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Submitted Through Federal eRulemaking Portal at www.regulations.gov to:
The Consumer Financial Protection Bureau (the "CFPB")

Re: **Comment on: CFPB Proposed Rule on Equal Credit Opportunity Act (Regulation B) (the "Proposed Rule")**
(12 CFR Part 1002, Docket No. CFPB-0039); [Fed. Reg. Vol. 90, No. 217, pp. 50901-50923]
[RIN 3170-AB54]

Ladies and/or Gentlemen:

The ACR Project, which works to enforce (and where necessary restore) the Constitution's promise of equal protection, and Manhattan Institute, a nonpartisan public policy research foundation which develops and disseminates ideas fostering greater economic choice and individual responsibility, have reviewed with interest the Proposed Rule. Together, we offer the following comments in support of the Proposed Rule.

I. GENERAL STATEMENT OF SUPPORT

We applaud the CFPB undertaking the onerous task of reconciling its existing regulations with the enacted text of the Equal Credit Opportunity Act (the "ECOA"), as best understood given the constitutional constraint on federal power running parallel to the restraint the Equal Protection Clause imposes on the states. Such reconciliation is well-justified by changed-circumstances and the current status of the jurisprudence. Because it bears directly on the interrelation of the constitutionality of a regulation purporting to impose disparate-impact liability under a statute that does not prohibit utilization of facially neutral, evenhandedly applied policies bearing disparate impacts across demographic groups, we suggest that you add to footnote 61 a citation to *Louisiana v. E.P.A.*, 712 F.Supp.3d 820, 843 (W.D. La. 2024) (holding such administrative imposition of disparate-impact requirements under Title VI unconstitutional).

We offer the below comments both to applaud particular portions of the Proposed Rule and to suggest potential discrete improvements. These comments address the Proposed Rule's changes to the existing ECOA regulation's treatment of disparate impact and of Special Purpose Credit Programs ("SPCPs").

II. CONCERNING CHANGES TO DISPARATE-IMPACT REGULATIONS

In the Proposed Rule's background section, it succinctly quotes the relevant enacted language of the

ECOA both at its inception and after Congress's 1976 amendments. Congress codifies the language relevant to disparate impact at 15 U.S.C. § 1691(a): "It shall be 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)[.]" As the CFPB correctly notes, nothing in this language remotely suggests Congress's adoption of an "effects test" or Congress's ban of facially neutral policies, adopted for nondiscriminatory reasons and enforced even-handedly, that may bear disparate impacts across demographic groups.

While the courts have in some instances recognized or imposed disparate-impact prohibitions and liability in similar nondiscrimination statutes, dating back to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the CFPB should consider that even in the resulting original habitat of disparate-impact theory, further developments strongly suggest both that *Griggs* was wrongly decided and that the Supreme Court will reverse *Griggs* when given the chance. *See* Dan Morenoff, *Disparate-Impact Liability: Unfounded, Unconstitutional, & Not Long for This World*, 26 FEDERALIST SOC'Y REV. 193 (2025). Even if *Griggs* remained good law, though, the CFPB would be right to note that the ECOA's statutory language simply provides no basis to conclude that it bars facially neutral policies, adopted for nondiscriminatory reasons and enforced bearing disparate impacts across demographic groups. The CFPB is of course right to bring itself into compliance with the ECOA.

The CFPB's current regulation imposing disparate-impact liability nonetheless claims justification in the legislative history of the ECOA (specifically, Congress's 1976 committee reports). Committee reports never went through the bicameralism and presentment required by our Constitution. No Congress ever passed, and no President ever signed, a legislative history. Simply put, the source of law nominally justifying the current rule is no law at all.

And we share the CFPB's concerns "that disparate-impact liability may lead some creditors to consider prohibited characteristics in developing policies and procedures, contrary to [the] ECOA's purposes, in order to minimize potential liability." Justifications for such concerns that disparate impact wars with the nondiscrimination mandates it purports to enforce have been well-documented in many contexts. i.e., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Scalia, J., concurring); Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. 471 (Spring 2018).

We conclude that both rationales advanced in the Proposed Rule for the removal of disparate-impact language from the CFPB's ECOA regulations are entirely proper.

III. CONCERNING CHANGES TO SPCP REGULATIONS

At 15 U.S.C. § 1691, the ECOA's currently codified enacted text provides in relevant part that:

> (a) **Activities constituting discrimination.** It shall be 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)
> …
> (c) **Additional activities not constituting discrimination.** It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to--…(3) any special purpose credit

program offered by a profit-making organization to meet special social needs which meet standards prescribed in regulations by the Bureau; if such refusal is required by or made pursuant to such program.

12 CFR § 1002.8, the CFPB's currently applicable regulation, provides in relevant part that:

> (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: ... (3) Any special purpose credit program offered by a for profit organization, or in which such an organization participates to meet special social needs, if: (i) The program is established and administered 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; and (ii) The program is established and administered 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.
>
> (b) **Rules in other section**–...(2) Common characteristics. A program described in paragraph ... (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 any applicant on any prohibited basis; however, 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 was not established and is not administered with the purpose of evading the requirements of the Act or this part.

Notice how these provisions interact:

1. § 1691(a) bars *all* discrimination in *any* aspect of a credit transaction on the basis of the covered demographic classifications. This prohibition covers the terms on which lenders extend credit.

2 § 1691(c) exempts particular *refusals* to extend credit, but *neither* authorizes the discriminatory *extension* of credit, nor the extension of credit *on discriminatorily unfavorable terms*.

3. § 1002.8 nonetheless purports to *authorize* lenders to: (a) lend to individuals through SPCPs on more favorable terms because of their covered demography; and (b) refuse similar terms because of covered demographic classifications to others they extend credit.

4. § 1002.8 approves SPCPs if they: (a) are established in writing; and (b) were not established or administered to evade the Act.

The contradictions are obvious.

The current regulation purports to authorize what the statute prohibits: both the extension of credit on more favorable terms to applicants because of their covered demography and the denial of equally favorable terms because of covered demography to others extended credit. No agency has the administrative authority to overturn a statutory prohibition. The current regulation cannot be proper.

The current regulation's legal problems don't stop there. Under the current regulation, to run an SPCP, a lender must create a formal written plan *explaining how it will discriminate* based on covered demography in its extensions and refusals of credit. And, under the current regulation, the CFPB will permit that program to go forward only if the lender created and administers that plan without the intention of evading the ECOA's otherwise applicable prohibition on treating applicants differently based on their covered demography. (Yes, you read that correctly.) No lender could ever meet those criteria in its SPCP documents: unless they were seeking to evade the ECOA's otherwise applicable prohibition, there would never be a need to create the program. While the CFPB has allowed *many* SPCPs to operate, if the current regulation's terms were taken seriously, literally *no* program could *ever* qualify as an SPCP.

Against this backdrop, rewriting the current regulation is particularly necessary.

We specifically applaud the Proposed Rule's requirement that any lender seeking approval of an SPCP document "that it is the fact of protected class membership that is causing program participants to be unable to obtain credit [rather than] considerations *other* than that fact[.]" And we specifically commend the Proposed Rule's requirement that each SPCP-written-plan "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."

These alterations deserve special praise, because—to the extent that the CFPB intends to continue to consider approvals of SPCPs—they correctly reflect strict-scrutiny's requirement that a governmental consideration of race must be narrowly tailored to a compelling state interest. Nonetheless, we suggest adjusting the Proposed Rule's language (across the board) to reflect that the ECOA bars discrimination across covered demographic *classifications*, rather than creating "protected *class*[*es.*]" (emphasis added). Such language would better reflect the fact that the ECOA sanctions no protected or unprotected *classes*, instead protecting *all* Americans from discrimination because of its listed categories of classification.

IV. <u>Conclusion</u>

We hope these comments assist you in improving the Proposed Rule before its final issuance. Thank you for your attention.

Respectfully Yours,

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