December 15, 2025

Acting Director Russell Vought
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Equal Credit Opportunity Act (Regulation B); Docket No. CFPB 2025-0039 or RIN 3170-AB54 (90 Fed Reg. 50901, Nov. 13, 2025)

Via regulations.gov and 2025-NPRM-ECOA@cfpb.gov.

Dear Acting Director Vought,

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the American Civil Liberties Union Foundation ("ACLU") submit this comment in response to the Consumer Financial Protection Bureau's ("CFPB") Proposed Rule, which aims to amend essential provisions of the regulations implementing the Equal Credit Opportunity Act ("ECOA"). **We strongly urge CFPB to immediately withdraw this NPRM, which would drastically transform the enforcement of ECOA and severely undermine its purpose.** It represents the most sweeping substantive changes to Regulation B since its promulgation five decades ago. The Proposed Rule seeks to do away with disparate impact liability, undermine protections against pre-application discouragement, and effectively eliminate any meaningful special purpose credit programs.

In summary, the Proposed Rule is inconsistent with ECOA, its legislative history, and relevant Supreme Court decisions. It would drastically impact the civil rights of Black people and other people of color, women, older people, and other consumers the CFPB is charged with protecting. The Proposed Rule strikes at the core purpose of ECOA, which is to ensure equal access to credit. Furthermore, the Proposed Rule comes at a time in which the financial services industry is undergoing rapid technological changes that could make it even more difficult for consumers to become aware–or to prove–that they have been subjected to unlawful discrimination. Given these concerns described in these adverse comments, individually and in combination, the NPRM should be withdrawn.

The Lawyers' Committee is a nonpartisan, nonprofit civil rights organization founded in 1963 by the leaders of the American bar at the request of President John F. Kennedy to secure equal justice for all through the rule of law by targeting the inequities confronting Black Americans and other people of color. The Lawyers' Committee uses legal advocacy to achieve racial justice and ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. As part of this work, the Lawyers' Committee has participated as counsel or *amicus curiae* in cases addressing race, ethnicity, and national origin discrimination in a wide range of subjects, including education, employment, health care and fair housing. The Lawyers' Committee advocates for policies that foster inclusive, integrated communities that are free from discrimination and that provide access to opportunity for all their residents, including Black families that have been subjected to discriminatory housing policies. *See, e.g., MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2nd Cir., 2016).

For more than 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. With more than three million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., to advance the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, familial or marital status, status as a recipient of public assistance, or record of arrest or conviction. Throughout our history, the ACLU has worked to dismantle barriers to housing, credit, employment, and other economic opportunities through advocacy and litigation, including challenges to discriminatory online ad-targeting practices that conceal economic opportunities from historically marginalized groups.

I. Disparate Impact Liability is Crucial to Fulfill ECOA's Purpose of Ensuring Equal Access to Credit For All.

By narrowing the scope of prohibited conduct to that which can be shown to be intentionally discriminatory, the Proposed Rule guts a key tool to root out policies that unjustifiably harm some groups more than others and severely limits opportunities for people to seek redress for discrimination. Disparate impact standards recognize that policies and practices that appear neutral can still cause significant, disproportionate, discriminatory harm. In these instances, creditors must be able to show that such policies are justified by a substantial, legitimate reason and that there is no less discriminatory alternative available.

Furthermore, the disparate impact regulations help ensure that public funds – to which all taxpayers contribute, irrespective of race, color, national origin, sex, and other protected characteristics – are not spent in any fashion that causes or entrenches discrimination. As the

United States Supreme Court has explained, policies that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas.[1] ECOA and its implementing regulations only require the removal of artificial, arbitrary, and unnecessary barriers when those barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

ECOA and other civil rights laws, moreover, have long incorporated a disparate impact approach because discriminatory motives are often covert. This makes discrimination difficult to expose and prove directly. Federal agencies, Congress, and the Supreme Court have all recognized that in the context of civil rights enforcement, intent-based enforcement is insufficient to root out hidden, pernicious, and persistent biases.[2] Disparate-impact analysis provides an important tool for "uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[3]

Congress understood the importance of using disparate impact as a tool when it passed ECOA. Much of the testimony at the congressional hearings that preceded ECOA's passage focused on the arbitrary and systemic barriers that women faced obtaining credit.[4] These barriers were largely neutral on their face.[5] They included requirements and practices like requiring the credit applicant to have their name and phone number listed in the telephone book at a time when social custom dictated that a married couple list their phone number under the husband's name, discounting income that came from part-time employment or support payments which women overwhelmingly received over men, and disqualifying women from credit due to a lack of credit history when the credit history of a married couple was typically kept under the husband's name.[6] It would be difficult, if not impossible, for a woman to prove that any of these facially-neutral requirements used by creditors constituted intentional discrimination. Disparate impact liability, with its focus on the effects of facially neutral policies, was and continues to be key to ensuring the removal of barriers to credit opportunities against women (as it is for the ongoing identification and removal of barriers impacting Black people, other people of color, and other protected classes).

Congress recognized as much. The Congressional Reports that accompanied ECOA specified that it would apply to lending practices that were either motivated by discrimination or

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[1] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971); *City of Rome v. United States*, 446 U.S. 156, 176–77 (1980); *Gaston Cty. v. United States*, 395 U.S. 285, 297 (1969).
[2] *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 538–39 (2015).
[3] *Id.* at 540.
[4] Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J. L. & POL'Y 576, 601-611 (2018), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1566&context=jlp*; See also Miller v. Am. Exp. Co.*, 688 F.2d 1235, 1239 (9th Cir. 1982) (recognizing that "ECOA was meant to protect women, among others, from arbitrary denial or termination of credit").
[5] Taylor, *supra* note 4.
[6] *Id.*

had a discriminatory effect.[7] The Reports further state that ECOA's prohibition against credit discrimination be modeled on Title VII's prohibition against employment discrimination.[8] Both Reports, in fact, explicitly endorsed the *Griggs* "effects test," adopted by the Supreme Court only five years earlier, as a method for providing discrimination under ECOA:

> The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor. 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 v. Duke Power Company*, 401 U.S. 424 (1971), and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.[9]

Unsurprisingly, ECOA's implementing agency (first the Board of Governors of the Federal Reserve and now the CFPB) has always recognized that Congress included disparate impact liability as a tool to effectuate ECOA's promise of equal access to credit. The Federal Reserve noted that ECOA's legislative history states that "courts are directed to take account of the 'effects' test developed in employment discrimination cases" when beginning the process of implementing ECOA regulations.[10] And Regulation B explicitly adopts this effects test.[11] In fact, many of the specific prohibitions included in Regulation B address the facially-neutral practices that made it difficult for women to access credit like requiring a telephone listing in the name of the credit applicant or discounting income that comes from part-time employment or support payments.[12] Protecting the ability of the CFPB to use disparate impact liability when enforcing ECOA ensures that it has the power to address the facially neutral practices that prompted Congress to pass ECOA in the first place.

The Proposed Rule makes passing and dismissive reference to this history, but fails to explain how eliminating disparate-impact liability can be reconciled with Congress' clear intent to include these claims in ECOA enforcement, and its judgment that disparate-impact liability furthers ECOA's broad nondiscrimination purpose. This failure cannot be squared with the

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[7] Francesca Lina Procaccini, *Stemming the Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 HARV. L. & POL'Y REV. S43, S54 (2015), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2013/11/9.2_Procaccini.pdf.
[8] *Id.*
[9] *Id.*
[10] Taylor, *supra* note 4, at 600-601.
[11] *Id.*
[12] 12 C.F.R. § 202.6.

Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). There, in holding that the Fair Housing Act (FHA) permits liability for policies that have an unjustified disparate impact based on protected characteristics, the Supreme Court closely examined the FHA's statutory purposes, agency interpretations over time, and legislative history, and recognized the salience of that context in interpreting the statutory language. *Id.* at 536-39. The Proposed Rule purports to align ECOA enforcement with *Inclusive Communities*, but in fact, the Supreme Court's multifaceted analysis supports the conclusion that ECOA authorizes disparate-impact claims.

In *Inclusive Communities*, the Court concluded that the disparate impact framework furthered the FHA's "central purpose . . . to eradicate discriminatory practices within a sector of the Nation's economy." *Id.* at 521. As the Court observed, disparate-impact theory "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Id.* So too with ECOA. The *Inclusive Communities* rationale applies powerfully in the credit context, where consumers rarely have visibility into lending decisions, where multiple players may be involved in any given decision, and where reliance on seemingly neutral statistical models and algorithms may perpetuate entrenched historical discrimination.[13] The Proposed Rule notes that "consumers would remain protected under ECOA from disparate treatment," but it fails to grapple with any of these unique hurdles to uncovering and demonstrating disparate treatment. The agency has not explained how it will effectuate ECOA's central purpose of ensuring equal credit opportunity without this vital tool for rooting out covert bias. Nor does the agency account—in the Regulatory Impact Analysis or otherwise—for the significant economic costs of opening the door even wider to discrimination against creditworthy borrowers.

Disparate impact liability has been fundamental to rooting out discrimination in credit and lending opportunities, including by the Department of Justice (DOJ) and other federal agencies. In 2011, DOJ reached a $335 million residential fair lending settlement, the largest in its history, to resolve allegations that Countrywide Financial Corporation and its subsidiaries engaged in a widespread pattern or practice of discrimination against qualified African-American and Hispanic borrowers in their mortgage lending from 2004 through 2008.[14]

In 2013, CFPB and the DOJ filed a lawsuit in the U.S. District Court for the Eastern District of Michigan against a bank, alleging that it engaged in discriminatory lending practices.

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[13] *See, e.g.*, *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (concluding that disparate impact claims are cognizable under ECOA, noting that "otherwise, the Act will provide a remedy only in those rare cases where a company deciding on credit expressly states it is denied for a prohibited reason"); *Barrett v. H&R Block, Inc.*, 652 F. Supp. 2d 104 (D. Mass. 2009) (noting that "the agency charged with interpreting the ECOA, the Federal Reserve Board ('FRB'), has concluded that Congress intended to allow disparate impact claims under the statute").

[14] Press Release, *Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, U.S. DEPT. OF JUST.: OFF. OF PUB. AFFAIRS (Dec. 21, 2011), https://www.justice.gov/archives/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination.

The plaintiffs alleged that, as a result of the defendant's policies and practices, African-American, Asian/Pacific Islander, and Hispanic borrowers unfairly paid higher prices for their automobile loans than non-Hispanic White borrowers. Under the consent order, the defendant agreed to implement policies and procedures designed to ensure that the dealer markup on automobile retail installment contracts was negotiated in a nondiscriminatory manner. In addition, the defendant would compensate certain African-American, Hispanic, and Asian/Pacific Islander borrowers through the establishment of an $80 million dollar settlement fund.[15]

In 2015, CFPB and DOJ filed a joint complaint against Provident Funding Associates for charging higher broker fees on mortgage loans to African-American and Hispanic borrowers. The agencies also filed a proposed order that, if entered by the court, would require Provident to pay $9 million in damages to harmed African-American and Hispanic borrowers.[16]

In 2023, a Pennsylvania-based bank agreed to pay $3 million to settle a federal lending discrimination lawsuit alleging the company refused to provide credit services to people in majority-Black and Hispanic neighborhoods.[17] Indeed, the the unprecedented and improper nature of the Proposed Rule is further underscored by recent efforts by the CFPB, under new leadership, to terminate existing consent decrees—which one federal district court referred to as "breathtaking" and "unprecedented" while rejecting the CFPB's motion to vacate the final judgment and consent decree in *Bureau of Consumer Financial Protection v. Townstone Financial, Inc.*, 350 F.R.D. 32, 38-39 (N.D Ill. 2025).

But equal access to credit opportunities remains illusory for many Black households and other households of color. While it is rare to see creditor practices that explicitly discriminate based on race—especially with the increasing use of algorithmic models and other technologies to make lending decisions,[18] research has shown that Black and Latinx applicants are more likely

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[15] *United States v. Ally Fin. Inc.*, No. 2:13-cv-15180 (E.D. Mich. filed Dec. 20, 2013); *See also* Press Release, *CFPB and DOJ Take Action Against National City Bank for Discriminatory Mortgage Pricing*, CONSUMER FIN. PROT. BUREAU (Dec. 23, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-take-action-against-national-city-bank-for-discriminatory-mortgage-pricing/.

[16] Press Release, *CFPB and Department of Justice Take Action Against Provident Funding Associates for Discriminatory Mortgage Pricing*, CONSUMER FIN. PROT. BUREAU (May 28, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-department-of-justice-take-action-against-provident-funding-associates-for-discriminatory-mortgage-pricing/.

[17] *United States v. Essa Bank & Tr.*, No. 2:23-cv-02065, Compl. ¶2 (E.D. Pa. filed May 31, 2023); *See also* Aaron Moselle, *Bank set to settle lawsuit alleging 'redlining' in Philly area*, WHYY (June 1, 2023), https://whyy.org/articles/essa-bank-lending-discrimination-lawsuit-redlining/.

[18] See, e.g., Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, THE MARKUP (Aug. 25, 2021), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms./; *See also CFPB and Department of Justice Take Action Against Provident Funding Associates*, *supra* note 16.

to be denied mortgage loans than white applicants with similar credit backgrounds.[19] Another study found that lenders in 2019 were 80 percent more likely to deny home loans to Black applicants and 70 percent more likely to deny Native American applicants than to white applicants with similar financial backgrounds.[20] Moreover, issues like lack of inheritances and other barriers to entry, including income and access to credit, work against the ability of Black and Hispanic families to amass wealth required for acquiring assets for personal financial security and community investment.[21] Black and Hispanic consumers are also more likely to lack a credit history or have too scant a history to generate a credit score, referred to as being 'credit invisible.'[22] The denial rate for Black families (upward of 15% for purchase and 35% for refinance) is more than double the denial rate for white families (5% for home purchases and 15% for refinance).[23] The ability to use disparate impact liability to target facially neutral practices that disproportionality harm communities of color, therefore, remains crucial.

II. The proposed changes to the anti-discouragement provisions will undermine ECOA's purpose of making credit equally available to protected classes and hinder agency enforcement against modern-day redlining.

Since 1975, ECOA's implementing regulation, Regulation B, has clarified the common-sense understanding that the civil rights protections to ensure equal access to credit codified in ECOA include the prohibition on discouraging protected groups from applying for credit in the first place. ECOA Regulation B, § 1002.4(b) prohibits a creditor from "mak[ing] 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." Civil rights advocates, enforcement agencies, and the courts have consistently found that discriminatory statements, coded language, and unequal treatment at the pre-application stage can powerfully deter consumers of color, women, and other protected groups from seeking credit and must remain in ECOA's scope.[24]

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[19] Miguel Miguel, *American Dream Deferred: The Effects of Credit Worthiness on Mortgage Access for Racialized Minorities in Los Angeles County*, UCLA Latino Pol'y & Pol. Inst. (June 7, 2023), https://latino.ucla.edu/wp-content/uploads/2023/06/american-dream-deferred_06.07.2023.pdf.

[20] Martinez & Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, *supra* note 18.

[21] Dana M. Peterson & Catherine L. Mann, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, Citi Glob. Persps. and Solutions 48 (Sept. 22, 2020), https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D.

[22] *Past Imperfect: How Credit Scores "Bake In" and Perpetuate Past Discrimination* 1, Nat'l Consumer L. Ctr., https://www.nclc.org/wp-content/uploads/2016/05/20240227_Issue-Brief_Past-Imperfect.pdf (last updated Feb. 2024).

[23] Peterson & Mann, *supra* note 21.

[24] Lisa Rice, *Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color*, Nat'l Fair Hous. All. (Feb. 28, 2019), https://nationalfairhousing.org/wp-content/uploads/2019/04/Missing-Credit.pdf.

One clear example of the importance of this past enforcement by the CFPB is in relation to a final judgment and consent decree relating to Townstone, a mortgage lender. Beginning in or around 2014, Townstone began broadcasting its own radio show and podcast, co-hosted by the company's sole owner and CEO, called the Townstone Financial Show. The CFPB found that during the radio show, the hosts made comments on several occasions discouraging Black applicants from applying for mortgage loans, including making disparaging comments about the spending habits of women living in majority-Black neighborhoods; referring to predominantly Black communities as "crazy" and as places where you "drive very fast" and "don't look at anybody", "hoodlum weekend" between Friday and Monday, in need of heavy policing, and as places that passing through would give you the same rush as sky diving; and referred to a downtown Chicago grocery store as "Jungle Jewel" and as a scary place. Statistical information showed that Townstone received fewer mortgage applications from Black applicants, fewer mortgage applications for properties in neighborhoods with a high-Black population (defined as neighborhoods in which 80% or more of residents are Black), and fewer mortgage applications for properties in neighborhoods with a majority of Black residents.[25] As indicated above, in June, a federal district court rejected an attempt by the CFPB to vacate the final judgment and consent decree pertaining to Townstone, referring to it as "breathtaking" and "unprecedented."[26]

The Bureau's proposed revisions to the anti-discouragement provisions, however, would undermine ECOA's mandate, ignore its enforcement history, and perpetuate racial, gender, and other unjust inequities in access to credit. First, by redefining discouragement to cover only explicit words or images, the proposal erases decades of recognition that discrimination against communities of color, women, and other marginalized communities often operates through conduct and structural practices—such as selective marketing and unequal pre-application treatment—rather than simply overt statements.[27] And, by categorically excluding "encouraging statements" from liability, the proposed revisions threaten to create an obvious loophole for creditors to unlawfully express preference for some potential applicant groups while implicitly excluding others. Taken together, these proposed revisions are profoundly troubling. They threaten to gut vital civil rights protections and reopen the door to subtle but powerful forms of discrimination that continue to deny communities of color, women, and other marginalized groups equal access to credit.[28]

<u>Definition of "oral or written statement"</u>

[25] *Consumer Fin. Prot. Bureau v. Townstone Fin., Inc.*, 107 F.4th 768, 772 (7th Cir. 2024).
[26] *Consumer Fin. Prot. Bureau v. Townstone Fin., Inc.*, 350 F. Supp. 32, 38-39 (N.D. Ill. 2025).
[27] See, e.g. Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America (2017); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 Mich. J. Race & L. 335 (2003).
[28] Bruce Mitchell & Juan Franco, *HOLC 'Redlining' Maps: The Persistent Structure of Segregation and Economic Inequality*, Nat'l Cmty. Reinvestment Coal. (Mar. 20, 2018), https://ncrc.org/holc/.

As noted, § 1002.4(b) prohibits a creditor from "mak[ing] any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application." The proposal seeks to redefine "oral or written statements" to mean only explicit words or images rather than the long-standing interpretation that discouragement includes "acts or practices".[29] Narrowing the definition of oral or written statement would invite precisely the kind of evasion Congress anticipated: lenders would be free to signal bias through conduct or selective engagement so long as they avoided explicit verbal or written cues. This shift threatens to eliminate coverage of many of the most common and effective forms of discouragement—such as selective marketing, unequal assistance, steering, and other forms of differential pre-application treatment that have been found to signal to borrowers of color that they were not expected or welcome to seek credit long before an application is filed.[30] For example: creditors could simply stop marketing in Black neighborhoods[31]; treat walk-in customers differently based on race[32]; or, fail to provide language access services to LEP borrowers[33], and claim none of these are "statements" under the proposed definition even though they unquestionably discourage applicants and have been treated by regulators as such for decades.

Statement to applicants or prospective applicants

The anti-discouragement provisions have been interpreted to prohibit the selective encouragement of certain applicants or prospective applicants on the basis that such encouragement could discourage applicants or prospective applicants who did not receive it. The Bureau is proposing to revise § 1002.4(b) and its commentary to sanction the use of encouraging statements that express preference for a particular group of credit applicants, an interpretation that would weaken ECOA's protections and is fundamentally inconsistent with both the statute and decades of civil-rights enforcement. Specifically, it would revise the commentary to state that "encouraging statements directed at one group of consumers cannot discourage applicants or prospective applicants who were not the intended recipients of the statements."

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[29] *Equal Credit Opportunity Act (Regulation B)*, 90 Fed. Reg. 50,901, 50903 (proposed Nov. 13, 2025) (to be codified at 12 C.F.R. pt. 1002), https://www.govinfo.gov/content/pkg/FR-2025-11-13/pdf/2025-19864.pdf.

[30] See, e.g., *CFPB v. Trident Mortg. Co. LP*, No. 2:22-cv-02936-GEKP, ECF No. 13 (E.D. Pa. Sept. 14, 2022); *CFPB v. Hudson City Sav. Bank, F.S.B.*, No. 2:15-cv-07056-CCC-JBC, ECF No. 9 (D.N.J. Nov. 4, 2015); *United States v. First Merchants Bank*, No. 1:19-CV-02365-JPH-MPB, 2019 WL 3779768 (S.D. Ind. Aug. 12, 2019).

[31] Rachel Swarns, *Biased Lending Evolves, and Blacks Face Trouble Getting Mortgages*, N.Y. TIMES (Oct. 30, 2015), https://www.nytimes.com/2015/10/31/nyregion/hudson-city-bank-settlement.html.

[32] Press Release, *Justice Department and Consumer Financial Protection Bureau reach settlement to resolve allegations of auto lending discrimination by Fifth Third Bank*, U.S. DEPT. OF JUST.: OFF. OF PUB. AFFAIRS (Sept. 28, 2015), https://www.justice.gov/archives/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-resolve.

[33] *Barriers to Language Access in the Housing Market: Stories from the Field*, AM. FOR FIN. REFORM (May 2016), https://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.

In fair housing, employment, education, and other credit markets, courts and regulators have long recognized that expressing preference for one group necessarily signals discouragement or exclusion to others. For example, in 2015, the Justice Department and the Bureau reached a settlement with Hudson City Savings Bank to resolve allegations of redlining predominately Black and Hispanic neighborhoods in its residential mortgage lending practices.[34] Hudson City allegedly marketed heavily to white suburban neighborhoods and steered clear of Black and Hispanic neighborhoods as they opened branches across New York and Connecticut. Similarly, targeting certain Blacks and Latinos for predatory loans ("reverse redlining") has also signaled discouragement. In Georgia, a Black Plaintiff survived summary judgement in his claim alleging that the Defendants intentionally targeted African–Americans by advertising properties via signs in front of each house for sale and via word of mouth, both of which were designed to reach the primarily African–American residents of communities where the Defendants purchased properties.[35] Under the proposed revision, this type of selective encouragement might escape scrutiny because the "discouragement" was not explicitly addressed to consumers of color. Thus, the proposed revision threatens to create an obvious and dangerous loophole – that a creditor could target its outreach, advertising, and its services solely to predominately white areas as long as its statements were framed as "encouraging" for the intended audience regardless of the discouraging effect on potential applicants of color.

Moreover, the Proposed Rule undermines protections by introducing a heightened standard for discouragement that is overly narrow, impracticable, and inconsistent with longstanding precedent. Specifically, the Proposed Rule would (1) prohibit discouragement "only if a creditor 'knows or should know' that the statement would cause a reasonable person to be discouraged," (2) prohibit discouragement "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 [their] prohibited basis characteristic(s),'" and (3) to narrow protections to apply "only to statements that express a discriminatory preference or policy of exclusion," rather than those that "express, imply, or suggest" such a preference or policy. The Proposed Rule also effectively carves out exceptions for certain types of "non-prohibited statements that a creditor may make," including those:

> (1) in support of 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 stories, and its crime statistics,

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[34] Press Release, *Justice Department and Consumer Financial Protection Bureau Reach Settlement with Hudson City Savings Bank to Resolve Allegations of Mortgage Lending Discrimination*, U.S. DEPT. OF JUST.: OFF. OF PUB. AFFAIRS (Sept. 24, 2015), https://www.justice.gov/archives/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-hudson-city; *See also Consumer Fin. Prot. Bureau v. Hudson City Sav. Bank, F.S.B.,* 2:15-cv-07056, Compl. (D.N.J. filed Sept. 24, 2015), https://files.consumerfinance.gov/f/201509_cfpb_hudson-city-joint-complaint.pdf.

[35] *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1341 (N.D. Ga. 2018).

and (3) encouraging consumers to seek out resources to develop their financial literacy.

These changes are unduly narrow, impracticable, and inconsistent with ECOA's statutory purpose, legislative history, and legal precedent recognizing that such references may be evidence of discrimination based on the circumstances. Notably, the categories of "non-prohibited statements" under the Proposed Rule closely track the discriminatory statements made by Townstone representatives that were submitted by CFPB as evidence of unlawful discouragement under § 1002.4(b).[36] As discussed above, CFPB's discouragement-related allegations specifically referenced Townstone representatives' statements about their support of police in majority-Black neighborhoods, derogatory comments about a grocery store based on its patrons "from all over the world," views that various majority-Black neighborhoods were dangerous places, and disparaging comments about the spending habits of women living in majority-Black neighborhoods.[37] The Proposed Rule, therefore, threatens to immunize the very types of statements very recently recognized by courts and the agency as unlawful discouragement. We urge the agency to rescind the Proposed Rule to avoid weakening these vital protections against discrimination in credit and lending opportunities.

Discriminatory Ad-Targeting Practices and Other Algorithmic Discrimination

Narrowing ECOA's anti-discouragement provision to "oral or written statements" instead of the longstanding application to "acts or practices" greatly weakens the statute. The proposed revisions to the discouragement provisions in Regulation B are particularly harmful in light of the ways that discriminatory online ad-targeting practices increasingly determine who does and does not have access to information about credit opportunities. Without a robust interpretation of the discouragement provision, ECOA cannot serve its core purpose of preventing practices used to limit economic opportunities for people from marginalized backgrounds, including people of color and women.

Discriminatory advertising practices for credit, housing, and other important economic opportunities have long been used to segregate unlawfully, either through ads containing discriminatory limitations or ads with neutral content published in a discriminatory manner. In the context of housing and mortgage lending, discriminatory advertising practices fit into a larger system of racial segregation and systematic exclusion of Black people and other people of color from housing and lending opportunities through redlining practices.[38] As developers built homes using federal dollars conditioned on selling to white families, they used discriminatory

[36] *CFPB v. Hudson City Sav. Bank*, Compl. ¶¶ 33–41 (D.N.J. filed Sept. 24, 2015).
[37] *CFPB v. Hudson City Sav. Bank*, Compl. ¶¶ 33–38 (D.N.J. filed Sept. 24, 2015).
[38] *See* ROTHSTEIN, *supra* note 24, at 18-24; *See also* Arnold R. Hirsch, *"The Last and Most Difficult Barrier": Segregation and Federal Housing Policy in the Eisenhower Administration, 1953-1960*, POVERTY & RACE RSCH. ACTION COUNCIL (Mar. 2005), https://www.prrac.org/pdf/hirsch.pdf.

advertising to solicit white buyers.[39] Similarly, discriminatory ad-targeting practices have a long history of causing and perpetuating inequities in the workplace and beyond. Newspapers and other publications routinely relied on gender-based stereotypes and segregated job advertisements, in separate columns, for men and women. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376 (1973) (upholding ordinance prohibiting segregated employment ads).

Online ad-targeting practices play a significant role in perpetuating and exacerbating that legacy of discrimination in this country. Online ad-targeting directs ads to specific individuals or groups, and anyone outside the targeted audience will never receive the ad, thereby effectively denying them access to that opportunity. After analyzing the data practices of major Internet service providers, the Federal Trade Commission (FTC) found that many "allo[w] advertisers to target consumers by their race, ethnicity, sexual orientation, economic status, political affiliations, or religious beliefs."[40] Such ad-targeting practices have drawn significant attention from the FTC, the Federal Reserve, and other agencies as a result of the significant harms and inequities they cause.[41]

The significant harms of discriminatory ad-targeting practices led the ACLU and other civil rights groups to file charges with the Equal Employment Opportunity Commission (EEOC) to challenge Facebook's use of ad-delivery algorithmic tools that allowed advertisers to select the categories of people that they wanted to see their ads.[42] Employers used Facebook's ad-delivery tool to exclude women and older people from job ads. The EEOC issued a decision finding reasonable cause that Facebook's online ad-targeting practices violated federal antidiscrimination law,[43] leading to a historic settlement agreement by Facebook to change its advertising platform so that advertisers could no longer exclude users from learning about credit, housing, or

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[39] Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass at 20 (1993).

[40] *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers*, Fed. Trade Comm'n at iii (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

[41] *Id.*; *See also* Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, Fed. Trade Comm'n (Apr. 19, 2021), https://privacysecurityacademy.com/wp-content/uploads/2021/04/Aiming-for-truth-fairness-and-equity-in-your-companys-use-of-AI.pdf; Carol Evans & Westra Miller, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook, Third Issue, 2019, https://www.consumercomplianceoutlook.org/2019/third-issue/from-catalogs-to-clicks-the-fair-lending-implications-of-targeted-internet-marketing/.

[42] Press Release, *In Historic Decision on Digital Bias, EEOC Finds Employers Violated Federal Law When They Excluded Women and Older Workers from Facebook Job Ads*, Am. Civ. Liberties Union (Sept. 25, 2019), https://www.aclu.org/press-releases/historic-decision-digital-bias-eeoc-finds-employers-violated-federal-law-when-they.

[43] *Id.*

employment opportunities based on protected characteristics.[44] The company later entered into an additional settlement of a lawsuit brought by the U.S. Department of Justice for discriminatory ad targeting and delivery practices.[45] Through litigation and advocacy efforts, the Lawyers' Committee, the ACLU, and other civil rights organizations have continued to highlight and challenge the pervasive use of discriminatory ad-targeting practices for housing, credit, and employment opportunities, as well as the ways in which such practices reflect and replicate existing disparities in society and inflict lasting harms on individuals from marginalized backgrounds.[46] Since then, courts have recognized the harms of discriminatory ad-targeting practices, including the use of ad-delivery algorithms that prevent users from having the same opportunity to view ads for housing and other economic opportunities based on protected characteristics. *See, e.g.*, *Vargas v. Facebook, Inc.*, No. 21-16499, 2023 WL 6784359, at *1-3 (9th Cir. Oct. 13, 2023).

The proposed changes to Regulation B's anti-discouragement protections would eviscerate ECOA's ability to address these harmful practices. Narrowing ECOA's anti-discouragement provision to "oral or written statements" instead of the longstanding application to "acts or practices" would threaten to allow creditors to use digital ad-targeting tools to solely direct credit opportunities to certain people based on race, gender, or other protected characteristics and effectively ensure exclusion of others with different characteristics. As long as the oral or written content of the ad is not explicitly discouraging an application by protected groups, under the proposed regulation, an act or practice, even for example an advertiser using targeting tools to intentionally remove Black people or women from the pool of ad recipients, may not be unlawful. Likewise, the proposed commentary that "encouraging statements directed at one group of consumers cannot discourage applicants or prospective applicants who were not the intended recipients of the statements" ignores that in the marketplace of today, creditors often communicate with prospective applicants through online ad-targeting tools that are uniquely exclusionary. When directing an encouraging statement to a

[44] Galen Sherwin & Esha Bhandari, *Facebook Settles Civil Rights Cases by Making Sweeping Changes to Its Online Ad Platform*, AM. CIV. LIBERTIES UNION (Mar. 19, 2019), https://www.aclu.org/news/womens-rights/facebook-settles-civil-rights-cases-making-sweeping.

[45] Press Release, *Justice Department Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising*, U.S. DEPT. OF JUST.: OFF. OF PUB. AFFAIRS (June 21, 2022), https://www.justice.gov/archives/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known.

[46] *See, e.g.*, Brief for the Laws. Comm. for Civ. Rts. Under L. et al. as Amici Curiae Supporting Appellants, *Liapes v. Facebook, Inc.*, No. A164880 (Cal. App. Ct. filed June 29, 2023), https://www.aclu.org/cases/liapes-v-facebook-inc?document=Amicus-Brief; Brief for the ACLU Found. et al. as Amici Curiae Supporting Appellants, *Opiotennione v. Bozzuto Mgmt. Co.*, No. 21-1919 (4th Cir. filed Dec. 17, 2021), https://www.aclu.org/cases/neuhtah-opiotennione-v-bozzuto-management-company-et-al?document=neuhtah-opiotennione-v-bozzuto-management-company-et-al; Brief for the ACLU Found. et al. as Amici Curiae Supporting Appellants, *Vargas v. Facebook, Inc.*, No. 21-16499 (9th Cir. filed Jan. 26, 2022), https://www.aclu.org/cases/vargas-v-facebook-inc?document=Vargas-et-al-v-Facebook-amicus-brief-; *Nat'l Fair Hous. All., et al. v. Facebook, Inc.*, No. 1:18-cv-02689-JGK (S.D.N.Y. June 25, 2018).

group of consumers through online targeting tools, a creditor inherently discourages those who are not the intended recipients because those outside the target group will not receive the opportunity at all.

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Collectively, the proposed changes weaken ECOA's anti-discouragement protections. Rather than preventing discrimination at its earliest and most insidious stages, the proposed revisions threaten to permit creditors to discriminate through conduct, structure, and selective messaging—so long as they avoid explicit statements of discriminatory intent. This result is inconsistent with ECOA's text, purpose, and enforcement history, and would re-open pathways for discriminatory credit access that the statute was enacted to close.

III. The proposed changes to Special Purpose Credit Programs would run counter to the legislative intent of Congress and perpetuate discrimination

The proposed rule changes to ECOA Regulation B will perpetuate discrimination by severely limiting the reach of Special Purpose Credit Programs (SPCP); rejecting the legislative intent of ECOA. CFPB "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 its Notice of Proposed Rulemaking, CFPB cited to *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. __ (2025); for the proposition that there is no exception to civil rights laws (e.g., Title VII) that allows for discrimination against majority groups.[47] However, the Court identified two compelling interests that permit resorting to race-based government action in their *SFFA* decision; one of which is remediating specific, identified instances of past discrimination that violated the Constitution or a statute.[48] SPCPs, indeed, are focused on remediating specific, identified instances of past (and current) credit discrimination that violate ECOA. Significantly hindering the scope of SPCPs, as the NPRM proposes, will make it even more difficult for Black and Hispanic families to identify and remedy credit based discrimination.[49]

SPCPs play an essential role in identifying and redressing historical barriers to credit equity that persist to this day.[50] SCPCs work with marginalized communities to create access to credit and, ultimately, generate wealth in historically underrepresented communities. In an effort

[47] *Equal Credit Opportunity Act (Regulation B), supra* note 29.
[48] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207, 143 S. Ct. 2141, 2162, 216 L. Ed. 2d 857 (2023).
[49] *Equal Credit Opportunity Act (Regulation B), supra* note 29.
[50] *See Griggs*, 401 U.S. at 430–31; *City of Rome*, 446 U.S. at 176–77; *Gaston Cty.*, 395 U.S. at 297.

to combat inequality toward historically marginalized communities, Congress clarified that SPCPs were permitted to consider a prohibited basis, such as race, national origin, or sex, in programs "specifically designed to prefer members of economically disadvantaged classes"[51] and "to increase access to the credit market by persons previously foreclosed from it."[52]

Today, Black families continue to trail other races in access to credit. CFPB reported in 2019 that Black families continued to be the most likely racial group to be denied a mortgage for home purchase or refinance.[53] Under the current interpretation of Regulation B, a for-profit lender could rely upon historical evidence of lending discrimination to focus an SPCP on homebuyers of color.[54] If a lender makes such a determination, the SPCP could offer relaxed underwriting guidelines, down payment assistance, reduced interest rates, or other favorable terms and conditions to the designated class of persons. By providing access to credit on favorable terms, an SPCP could address racial inequities created by historical redlining of Black communities and communities of color areas and its continuing legacy. Such investments in these neighborhoods could increase homeownership or home appreciation rates and have a broader impact on the racial wealth gap.[55] The programs also seek to redress the long-standing Black-White homeownership gap: 71% of White households are homeowners vs. 41% of Black households.[56]

However, the proposed changes to ECOA Regulation B exceed the authority of the statute and run counter to the intent of Congress when they clarified the SPCP exception. The proposed prohibition on using race, color, national origin, or sex as eligibility criteria for creating a SPCP perpetuates the falsehood that identifying, analyzing, and creating programs to redress specific forms of discrimination is, in fact, discriminatory. Congress created the SPCP in response to the pervasive discrimination and exclusion that has prevented many borrowers of color from accessing credit on equal terms.[57] The Proposed Rule runs directly in opposition to

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[51] Black families have one third, and Hispanic families one-fourth the financial assets of white families; Dana M. Peterson & Catherine L. Mann, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, CITI GLOB. PERSPS. AND SOLUTIONS 48 (Sept. 22, 2020), https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjJjBJSaTOSdw2DF4xynPwFB8a2jV1FaA3Idy7vY59bOtN2lxVQM%3D.

[52] S. Rept. 94-589, 94th Cong., 2nd Sess., at 7, reprinted in 1976 U.S.C.C.A.N. 403, 409.

[53] *Id.* at 53 (Fig. 89).

[54] 12 C.F.R. § 1002.8 (2025).

[55] *Id.; See also* Scott Susin, *Racial and Ethnic Mortgage Rate Disparities, 2000-2023*, FED. HOUS. FIN. AGENCY (Nov. 13, 2024), https://scottsusin.com/assets/pdf/Racial%20and%20Ethnic%20Mortgage%20Rate%20Disparities,%202000-2023%20-%20FHFA.pdf.

[56] Jung Hyun Choi et al., *Explaining the Black-White Homeownership Gap: A Closer Look at Disparities across Local Markets* at 11, URB. INST., https://www.urban.org/sites/default/files/publication/101160/explaining_the_black-white_homeownership_gap_2.pdf (last updated Nov. 2019).

[57] *Special Purpose Credit Programs: A Tool for Greater Equity* at 2, P'SHIP FOR FIN. EQUITY (Dec. 2023), https://financialequity.net/wp-content/uploads/2023/12/SPCPs-A-Tool-for-Greater-Equity-final.pdf.

the legislative intent of Congress and defangs the most effective tools available for redressing discriminatory lending practices.[58]

The legislative history supporting SPCP is clear and SPCPs have a proven history of providing assistance to households of color.[59] Financial institutions have developed SPCPs to help homeowners of color refinance[60] and provide access to special credit products designed to reduce barriers impeding Black and Latino homebuyers.[61] Major financial institutions like United Wholesale Mortgage[62], Bank of America[63], and Wells Fargo[64] have established SPCPs in recent years to seek out under-represented borrowers.[65] These programs would be unavailable under the proposed Regulation B changes, cutting off tens of millions of dollars of economic investment in historically divested communities.[66]

IV. Conclusion

Disparate impact and the prohibition against discouragement / encouragement has been recognized and upheld by courts and utilized by federal agencies for more than forty years as essential to enforcing equal lending opportunities, which ensure everyone has access to the credit they deserve. Likewise, SPCPs targeted at disadvantaged populations have worked towards similar ends by creating a way to remedy past discrimination. By eliminating decades of

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[58] "[T]he Fed interpreted the ECOA's legislative history to mean that Congress intended the statute to include disparate impact claims. This interpretation is consistent with how the Fed interpreted the ECOA soon after Congress enacted the statute in 1974." *ECOA and Disparate Impact Theory*, *supra* note 4, at 616.
[59] Susin, *supra* note 55; *See also* Liam Reynolds et al., *How People-Based Special Purpose Credit Programs Can Reduce the Racial Homeownership Gap*, URB. INST. (Apr. 22, 2022), https://www.urban.org/urban-wire/how-people-based-special-purpose-credit-programs-can-reduce-racial-homeownership-gap.
[60] Press Release, *Wells Fargo Expands Efforts to Advance Racial Equity in Homeownership*, WELLS FARGO NEWSROOM (Apr. 13, 2022), https://newsroom.wf.com/news-releases/news-details/2022/Wells-Fargo-Expands-Efforts-to-Advance-Racial-Equity-in-Homeownership/default.aspx.
[61] *TD Bank Introduces New Mortgage Loan Product Designed for Minority Communities*, TD STORIES (Mar. 2, 2022), https://stories.td.com/us/en/article/td-bank-introduces-new-mortgage-loan-product-designed-for-minority-communities.
[62] David Krechevsky, *UWM Expands Affordability Offerings For 1st-Time Buyers*, NAT'L MORTG. PRO. (July 12, 2023), https://nationalmortgageprofessional.com/news/uwm-expands-affordability-offerings-1st-time-buyers.
[63] Press Release, *Bank of America Introduces Community Affordable Loan Solution™ to Expand Homeownership Opportunities in Black/African American and Hispanic-Latino Communities*, BANK OF AM. NEWSROOM (Aug. 30, 2022), https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/08/bank-of-america-introduces-community-affordable-loan-solution--t.html.
[64] Doug Page, *Wells Fargo Details Programs To Improve Minority Homeownership*, NAT'L MORTG. PRO. (July 12, 2023), https://nationalmortgageprofessional.com/news/wells-fargo-details-programs-improve-minority-homeownership.
[65] Susin, *supra* note 55.
[66] *Id.*; *See also* Choi et al., *supra* note 56.

precedent under the ECOA, this rule eviscerates essential tools for uncovering and remedying systemic bias in lending that has endured within the market for decades.

As organizations dedicated to combating racial discrimination and its persistent effects in education, housing, economic opportunity, and many other aspects of American life, the Lawyers' Committee and the ACLU oppose this Proposed Rule. In light of all of the important considerations discussed, we strongly urge the CFPB to immediately withdraw its NPRM and to maintain regulations and enforcement that are essential to the purpose of ECOA. If you have any questions or need additional information, please contact Kelechi Agbakwuru, Counsel for Fair Housing & Community Development Project, at kagbakwuru@lawyerscommittee.org or Linda Morris, Senior Staff Attorney for the ACLU Women's Rights Project, at LindaM1@aclu.org.

Sincerely,

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