation B.[91] Multiple commenters noted that, despite a long history of being allowed under Regulation B, most lenders have not used SPCPs.[92] In 2021, the U.S. Department of Housing and Urban Development noted in its statement on SPCPs that ''very few of these Programs have been established to create homeownership opportunities for affected communities.'' [93]

Since 2021, there has been growth in the number of SPCPs, with prominent examples from large banks, large non-depository institutions, and several non-profit organizations.[94] However, available information suggests that the use of SPCPs is likely still limited. The Federal Housing Finance Agency (FHFA) released a report in 2024 showing that government-sponsored enterprises (GSEs) acquired almost 15,000 mortgages originated through SPCPs in 2023, or 0.8 percent of the total mortgages GSEs acquired that year.[95] With respect to small business lending, the American Bankers Association (ABA), as of 2025, also notes that few lenders have implemented SPCPs for small business lending.[96]

The Bureau also expects that SPCPs are even less likely to be provided by small lenders, compared to larger ones. In a 2022 comment letter, J.P. Morgan Chase Bank (JPMC) described that launching an SPCP required ''significant effort'' because they ''often necessitate modifications to existing processes, close monitoring of execution and results, engagement with community leaders, adjustments to the program over time, updates to documentation, and consistent engagement with the relevant supervisory agency.'' [97]

While certain government agencies have sought to encourage SPCPs in recent years, the information available to the Bureau indicates that the actual prevalence of SPCPs, is quite low. Therefore, while the Bureau cannot quantify with any precision the number of potentially affected lenders, it has documented reasons to believe that the number is small.

The Bureau also does not have detailed information on the amount of lending that SPCPs represent as a fraction of a creditor's portfolio. However, some individual lenders have made available information on their existing SPCPs. As one case study stated, ''Wells Fargo [in the spring of 2022] set aside $150 million to lower interest rates on mortgages for Black customers'' [98] under SPCPs. However, this amount only constituted a small percentage of Wells Fargo's overall lending business.[99] Large lenders such as Wells Fargo (one of the largest in the country) are best positioned to create and benefit from SPCPs. Given research showing that net interest margins increase with bank size, and the fixed administrative costs and credit risks of operating a SPCP, it seems likely that SPCP lending would represent an even smaller fraction of lending for smaller lenders.[100]

Since, based on the limited information available, few lenders appear to have developed SPCPs and, for an individual lender, it seems to represent a small fraction of existing lending, the Bureau expects the total cost to covered persons by the proposed changes to Regulation B to be small relative to the total dollar amount of lending. The Bureau requests comment on the size and extent of existing SPCPs and the costs to covered persons described in this section.

xi. Benefits to Consumers

Some consumers may benefit from the proposed changes in the form of additional credit availability. Designing and operating SPCPs involves meaningful administrative costs as well as, in many cases, accepting higher levels of risk from program participants. It is possible that creditors decide to provide fewer loans outside of the SPCP in response to these costs. Thus, consumers who do not qualify for an existing SPCP may see additional credit availability if the proposed changes cause creditors to discontinue their SPCPs and make those funds available to borrowers at large, or else to broaden the eligibility criteria for existing SPCPs previously limited to certain prohibited basis groups. For reasons explained above, the Bureau has reason to believe that SPCPs currently account for an insignificant portion of consumer lending. The Bureau therefore believes that the extent to which consumers will benefit from additional credit availability as a result of this regulatory change is likely insignificant.

The Bureau lacks sufficient data to quantify these potential benefits and seeks comments on the extent to which consumers may benefit in this way from the proposed changes.

xii. Costs to Consumers

Consumers who could have expected to benefit from an SPCP under the baseline could see this benefit reduced or removed under the proposed changes. This includes consumers who receive credit from an SPCP when they otherwise would not have, as well as consumers who receive more favorable credit terms under an SPCP than they otherwise would have in the absence of the SPCP. To the extent that the proposed changes cause lenders to remove SPCPs or redesign programs such that these consumers no longer benefit, customers would incur a cost.

The Bureau lacks the necessary data to estimate the total cost of the proposed regulations to consumers. However, as described in the previous section, the Bureau has reason to believe that the prevalence of SPCPs is quite low and, at a market level, the total number of consumers receiving benefits under SPCPs likely represents a small portion of total credit. Therefore, the Bureau expects the costs to consumers to be

[90] 86 FR 3762 (Jan. 15, 2021).

[91] Request for Information on the Equal Credit Opportunity Act and Regulation B, *https://www.federalregister.gov/d/2020-16722.*

[92] See comment from Nat'l Fair Hous. All., *https://www.regulations.gov/comment/CFPB-2020-0026-0133,* and Mortg. Banker's Ass'n, *https://www.regulations.gov/comment/CFPB-2020-0026-0115.*

[93] Memorandum from Demetria L. McCain, Principal Deputy Assistant Secretary for Fair Housing & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., to Office of Fair Housing and Equal Opportunity (Dec. 7, 2021), *FHEO's Statement by HUD's Office of Fair Housing and Equal Opportunity on Special Purpose Credit Programs as a Remedy for Disparities in Access to Homeownership, https://web.archive.org/web/20241024180840/https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO_Statement_on_Fair_Housing_and_Special_Purpose_Programs_FINAL.pdf.*

[94] U.S. Dep't of Hous. & Urb. Dev., *Market examples of SPCPs—SPCP Toolkit for Mortgage Lenders, https://spcptoolkit.com/market-examples-of-spcps/* (last visited Sept. 9, 2025).

[95] Inside Mortg. Fin., *Special Purpose Credit Program Mortgages a Fraction of GSE Business* (Oct. 19, 2023), *https://www.insidemortgagefinance.com/articles/230785-special-purpose-credit-program-mortgages-a-fraction-of-gse-business;* Fed. Hous. Fin. Agency, *Mission Report 2023* (2024), *https://www.fhfa.gov/reports/mission-report/2023.*

[96] Am. Banker's Ass'n, *Special Purpose Credit Programs, https://www.aba.com/banking-topics/commercial-banking/small-business/special-purpose-credit-programs* (last visited Sept. 9, 2025).

[97] *https://www.regulations.gov/comment/OCC-2022-0002-0252.*

[98] Orla McCaffrey, *JPMorgan Chase takes special-purpose credit program national* (Nov. 18, 2022), Am. Banker, *https://www.americanbanker.com/news/jpmorgan-chase-takes-special-purpose-credit-program-national.*

[99] According to 2024 Home Mortgage Disclosure Act Data, Wells Fargo originated $38 billion in total mortgage volume. *See https://ffiec.cfpb.gov/data-publication/modified-lar/2024* (last visited Sept. 9, 2025).

[100] W. Blake Marsh & Taisiya Goryacheva, *Do Net Interest Margins for Small and Large Banks Vary Differently with Interest Rates?,* Fed. Rsrv. Bank of Kan. City (Feb. 10, 2022), *https://www.kansascityfed.org/research/economic-review/do-net-interest-margins-for-small-and-large-banks-vary-differently-with-interest-rates/.*

small from the proposed changes to Regulation B related to SPCPs. The Bureau requests comment on the overall cost to consumers from the proposed changes to SPCP provisions in Regulation B.

F. Potential Impacts of the Proposed Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

The Bureau believes that nearly all depository institutions and credit unions with $10 billion or less in total assets would be subject to Regulation B and therefore subject to the proposals described above. To estimate the number of covered depository institutions with $10 billion or less in total assets, the Bureau uses data collected by the Federal Financial Institutions Examination Council's (FFIEC's) Reports of Condition and Income (Call Reports). To estimate the number of credit unions with $10 billion or less in total assets, the Bureau uses data collected by the National Credit Union Administration's (NCUA) Call Reports. Based on the 2024Q4 FFIEC Call Reports, there are 4,328 banks with $10 billion or less in total assets. Based on 2025Q2 NCUA Call Report data, there are 4,348 credit unions with $10 billion or less in total assets.

The Bureau believes that the proposed changes to disparate impact liability and liability for discouragement will likely lead institutions with $10 billion or less in total assets to save on ongoing compliance costs. As described above, financial institutions may save time and resources creating, testing, validating, and auditing models for potential disparate impact risks in their lending strategy or portfolio, although the need to comply with other fair lending laws may limit this benefit. The institutions may also reduce spending associated with compliance activities and training relevant staff, contractors, and modelers on disparate impact risks. Institutions may also reduce the time and resources associated with monitoring marketing, pre-application conversations, and preliminary inquiries. Both proposed changes also reduce potential litigation risk from enforcement actions or private claims based on disparate impact theories or allegations of discouragement or discrimination prior to applying for credit. The Bureau lacks the necessary data to quantify the extent of these benefits.

With respect to the proposed changes regarding disparate impact or discouragement, the Bureau expects depository institutions or credit unions with $10 billion or less in total assets to incur one-time costs associated with updating policies, practices, procedures, and control systems; verifying, updating and reviewing compliance; and training staff and third parties on changed policies. As described above, the Bureau has reason to believe that institutions are likely to incur one-time costs similar to that of the Bureau's previous AVM Rule. As discussed above, the Bureau expects, as an upper bound, each institution with $10 billion or less in total assets to incur a cost of between $5,600 to $9,600 in one-time costs associated with each of the two categories of proposals. The Bureau seeks comment on the one-time cost of the proposed rule on depository institutions with $10 billion or less in total assets.

The Bureau also expects that the proposed revisions regarding SPCPs will impose additional restrictions on any depository institution with $10 billion or less in total assets who either has or would have had an SPCP. As described above, the new restrictions may reduce the net benefit that a depository institution derives from implementing an SPCP. However, for the reasons described above, the Bureau expects that few depository institutions with $10 billion or less in total assets have or would be expected to create an SPCP and that it represents a small part of any individual institution's lending. For this reason, the Bureau expects the proposed SPCP changes to have a small impact on depository institutions with $10 billion or less.

G. Potential Impacts on Consumers in Rural Areas, as Described in Section 1026

This section assesses the potential impact of the proposed amendments to Regulation B on rural consumers. The Bureau evaluates the proposed provisions jointly given their overall implications on fair lending protections and credit access for rural consumers.

Consumers in rural areas may experience greater impact from fewer protections against disparate impact because of the proposed changes to Regulation B. Without disparate impact liability, covered persons may curtail their efforts in reviewing and mitigating neutral policies that could disproportionately exclude rural borrowers. One potential reason for this exclusion is that the loan application process in rural areas often involve consideration of informal or soft information, given the small-dollar or agricultural nature typical of such rural loans.

The Bureau expects that rural consumers would face many of the same costs and benefits from the proposed changes to discouragement provisions as described above in Section E. It is possible that rural consumers could be excluded from advertising about products from which they may have benefitted, relative to the baseline. They also may experience fewer protections from discouraging behavior by lenders made at the pre-application stage, relative to the baseline.

Restriction of SPCP eligibility criteria would curtail programs designed to increase lending to consumers of prohibited basis groups in rural areas. Consumers who benefit from targeted mortgages and small business SPCPs could face higher barriers to credit access and fewer opportunities for entrepreneurship. However, as described in the previous section, the Bureau believes that the prevalence of SPCPs is quite low and the total number of consumers receiving benefits under SPCPs represent a small portion of any credit market. Therefore, the proposed changes to SPCPs will likely have a small impact on rural consumers. The Bureau seeks comment as to the proposed rule's effect on rural consumers.

VI. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[101] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[102] Potentially affected small entities include depository and non-depository providers of credit.

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small

[101] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any small governmental units or not-for-profit organizations to which the proposal would apply.

[102] 5 U.S.C. 601(3) (the Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment).

entities.[103] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[104]

An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau does not expect the rule to impose significant economic impacts on small entities relative to the baseline. Any effects, including one-time costs, would be expected to be small for each entity. In part V.E.x, the Bureau described how the size of SPCPs as a share of a lender's overall portfolio is expected to be small based on existing evidence. In part V.E.x, the Bureau also described how the prevalence of SPCPs is low and the Bureau expects this would also be true of (and especially for) small entities. Therefore, the Bureau does not expect the SPCPs provisions to affect a substantial number of small entities.

Accordingly, the Acting Director certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on its analysis of the impact of the proposed rule on small entities and requests any relevant data.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies are generally required to seek the Office of Management and Budget (OMB)'s approval for information collection requirements prior to implementation. The collections of information related to Regulation B have been previously reviewed and approved by OMB and assigned OMB Control Number 3170–0013 (Regulation B). Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau has determined that this proposed rule would not impose any new or revised information collection requirements (recordkeeping, reporting or disclosure requirements) on covered entities or members of the public that would constitute collections of information requiring OMB approval under the PRA.

The Bureau welcomes comments on this determination, which may be submitted to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to *CFPB_PRA@cfpb.gov.* All Comments are matters of Public Record.

VII. Severability

The Bureau preliminarily intends that the provisions of the rule are separate and severable from one another. If any provision of the final rule, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue to be in effect. The Bureau has designed each provision to operate independently so that the effect of each provision will continue regardless of whether one or another provision is not effectuated. Therefore, proposed provisions related to disparate impact, discouragement, and special purpose credit programs are intended to be separate and severable. Moreover, aspects of these provisions are also intended to be severable, if any portion is not effectuated, including the changes proposed to the discouragement provision and the prohibitions and restrictions proposed for special purpose credit programs.

Executive Order 12866

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select those regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; and distributive impacts). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, or the President's priorities. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this action is a ''significant regulatory action'' under Executive Order 12866. Accordingly, OMB has reviewed this action.

List of Subjects in

12 CFR Part 1002

Banks, Banking, Civil rights, Consumer protection, Credit, Credit unions, Marital status discrimination, National banks, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend Regulation B, 12 CFR part 1002, as set forth below:

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

■ 1. The authority citation for part 1002 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b. Subpart B is also issued under 15 U.S.C. 1691c–2.

SUBPART A—GENERAL

■ 2. Amend § 1002.4 by revising paragraph (b) to read as follows:

§ 1002.41002.4 General rules.

* * * * *

(b) *Discouragement.* A creditor shall not make any oral or written statement, in advertising or otherwise, directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristic(s). For purposes of this paragraph (b), oral or written statements are spoken or written words, or visual images such as symbols, photographs, or videos.

* * * * *

■ 3. Amend § 1002.6(b) *Discouragement.* A creditor shall not make any oral or written statement, in advertising or otherwise, directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny, or would grant on less favorable terms, a credit application by the applicant or prospective applicant because of the applicant or prospective applicant's prohibited basis characteristic(s). For purposes of this paragraph (b), oral or written statements are spoken or written words, or visual images such as symbols, photographs, or videos.

[103] 5 U.S.C. 603 through 605.

[104] 5 U.S.C. 609.

3. Amend § 1002.6 by revising paragraph (a) to read as follows:

§ 1002.61002.6 Rules concerning evaluation of applications.

(a) *General rule concerning use of information.* Except as otherwise provided in the Act and this part, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis. The Act does not provide that the ''effects test'' applies for determining whether there is discrimination in violation of the Act.

* * * * *

■ 4. In § 1002.8(a) *General rule concerning use of information.* Except as otherwise provided in the Act and this part, a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis. The Act does not provide that the ''effects test'' applies for determining whether there is discrimination in violation of the Act.

* * * * *

4. In § 1002.8, revise paragraphs (a)(3)(i) and (ii), the heading of paragraph (b), and paragraphs (b)(2) and (c), and add paragraphs (b)(3) and (4), to read as follows:

§ 1002.81002.8 Special purpose credit programs.

(a) * * *

(3) * * *

(i) * * *

(A) Identifies the class of persons that the program is designed to benefit;

(B) Sets forth the procedures and standards for extending credit pursuant to the program;

(C) Provides evidence of the need for the program;

(D) Explains why, under the organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program; and

(E) When the persons in the class are required to share one or more common characteristics that would otherwise be a prohibited basis, explains why meeting the special social needs addressed by the program:

(*1*) Necessitates that its participants share the specific common characteristics that would otherwise be a prohibited basis; and

(*2*) Cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria; and

(ii) The program is established and administered to extend credit to a class of persons who, under the organization's standards of creditworthiness, would not receive such credit.

(b) *Controlling provisions*—

* * * * *

(2) *Common characteristics.* A program described in paragraphs (a)(2) or (a)(3) of this section qualifies as a special purpose credit program only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, except as provided in paragraphs (b)(3) and (b)(4) of this section, all program participants may be required to share one or more common characteristics that would otherwise be a prohibited basis so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.

(3) *Prohibited common characteristics.* A special purpose credit program described in paragraph (a)(3) of this section shall not use the race, color, national origin, or sex, or any combination thereof, of the applicant, as a common characteristic or factor in determining eligibility for the program.

(4) *Otherwise prohibited bases in for-profit programs.* Subject to paragraph (b)(3) of this section, a special purpose credit program described in paragraph (a)(3) of this section may require its participants to share one or more common characteristics that would otherwise be a prohibited basis only if the for-profit organization provides evidence for each participant who receives credit through the program that in the absence of the program the participant would not receive such credit as a result of those specific characteristics.

(c) *Special rule concerning requests and use of information.* If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more common characteristics that would otherwise be a prohibited basis and if the program otherwise satisfies the requirements of paragraphs (a) and (b) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

* * * * *

■ 5. Amend § 1002.1002.8 Special purpose credit programs.

(a) * * *

(3) * * *

(i) * * *

(A) Identifies the class of persons that the program is designed to benefit;

(B) Sets forth the procedures and standards for extending credit pursuant to the program;

(C) Provides evidence of the need for the program;

(D) Explains why, under the organization's standards of creditworthiness, the class of persons would not receive such credit in the absence of the program; and

(E) When the persons in the class are required to share one or more common characteristics that would otherwise be a prohibited basis, explains why meeting the special social needs addressed by the program:

(*1*) Necessitates that its participants share the specific common characteristics that would otherwise be a prohibited basis; and

(*2*) Cannot be accomplished through a program that does not use otherwise prohibited bases as participant eligibility criteria; and

(ii) The program is established and administered to extend credit to a class of persons who, under the organization's standards of creditworthiness, would not receive such credit.

(b) *Controlling provisions*—

* * * * *

(2) *Common characteristics.* A program described in paragraphs (a)(2) or (a)(3) of this section qualifies as a special purpose credit program only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, except as provided in paragraphs (b)(3) and (b)(4) of this section, all program participants may be required to share one or more common characteristics that would otherwise be a prohibited basis so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.

(3) *Prohibited common characteristics.* A special purpose credit program described in paragraph (a)(3) of this section shall not use the race, color, national origin, or sex, or any combination thereof, of the applicant, as a common characteristic or factor in determining eligibility for the program.

(4) *Otherwise prohibited bases in for-profit programs.* Subject to paragraph (b)(3) of this section, a special purpose credit program described in paragraph (a)(3) of this section may require its participants to share one or more common characteristics that would otherwise be a prohibited basis only if the for-profit organization provides evidence for each participant who receives credit through the program that in the absence of the program the participant would not receive such credit as a result of those specific characteristics.

(c) *Special rule concerning requests and use of information.* If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more common characteristics that would otherwise be a prohibited basis and if the program otherwise satisfies the requirements of paragraphs (a) and (b) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

* * * * *

5. Amend § 1002.15 by revising paragraph (d)(1)(ii) to read as follows:

§ 1002.15 Incentives for self-testing and self-correction.

(d) * * *

(1) * * *

(ii) By a government agency or an applicant in any proceeding or civil action in which a violation of the Act or this part is alleged.

* * * * *

■ 6. In Supplement I to part 1002:

■ a. Under *Section 1002.2—Definitions,* revise *Paragraph 2(p)(4),* including the heading.

■ b. Under *Section 1002.4—General Rules,* revise *Paragraph 4(b),* including the heading.

■ c. Under *Section 1002.6—Rules Concerning Evaluation of Applications,* revise *6(a)—General rule concerning use of information,* by revising *Paragraph (6)(a)(2).*

■ d. Under *Section 1002.8—Special Purpose Credit Programs,* revise *8(a)—Standards for programs* by revising *Paragraph (8)(a)(5),* revise *8(b)—Rules in other sections* by revising the heading and adding *Paragraph (8)(b)(2),* revise *8(c)—Special rule concerning requests and use of information* by revising *Paragraph (8)(c)(2).*

The revisions and additions read as follows:

Supplement I to Part 1002—Official Interpretations

* * * * *

Section 1002.2—Definitions

* * * * *

2(p) Empirically derived and other credit scoring systems.

* * * * *

4. *Disparate treatment.* An empirically derived, demonstrably and statistically sound, credit scoring system may include age as a predictive factor (provided that the age of an elderly applicant is not assigned a negative factor or value). Besides age, no other prohibited basis may be used as a variable. Generally, credit scoring systems treat all applicants objectively and thus avoid problems of disparate treatment. In cases where a credit scoring system is used in conjunction with individual discretion, disparate treatment could conceivably occur in the evaluation process.

* * * * *

Section 1002.4—General Rules

* * * * *

Paragraph 4(b).

1. *Discouragement.* Generally, the regulation's protections apply only to persons who have requested or received an extension of credit. In keeping with the purpose of the Act—to promote the availability of credit on a nondiscriminatory basis—§ 1002.4(b) prohibits creditors from making oral or written statements directed at applicants or prospective applicants that the creditor knows or should know would cause a reasonable person to believe that the creditor would deny their credit application, or would grant it on less favorable terms, because of their prohibited basis characteristic(s). For purposes of § 1002.4(b), encouraging statements directed at one group of consumers cannot discourage other consumers who were not the intended recipients of the statements.

i. Statements prohibited by § 1002.4(b) include:

A. A statement that the applicant should not bother to apply, after the applicant states that he is retired.

B. Statements directed at the general public that express a discriminatory preference or a policy of exclusion against consumers based on one or more prohibited basis characteristics in violation of the Act.

C. The use of interview scripts that discourage applications on a prohibited basis.

ii. Statements not prohibited by § 1002.4(b) include:

A. Statements directed at one group of consumers, encouraging that group of consumers to apply for credit.

B. Statements in support of local law enforcement.

C. Statements recommending that, before buying a home in a particular neighborhood, consumers investigate, for example, the neighborhood's schools, its proximity to grocery stores, and its crime statistics.

D. Statements encouraging consumers to seek out resources to develop their financial literacy.

* * * * *

Section 1002.6—Rules Concerning Evaluation of Applications

6(a) General rule concerning use of information.

1. *General.* When evaluating an application for credit, a creditor generally may consider any information obtained. However, a creditor may not consider in its evaluation of creditworthiness any information that it is barred by § 1002.5 from obtaining or from using for any purpose other than to conduct a self-test under § 1002.15.

2. *Disparate treatment.* The Act prohibits practices that discriminate on a prohibited basis regarding any aspect of a credit transaction. The Act does not provide for the prohibition of practices that are facially neutral as to prohibited bases, except to the extent that facially neutral criteria function as proxies for protected characteristics designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

* * * * *

Section 1002.8—Special Purpose Credit Programs

8(a) Standards for programs.

1. *Determining qualified programs.* The Bureau does not determine whether individual programs qualify for special purpose credit status, or whether a particular program benefits an ''economically disadvantaged class of persons.'' The agency or creditor administering or offering the loan program must make these decisions regarding the status of its program.

2. *Compliance with a program authorized by Federal or state law.* A creditor does not violate Regulation B when it complies in good faith with a regulation promulgated by a government agency implementing a special purpose credit program under § 1002.8(a)(1). It is the agency's responsibility to promulgate a regulation that is consistent with Federal and state law.

3. *Expressly authorized.* Credit programs authorized by Federal or state law include programs offered pursuant to Federal, state, or local statute, regulation or ordinance, or pursuant to judicial or administrative order.

4. *Creditor liability.* A refusal to grant credit to an applicant is not a violation of the Act or regulation if the applicant does not meet the eligibility requirements under a special purpose credit program.

5. *Determining need.* In designing a special purpose credit program under § 1002.8(a)(3), a for-profit organization must determine that the program will benefit a class of people who would otherwise be denied credit. 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. For example, a creditor might design new products to reach consumers who would not meet 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. Or, a bank could review Home Mortgage Disclosure Act data along with demographic data for its assessment area.

6. *Elements of the program.* The written plan must contain information that supports the need for the particular program. The plan also must either state 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.

8(b) Controlling provisions.

1. *Applicability of rules.* A creditor that rejects an application because the applicant does not meet the eligibility requirements (common characteristic or financial need, for example) must nevertheless notify the applicant of action taken as required by § 1002.9.

2. *Use of common characteristics.* Section 1002.8(b)(2) permits a creditor to determine eligibility for a special purpose credit program using one or more common

characteristics that would otherwise be a prohibited basis only so long as that section's requirements, the requirements of § 1002.8(b)(3) and (4), and the other requirements of this part are satisfied. Under § 1002.8(b)(2), once the characteristics of the program's class of participants are established, the creditor is prohibited from discriminating among potential participants on a prohibited basis.

8(c) Special rule concerning requests and use of information.

1. *Request of prohibited basis information.* This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§ 1002.5 and 1002.6 to determine an applicant's eligibility for a particular program.

2. *Example.* An example of a program under which the creditor can ask for and consider information about a prohibited basis is an energy conservation program to assist the elderly, for which the creditor must consider the applicant's age.

* * * * *

Russell Vought,

Acting Director, Consumer Financial Protection Bureau.

[FR Doc. 2025–19864 Filed 11–12–25; 8:45 am]

BILLING CODE 4810–AM–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 705

[EPA–HQ–OPPT–2020–0549; FRL–7902.3–01–OCSPP]

RIN 2070–AL29

Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) Data Reporting and Recordkeeping Under the Toxic Substances Control Act (TSCA); Revision to Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) is proposing amendments to the Toxic Substances Control Act (TSCA) regulation for reporting and recordkeeping requirements for perfluoroalkyl and polyfluoroalkyl substances (PFAS). As promulgated in October 2023, the regulation requires manufacturers (including importers) of PFAS in any year between 2011–2022 to report certain data to EPA related to exposure and environmental and health effects. EPA is proposing to incorporate certain exemptions and other modifications to the scope of the reporting regulation. These exemptions would maintain important reporting on PFAS, consistent with statutory requirements, while exempting reporting on activities about which manufacturers are least likely to know or reasonably ascertain.

DATES: Comments must be received on or before December 29, 2025. Comments on the information collection provisions of this proposed rule under the Paperwork Reduction Act (PRA) must be received by the Office of Management and Budget's Office of Information and Regulatory Affairs (OMB–OIRA) on or before December 15, 2025. Please refer to the PRA section under ''Statutory and Executive Order Reviews'' in this preamble for specific instructions.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2020–0549, through the Federal eRulemaking Portal at *https://www.regulations.gov*. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets*.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Megan Nelson, Chemical Information, Prioritization, and Toxics Release Inventory Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 498–1248; email address: *nelson.megan.m@epa.gov*.

For general information contact: The TSCA Assistance Information Service Hotline, Goodwill Vision Enterprises, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action may apply to you if you have manufactured (defined by statute at 15 U.S.C. 2602(9) to include import) PFAS for a commercial purpose at any time from January 1, 2011, through December 31, 2022. The following list of North American Industry Classification System (NAICS) codes is not intended to be exhaustive but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Utilities (NAICS code 22);
- Manufacturing (NAICS codes 31 through 33);
- Wholesale trade (NAICS code 42); and
- Waste management and remediation services (NAICS code 562).

This list details the types of entities EPA is currently aware could potentially be impacted by this action. Other types of entities could also be impacted. To determine whether your entity is impacted by this action, please examine the applicability criteria found in 40 CFR 705.10 and 705.12. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Any use of the term ''PFAS'' or ''perfluoroalkyl or polyfluoroalkyl substance'' refers to chemical substances that meet the structural definition of PFAS codified at 40 CFR 705.3. PFAS is defined as including at least one of these three structures:

- R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons;
- R-CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons; and
- $CF_3C(CF_3)$R′-R″, where R′ and R″ can either be F or saturated carbons.

For a more thorough discussion of the chemical substances included in this rule, please see Unit III.A of the final rule (88 FR 70516, October 11, 2023) (FRL–7902–02–OCSPP).

This rule does not require reporting on substances that are excluded from the definition of ''chemical substance'' in TSCA section 3(2)(B). Those exclusions include, but are not limited to: any pesticide (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)) when manufactured, processed, or distributed in commerce for use as a pesticide; any food, food additive, drug, cosmetic, or device, as defined by the Federal Food, Drug, and Cosmetic Act (FFDCA), when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic or device; tobacco or any tobacco product; any source material, special nuclear material, or byproduct material as such terms are defined in the Atomic Energy Act of 1954 (AEA); or, any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954. A PFAS may be considered a ''chemical substance'' as defined under TSCA for some, but not all, uses of the PFAS. Some uses may be excluded from the definition of ''chemical substance,'' as outlined under TSCA section 3(2)(B). PFAS