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Re: Comment on Request for Information on the Equal Credit Opportunity Act and Regulation B, Docket No. CFPB-2020-0026

I. Introduction and Overview

The Center for Responsible Lending (CRL) appreciates the opportunity to comment on the Consumer Financial Protection Bureau (CFPB) Request for Information on the Equal Credit Opportunity Act (ECOA).

CRL is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 40 years, Self-Help has provided over $9 billion in financing to 172,000 homebuyers, small businesses, and nonprofit organizations. It serves more than 154,000 mostly low-income members through 62 retail credit union locations in North Carolina, California, Florida, Illinois, South Carolina, Virginia, and Wisconsin.

Our comment discusses ECOA's purpose, the importance of disparate impact theory, issues around artificial intelligence and machine learning models, special purpose credit programs, preemption, and small business lending. Additionally, CRL signed on to a detailed letter from the Americans for Financial Reform (AFR) Language Access Taskforce regarding the challenges in serving limited English proficient consumers.

A. ECOA's Purpose

ECOA and Regulation B are essential for fair lending and aim to guarantee a financial marketplace that operates in an equitable and inclusive manner free of discrimination. Credit determinations impact every facet of American life from birth to death and must be conducted in a fair, non-discriminatory manner to ensure equal opportunity for all, especially those within protected classes long denied equal access. During these triple crises of a global health pandemic, reckoning on racial injustice, and uncertain and uneven economic recovery, CFPB must use every tool in its toolbox to protect consumers and carry out its fair lending supervision and enforcement mandate created in the Dodd-Frank Wall Street Reform and Consumer Protection Act. The health and economic crises are falling disproportionately on women, Blacks, Latinos, Asian American and Pacific Islanders and Native communities, older Americans, and other economically vulnerable families with no relief in sight. ECOA must be fully enforced to ensure that no one is left in a worse position due to credit discrimination resulting from hardships produced during this crisis or at any other time.

Congress created ECOA to root out discrimination in lending and to produce a healthier financial marketplace. While initially promulgated to eliminate the invidious discrimination faced by white women who were denied equal credit access with similarly situated white males, ECOA was expanded to include other protected classes due to the reality that lack of access to credit denied creditworthy consumers the full benefits of the economy.[1] Additionally, consistent with the Supreme Court's recent decision in *Bostock v. United States*, the Bureau should continue to interpret ECOA's prohibition of discrimination on the basis of sex to include sexual orientation and gender identity discrimination.[2]

Moreover, ECOA's legislative history demonstrates that the law included a focus on a borrower's ability-to-repay and outlawed credit determinations based on inherent differences that are unrelated to creditworthiness.[3] The legislation safeguards the ability of states to provide greater fair lending protections, and it permits creditors to create special purpose credit programs to facilitate lending to underserved consumers with the protection that those lenders would not be held in violation of the nation's fair lending laws.

Implicit in the law's purpose is an assumption that credit is helpful and not harmful, that it is productive for consumers rather than destructive, that it serves wealth building rather than exploitative savings and wealth extraction. When the law provides that lenders may affirmatively advertise to disadvantaged groups, or that lenders may not discriminate based on source of income, the law assumes that lenders are not targeting communities of color, or those reliant on minimal public benefits for their income, with toxic loans. Rather, ECOA assumes, as its legislative history reflects, "[c]redit should be granted on one basis alone—the ability of the borrower to repay."[4]

So ECOA, especially as it affirmatively seeks to ensure that those who are underserved access credit, must be grounded in a responsible, safe lending market. Fulfilling the purpose of ECOA requires regulators to vigorously supervise and enforce not just ECOA itself, but all statutes aimed at a fair credit market, including the Bureau's authority to address unfair, deceptive and abusive practices. All lending should be based on the borrower's ability to repay – a longstanding banking principle and reflected in ECOA's legislative history forty-five years ago. Importantly, lending designed to be affordable aligns lender and borrower incentives so that lenders succeed only when borrowers do, and lenders need not engage in aggressive debt collection practices to support their business model.

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[1] Recently, Justice Ruth Bader Ginsburg passed away, and it must be noted here that her life's work of dismantling sex and gender discrimination helped to lay the foundation for the passage of the Equal Credit Opportunity Act. Specifically, the Supreme Court's decision in *Reed v. Reed* was the first time in history that the Fourteenth Amendment's Equal Protection Clause was applied to strike down a law that discriminated against women. Justice Ginsburg co-wrote the brief along with Pauli Murray, et.al., and the court found unanimously that dissimilar treatment, "on the basis of sex," between men and women was unconstitutional. 404 U.S. 71 (1971).

[2] 590 U.S. __, 140 S. Ct. 1731, 1737 (2020); Letter from CFPB to SAGE re: Application of the Equal Credit Opportunity Act to Credit Discrimination on the Bases of Gender Identity and Sexual Orientation (Aug. 30, 2016), https://www.cfpbmonitor.com/wpcontent/uploads/sites/5/2016/09/SAGE-Letter.pdf.

[3] 121 Cong. Rec. H964 (daily ed. Feb. 20, 1975) (statement of Rep. Annunzio).

[4] *Id.*

B. Credit Discrimination Remains a Significant Problem in the Market

Despite ECOA's assurances, credit discrimination remains a real threat. Increasingly, credit bias is no longer explicit but hidden behind opaque proprietary credit scoring models that "bake in" discrimination.[5] Moreover, wealthier consumers who are mostly white have access to mainstream low-cost financial services and low-wealth families, including people of color, are relegated to fringe financial services that extract savings and wealth. Prior to the enactment of ECOA and other fair lending laws, women, Blacks and Latinos, older Americans and others in protected classes were penalized for their innate characteristics in risk assessments through government-sanctioned discrimination and excluded from mainstream credit opportunities that produced gender and racial wealth gaps along with other generational impacts that are still felt today.

These policies and practices produced today's wealth gaps where whites have ten times the wealth of African Americans and eight times the wealth of Latinos.[6] While gender wealth gaps are less specific, broader societal discrimination places women on unequal footing with men as women continue to only earn 81 cents to ever one dollar that a white male makes.[7] This figure drops substantially for women at the intersection of sex and race/ethnicity: 62 cents for Black women; 57 cents for Native women; and 54 cents for Latinas.[8] Thus, credit decisions that rely on less inclusive criteria such as credit scoring produce higher costs for consumers in products ranging from small consumer loans to large purchases such as home mortgages.[9] These decisions penalize consumers and self-perpetuate cycles of vulnerability to exploitative credit and lack of access to safe and affordable credit through the creation of dual credit markets.

ECOA's protections also do not stop blatant discrimination in other consumer lending transactions such as indirect auto loans where the Bureau once issued strong and effective guidance to help protect consumers from discrimination in auto dealer mark-ups that cost consumers billions.[10] Even though the

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[5] Lisa Rice and Deidre Swesnick, *Discriminatory Effects of Credit Scoring on Communities of Color*, National Fair Housing Alliance (2012), https://nationalfairhousing.org/wp-content/uploads/2017/04/NFHA-creditscoring-paper-for-Suffolk-NCLC-symposium-submitted-to-Suffolk-Law.pdf.

[6] Nick Noel, Duwain Pinder, Shelley Stewart III, and Jason Wright, The Economic Impact of Closing the Racial Wealth Gap, McKinsey & Company (Aug. 2019), Exhibit 1 at p. 5, https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap.

[7] Robin Bleiweis, Quick Facts About the Gender Wage Gap, Center for American Progress, March 24, 2020, https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/.

[8] *Id.*

[9] Wei Li., et. al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, Center for Responsible Lending (March 2009), https://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf; Robert Bartlett, et.al, *Consumer-Lending Discrimination in the FinTech Era*, U.C. Berkeley (November 2019), http://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.

[10] CFPB, *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (March 12, 2013), https://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf; *CFPB, CFPB and DOJ Reach Resolution With Toyota Motor Credit To Address Loan Pricing Policies With Discriminatory Effects* (February 2, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-

Trump Administration signed and Congress issued a joint resolution against the CFPB's guidance, dealer mark-ups continue to disparately affect consumers of color. An investigation by the National Fair Housing Alliance found that non-white testers who were more financially qualified than their white counterparts were nevertheless offered higher-priced car loans resulting in them paying an extra $2,662 over the course of their loans.[11] Further, white testers were offered more financing options, 75 percent more than non-white testers, and received more offers for rebates, incentives, and increased offers to check with personal contacts to determine the creditworthiness of white testers than the non-white testers.[12]

Historic and ongoing discrimination deny opportunity to millions of families, stifling economic stability while producing short-term lender profits that end up limiting growth in the economy overall. Studies show that credit discrimination costs people and the economy trillions, including unearned local tax revenues and jobs, along with missed opportunities for homeownership.[13] Moreover, the entire economic welfare of cities like Detroit have been devastated and hampered by discriminatory credit decisions stemming from exclusionary policies that nurture predatory financial inclusion resulting in today's credit deserts, with only exploitative credit options in Black neighborhoods throughout the city.[14]

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credit-to-address-loan-pricing-policies-with-discriminatory-effects/; *CFPB, CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing* (July 14, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/.

[11] National Fair Housing Alliance, *Discrimination When Buying A Car: How The Color Of Your Skin Can Affect Your Car-Shopping Experience* (January 2018), https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.

[12] *Id.*

[13] Nick Noel, Duwain Pinder, Shelley Stewart, and Jason Wright, *The Economic Impact Of Closing The Racial Wealth Gap*, McKinsey & Company (August 13, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap; Dana M. Peterson and Catherin L. Mann, *Closing The Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, Citi GPS: Global Perspectives & Solutions (September 20, 2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D; Jeff Cox, *Morgan Stanley Says Housing Discrimination Has Taken A Huge Toll On The Economy*, CNBC, November 13, 2020, https://www.cnbc.com/2020/11/13/morgan-stanley-says-housing-discrimination-has-taken-a-huge-toll-on-the-economy.html.

[14] Ben Eisen, *Dearth of Credit Starves Detroit's Housing Market*, The Wall Street Journal, October 29, 2020, https://www.wsj.com/articles/a-broken-mortgage-market-strands-detroits-black-residents-11603984218?mc_cid=3692596f8b&mc_eid=3c8263b07b.

II. Disparate Impact

Disparate impact under ECOA is well-established, as the legislative history, case precedent, the regulation itself, and CFPB guidance demonstrates.[15] Disparate impact theory helps create accountability for entities that unjustifiably engage in practices that have a disproportionately harmful effect based on protected class. Furthermore, by focusing on the consequences of unfair credit practices, the disparate impact standard is frequently able to uncover discrimination that is intentional, but subtle or hidden. Equally important, disparate impact helps to eliminate practices that are neutral on their face but have an unjustified discriminatory effect. These practices often maintain the effects of prior intentional discrimination and systemic inequality.

As borrowers are generally restricted to knowing what occurs in their own credit transaction and do not have the opportunity to compare their experiences with those of other borrowers, they are unlikely to know about larger, systemic lender policies and practices that may unfairly deny them access to credit or provide credit on less favorable terms. In its role as regulator, CFPB is able to scrutinize lender policies and practices and can review borrower loan files to identify patterns of discrimination. The Bureau can require institutions to make changes to their policies and practices as well as obtain relief for consumers.

Given the enormous authority and responsibility of the Bureau to address credit discrimination and systemic inequality, the CFPB should act boldly to utilize disparate impact theory to root out

[15] Regulation B provides that ECOA may prohibit creditor practices that have a disparate impact, specifically stating that "Congress intended an 'effects test' concept . . . to be applicable to a creditor's determination of creditworthiness." 12 C.F.R. 1002.6(a).

ECOA's legislative history makes clear that the law forbids both explicit and disparate impact discrimination that results from neutral policies. A House Report that accompanied the passage of ECOA stated that "[t]he availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing." House Report that accompanied H.R. 6516, No. 94-210, p. 3. A Senate Report stated that "in determining the existence of discrimination ... courts or agencies are free to look at the effects of a creditor's practices as well as the motives or conduct in individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in such cases as Griggs ..., are intended to serve as guides in the application of this Act, especially with respect to the allocations of proof." S. Rep. No. 94-589.

Additionally, since 1980, federal courts have consistently recognized that disparate impact claims are cognizable under ECOA. *Cherry v. Amoco Oil Co*., 490 F.Supp. 1026 (N.D. Ga. 1980). The federal appellate courts which have addressed the question have all held that disparate impact claims are cognizable. *See Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *Miller v. Am. Express Co*., 688 F.2d 1235, 1239-40 (9th Cir. 1982); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir. 1987), vacated and remanded on other grounds, 492 U.S. 901 (1989). Federal district courts in the First, Second, Third, Fourth, Seventh, Eighth, and Eleventh Circuits have held the same. *See Barrett v. H & R Block, Inc*., 652 F. Supp. 2d 104, 108 (D. Mass. 2009); *Guerra v. GMAC LLC*, 2:08-CV01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009); *Dismuke v. Connor*, 05-CV-1003, 2007 WL 4463567 (W.D. Ark. Dec. 14, 2007); *Powell v. Am. Gen. Fin., Inc*., 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004); *Wide ex rel. Estate of Wilson v. Union Acceptance Corp.*, IP 02-0104-C-M/S, 2002 WL 31730920 (S.D. Ind. Nov. 19, 2002); *Faulkner v. Glickman*, 172 F.Supp.2d 732, 737 (D. Md. 2001); *Church of Zion Christian Ctr., Inc. v. SouthTrust Bank of Alabama*, CA 96-0922-MJ-C, 1997 WL 33644511 (S.D. Ala. July 31, 1997).

discriminatory practices. CFPB should maintain its 2012 bulletin on disparate impact and ECOA;[16] it should not be weakened in any way. The Bureau should also bolster its fair lending enforcement and supervision based on disparate impact. As the nation struggles with ongoing crises, consumers need the CFPB to protect them and more robustly carry out its fair lending mission mandate. Specifically, CFPB must address the first in line nature of the Paycheck Protection Program distribution where wealthier and mostly white male-owned business owners were able to secure a loan from their bank while women-owned businesses and businesses owned by people of color struggled and became inactive.[17] Further, CFPB should investigate the substantial disparities in approval rates and in pricing of mortgage loans highlighted in its recent HMDA report controlling for FICO, as only it has the ability to do so. Consumers and the public must know if discrimination is a factor in credit decisions and financial institutions must be held to account if they are violating the law.

As described in section III below, the Bureau should pay special attention to lenders' algorithmic lending models and ensure fair lending scrutiny. Moreover, as described in section IV, CFPB should provide more guidance on Special Purpose Credit Programs to ensure that ECOA lives up to its full mandate, including its remedial goals.

III. Artificial Intelligence and Machine Learning Models

CFPB should be vigilant about AI/ML models and consider the ways in which they can create unjustified outcomes in credit decisions, sometimes without detection. The Bureau should be careful not to put forth guidance that suggests support for innovative models and technology without accompanying fair lending inquiry.

Today, many credit decisions are reached through automated systems – algorithmic risk assessment models that have been shown to produce discriminatory outcomes despite industry assurances that they are free of bias.[18] CFPB should incentivize lenders to remain vigilant to ensure their models are nondiscriminatory. One of the best methods is for lenders to run rigorous fair lending analysis, including a disparate impact analysis, to ensure that risk assessment models do not drive discriminatory outcomes. Without proper oversight and enforcement from CFPB, many industry players will not conduct these rigorous tests and discrimination will go undetected and unresolved. Moreover, the CFPB should conduct its own testing in examinations to ensure lender compliance with the law and to identify patterns of discrimination.

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[16] CFPB Bulletin 2012-04 (Fair Lending), April 2012, https://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

[17] Chairwoman Maxine Water and Ranking Member Patrick McHenry, *Access Denied: Challenges for Women- and Minority-Owned Businesses Accessing Capital and Financial Services*, United States House of Representatives Committee on Financial Services Memo, July 6, 2020, https://financialservices.house.gov/uploadedfiles/hhrg-116-ba13-20200709-sd002-u1.pdf.

[18] Robert Bartlett, Adair Morse, Richard Stanton, and Nancy Wallace, *Consumer-Lending Discrimination in the FinTech Era*, Haas School of Business UC Berkeley (May 2019) at p. 1, http://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.

A. Algorithms Are Not Immune from Discriminating or Creating Clearly Discriminatory Outcomes

As research demonstrates, algorithms are not objective or free of potential bias.[19] They are only as good as the data that biased humans program into them. And even when the data itself is not biased, the interactions between the data may produce biased outcomes. Bias in the context of algorithmic analysis has been defined as "outcomes which are systematically less favorable to individuals within a particular group and where there is no relevant difference between groups that justifies such harms."[20] In 2018, the New York Times published a study finding artificial intelligence – in particular, facial recognition technology – was much less effective when the subject of the analysis was not a white male.[21] While the software was correct 99 percent of the time when the subject in the photo was a white man, when the subject was a darker skinned female, the software was wrong 35 percent of the time.[22] This is because the data set used in artificial intelligence is often reflective of those creating it, who are disproportionately white and male.[23] As Joy Buolamwini, MIT professor, stated "[y]ou can't have ethical A.I. that's not inclusive" and "[w]hoever is creating the technology is setting the standards."[24] This is a fundamental issue with algorithms.

Artificial intelligence and algorithms have been exposed as problematic in various sectors. In the employment discrimination context, new developments – such as automated hiring systems – have ushered in novel mechanisms for discrimination.[25] "The high bar of proof to demonstrate a disparate impact cause of action under Title VII of the Civil Rights coupled with the "black box" nature of many automated hiring systems, render the detection and redress of bias in such algorithmic systems difficult" and "the automation of hiring both facilitates and obfuscates employment discrimination."[26] Potential discrimination claims are shielded due to the black-box nature of algorithms plus the fact that companies claim the algorithm is a trade secret. This creates an insurmountable and unjust obstacle for disparate impact claimants. Federal Reserve Bank Governor Lael Brainard gives a disturbing example

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[19] Claire Cain Miller, *Algorithms and Bias: Q. and A. With Cynthia Dwork*, NY Times, Aug. 10, 2015, https://www.nytimes.com/2015/08/11/upshot/algorithms-and-bias-q-and-a-with-cynthia-dwork.html.

[20] Nicol Turner Lee, Paul Resnick, and Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, Brookings Institute, May 22, 2019, https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-toreduce-consumer-harms/.

[21] Steve Lohr, *Facial Recognition Is Accurate, if You're a White Guy*, NY Times, February 9, 2018, available at https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Ifeoma Ajunwa, *Automated Employment Discrimination* (March 15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437631.

[26] *Id*.

taken from a hiring firm's AI algorithm: "the AI developed a bias against female applicants, going so far as to exclude resumes of graduates from two women's colleges."[27] Brookings' Aaron Klein expanded on this example by stating "[o]ne can imagine a lender being aghast at finding out their AI was making credit decisions on a similar basis, simply rejecting everyone from a woman's college or a historically black college or university."[28]

Algorithms can both build in bias and reinforce bias in a systemic way. In the criminal justice context, COMPAS is an algorithm widely used in the United States to guide sentencing by predicting the likelihood of a criminal reoffending.[29] This system was reported in May 2016 as racially biased. According to the analysis, the system predicts that black defendants pose a higher risk of recidivism than they do, and the reverse for white defendants.[30] Also, predictive policing algorithms have been shown to lead to unjustified over-policing in communities of color.[31] Predictive policing moves police to places where large amounts of crime occurred, which the algorithm views as places where large amounts of arrests occurred. Most of the arrests used by the algorithm are for nonviolent crimes because they are more widespread and predictable, and more nonviolent crime arrests are for black individuals. Thus, the algorithm causes over policing for black neighborhoods, not because there is more crime there than in areas with large white populations, but because those neighborhoods have more arrests, often for discriminatory reasons. As has been demonstrated time and time again, there is enormous racial disparity and bias in the criminal justice system.[32] Our nation's current reckoning on racial injustice, driven by injustices in policing but extending to every facet of life, must include calls for reform in the use of AI and ML. These technologies must not become a tool to perpetuate systemic inequity and racism.

Moreover, algorithms have been at the center of Medicaid litigation. For example, *K.W. v. Armstrong* was a class action lawsuit representing approximately 4,000 Idahoans with development and intellectual disabilities who receive assistance from the state's Medicaid program.[33] The State of Idaho had used an in-house formula to determine the dollar value of the disability services available to qualifying

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[27] Aaron Klein, *Credit Denial in the Age of AI*, Brookings Institute, April 11, 2019, https://www.brookings.edu/research/credit-denial-in-the-age-of-ai/.

[28] *Id*.

[29] Julia Angwin et. al., *Machine Bias*, Pro Publica, May 23, 2016, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[30] *Id.*

[31] Andrew Guthrie Ferguson, *The Police Are Using Computer Algorithms to Tell If You're a Threat*, TIME Magazine, October 3, 2017, https://time.com/4966125/police-departments-algorithms-chicago/.

[32] Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, Sentencing Project, April 19, 2018, available at https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

[33] Rashida Richardson, Jason M. Schultz, and Vincent M. Southerland, *Litigating Algorithms 2019 US Report: New Challenges to Government use of Algorithmic Decision Systems*, AI Now Institute, New York University, https://ainowinstitute.org/litigatingalgorithms-2019-us.pdf; Jay Stanley, *Pitfalls of Artificial Intelligence Decision making Highlighted in Idaho ACLU Case*, ACLU, June 2, 2017, https://www.aclu.org/blog/privacy-technology/pitfalls-artificial-intelligence-decisionmaking-highlighted-idahoaclu-case.

individuals.[34] A significant number of peoples' "dollar-figure numbers" decreased dramatically.[35] When pressed, the state said that a formula had caused the numbers to drop, but the state considered the formula a trade secret.[36] In litigation the court ordered the state to disclose its formula.[37] The court found that the formula was unconstitutionally arbitrary and ordered the state to fix the formula so it allocated funds fairly to recipients.[38] In addition, the court ordered the state to test the formula regularly.[39]

These examples provide stark warnings against allowing algorithmic models to bypass fair lending scrutiny. Rather than shield algorithms from examination, a recent research article urges us to create an "auditing imperative" for algorithmic systems.[40] This may be seen as akin to fair lending testing in the lending sphere.

B. Algorithmic Models are Black Boxes

Devising a model's intent is challenging and often impossible. The complex interactions that AI engages in to form a decision can be so opaque that they prevent any party from being able to devise the intent of the machine's creator.[41] For this reason, AI models are referred to as black boxes. When AI programs are black boxes, they are able to form predictions and decisions in the same way as humans, but they are not able to communicate their reasons for making these conclusions.[42] This situation has been analogized to a human attempting to communicate with another highly intelligent species, with both species able to reason and understand but not able to communicate with each other.[43] Scholars have stated that this difficulty in communication "means that little can be inferred about the intent or conduct of the humans that created or deployed the AI, since even they may not be able to foresee what solutions the AI will reach or what decisions it will make."[44] Indeed, a recent paper argues that artificial intelligence is inherently structured in a manner that makes "proxy discrimination" a likely

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Ifeoma Ajunwa, *Automated Employment Discrimination* (March 15, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437631.

[41] Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 Harv. J.L. & Tech. 890 (2018), at 892, 897, 907, https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-ArtificialIntelligence-Black-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf.

[42] *Id*. at 907.

[43] *Id.* at 893.

[44] *Id.*

possibility.[45] Consumers have no way of knowing what data is fed into the models, which factors the algorithm used in making the determination, whether there are proxies for protected classes, or whether the algorithm denied credit based on erroneous or biased data.

i. Black-Box AI Models: Neural Networks & Support Vector Models (SVMs)

Neural networks are among the most commonly used models, but these networks are considered black boxes because of their complexity. The structure of a neural network is made up of input nodes, hidden nodes, and output nodes.[46] The complexity arises with the interactions between hidden nodes, which process data from the input nodes to form the output nodes.[47] This is because no node is responsible for a distinct function; thousands of nodes overlap each other to form a decision.[48] Humans are able to extract and examine one of these groups of nodes.[49] But because of the different language of AI black-boxes, this will likely appear as visual noise to humans.[50] This means that neural networks are often highly unintelligible to humans.

Support Vector Models (SVMs) are also widely used and considered black boxes. Unlike neural networks, which have a lack of transparency that arises from complexity, SVMs are black boxes because they possess geometric relationships that humans cannot visualize.[51]

C. AI May Use Biased Data to Form Biased Conclusions and the Use of Non-Traditional Variables Places Algorithmic Models at Risk of Not Distinguishing Correlation from Causation

Non-traditional variables increases the likelihood that conclusions will be biased as well as increase the likelihood that AI will draw a conclusion that there is causation where there is only correlation.[52] Nontraditional variables include data obtained from internet search histories, shopping patterns, social media activity, and various other consumer-related inputs.[53] This non-traditional information can be fed

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[45] Anya Prince and Daniel B. Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, Iowa Law Review (August 5, 2019), https://ssrn.com/abstract=3347959.

[46] Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 Harv. J.L. & Tech. 890 (2018), at 901, https://jolt.law.harvard.edu/assets/articlePDFs/v31/The-Artificial-IntelligenceBlack-Box-and-the-Failure-of-Intent-and-Causation-Yavar-Bathaee.pdf.

[47] *Id.* at 902.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 903.

[51] *Id.*

[52] White & Case, *Algorithms and Bias: What Lenders Need to Know*, January 20, 2017, https://www.whitecase.com/publications/insight/algorithms-and-bias-what-lenders-need-know. *See also* Ian Ayres, *Testing for Discrimination and the Problem of Included Variable Bias* (2010) at p. 6, https://www.law.upenn.edu/live/files/1138-ayresincludedvariablebiaspdf.

[53] *Id.*

into machines, which can draw conclusions based on the patterns it observes in the dataset.[54] This is a major concern because financial technology companies are using nontraditional data more and more to make consumer credit decisions. As one article put it: “If there are data out there on you, there is probably a way to integrate it into a credit model. But just because there is a statistical relationship does not mean that it is predictive, or even that it is legally allowable to be incorporated into a credit decision.”[55] The following is an example of the use of non-traditional variables in a manner that causes bias from the article *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*:

> Latanya Sweeney, Harvard researcher and former chief technology officer at the Federal Trade Commission (FTC), found that online search queries for African-American names were more likely to return ads to that person from a service that renders arrest records, as compared to the ad results for white names. Her research also found that the same differential treatment occurred in the micro-targeting of higher-interest credit cards and other financial products when the computer inferred that the subjects were African-Americans, despite having similar backgrounds to whites. During a public presentation at a FTC hearing on big data, Sweeney demonstrated how a web site, which marketed the centennial celebration of an all-black fraternity, received continuous ad suggestions for purchasing “arrest records” or accepting high interest credit card offerings.[56]

The *National Fair Housing Alliance v. Facebook* lawsuit serves as an additional example of biased data used in an algorithm. The main allegation in the lawsuit was that Facebook’s advertising platform contained pre-populated lists that allowed advertisers to place housing, employment, and credit ads that could exclude certain protected groups, such as African-Americans, Hispanics, and Asian Americans.[57] The plaintiffs also challenged that Facebook permitted advertisers to include or exclude Facebook users from receiving ads based on their sex or age, or based on demographics, behaviors and interests that were associated with protected classes.[58] Plaintiffs alleged that Facebook “extracts data from its users’ online behavior, both on Facebook and off, and uses algorithms designed to sort that data, process it, and repackage it to group potential customers into new and salient categories for advertisers to choose from when targeting their ads.”[59] Therefore, data sets were allegedly being

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[54] *Id.*

[55] Aaron Klein, *Credit Denial*, Brookings Institute (April 11, 2019), https://www.brookings.edu/research/credit-denial-in-the-age-of-ai/.

[56] Nicol Turner Lee, Paul Resnick, and Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, Brookings Institute, May 22, 2019, available at https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-toreduce-consumer-harms/.

[57] *National Fair Housing Alliance v. Facebook, Inc*., No. 1:18-cv-02689 (S.D.N.Y), https://nationalfairhousing.org/facebook-settlement/.

[58] *Id.*

[59] First Amended Complaint, National Fair Housing Alliance v. Facebook, Inc., No. 1:18-cv-02689, ¶ 52 (S.D.N.Y. June 25, 2018).

crafted to increase the likelihood of particular outcomes with groups that were the equivalent of protected classes.

Facebook's inclusion of certain groups and exclusion of others resulted in groups being disproportionately targeted by predatory lenders or excluded from reasonable and beneficial loans. This shows the risk of discrimination that can come with artificial intelligence, and that past bias (in this case, Facebook's selection of particular categories) can result in current bias (the discriminatory outcomes).

Furthermore, algorithms do not distinguish causation from correlation or know when it is necessary to gather additional data to form a sound conclusion. One notable example is social media. This is particularly relevant in the lending context, as some fintech lenders may use social media data as a predictor of default. But using this information might interfere with other more important and relevant indicators.[60]

Additionally, although consumers can check their credit reports for false information, "consumers cannot easily verify the myriad forms of nontraditional data that could be fed into a credit assessment algorithm. Consumers may not know whether an algorithm has denied them credit based on erroneous data from sources not even included in their credit reports."[61]

While some argue that the usage of non-traditional variables is beneficial in providing targeted information to different groups, it can lead to "unfair or discriminatory lending decisions if not appropriately implemented and monitored."[62] It can lead to decisions where patterns of discrimination are perpetuated from the initial entry of data to the conclusion. This is extremely dangerous territory for the civil rights of Americans and could enable the continuation of discrimination at a time when broad calls are being made for more racial equity. It is also reason to be vigilant to fair lending considerations as new credit scoring and underwriting models are developed. While there is potential for more equitable access, there is also potential for abuse and discriminatory outcomes, driven by unchecked algorithmic bias.

D. CFPB Should Be Wary of Models That Allegedly Promote Financial Inclusion but Actually Reinforce Bias and Predatory Lending

High-cost lenders peddling unaffordable loans cause particular harm to Black, Latino, and other communities of color,[63] often in the same geographic areas that experienced redlining. Storefront high-cost lenders have long targeted borrowers of color, more likely to locate stores even in more affluent

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[60] White & Case, *Algorithms and Bias: What Lenders Need to Know*, https://www.whitecase.com/publications/insight/algorithms-and-bias-what-lenders-need-know.

[61] *Id.*

[62] *Id.*

[63] *See* CFPB Payday Rule, 82 Fed. Reg. at 54556-57 (African Americans are payday borrowers at three times the rate, and Hispanics at twice the rate, of non-Hispanic whites (citing 2015 FDIC National Survey of Unbanked and Underbanked Households (calculations using custom data tool). Vehicle title borrowers are also disproportionately African American and Hispanic. *Id*.)

communities of color than in less affluent white communities.[64] Online high-cost lenders may focus more on subprime credit score than geography, although we understand that some lenders use zip codes to target online marketing. But historical discrimination against communities of color is also reflected in credit scores.[65] Lenders that focus on subprime borrowers will inevitably disproportionately target borrowers of color. The algorithms and big data that "fintech" lenders use may also result in disparate impacts on these communities.[66]

Moreover, online lenders often promote their models as expanding economic inclusion, which will often put borrowers of color among their target borrowers. Communities of color have historically been disproportionately left out of the traditional banking system due to exclusionary federal policies, a disparity that persists today. Some defend the high-cost "fintech" loans as bringing communities of color into the economic mainstream.[67] But high-cost loans, particularly with their high association with lost bank accounts,[68] drive borrowers out of the banking system and exacerbate this disparity. By sustaining and exacerbating an existing precarious financial situation, high-cost lending reinforces and magnifies existing income and wealth gaps – legacies of continuing discrimination – and perpetuates discrimination today.[69]

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[64] Li, et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending (2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf; Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.

[65] *See* Chi Chi Wu, *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, National Consumer Law Center (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

[66] *See* Testimony of Chi Chi Wu, National Consumer Law Center, Before the U.S. House Committee on Financial Services Task Force on Financial Technology Regarding "Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit" (July 25, 2019); Carol A. Evans, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP* Risks, Consumer Compliance Outlook (2017), https://consumercomplianceoutlook.org/2017/second-issue/keeping-fintech-fair-thinking-about-fair-lending-and-udap-risks/; *see also* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking* 19-20 (Iowa Law Review (2021 Forthcoming) (Aug. 2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3677283.

[67] *See* Remarks of Acting Comptroller of the Currency Brian Brooks to the Online Lending Policy Institute, June 11, 2020, supra.

[68] CFPB found that about half of borrowers with online payday or other high-cost online loans paid a nonsufficient funds (NSF) or overdraft fee. These borrowers paid an average of $185 in such fees, while 10% paid at least $432. It further found that 36% of borrowers with a bounced payday payment later had their checking accounts closed involuntarily by the bank. CFPB Online Payday Loan Payments at 3-4, 22 (April 2016).

[69] For more on concerns about the harm predatory consumer loans cause communities of color, and the efforts the consumer and civil rights coalition has long made to stop that harm, see the sampling of references cited here: http://stopthedebttrap.org/wp-content/uploads/2014/11/PayDay-loans.7-2016.pdf;

In sum, while artificial intelligence holds great promise, we must not assume it is objective or bias-free. Rather than shield algorithms, we must find ways to test and audit algorithms to ensure they do not perpetuate bias or cause unjustified disparate outcomes. The Bureau should provide guidance to ensure that entities conduct fair lending testing of models and consider less discriminatory alternatives.

IV. The Bureau Should Encourage Special Purpose Credit Programs (SPCPs)

We urge the Bureau to more broadly inform lenders of the potential to use special purpose credit programs (SPCPs) in order to facilitate extension of responsible credit favorably designed for underserved communities. For a discussion of ongoing barriers to homeownership for communities of color, see CRL's 2019 Congressional testimony,[70] as well as the work of the National Fair Housing Alliance (NFHA).[71]

To address potential regulatory uncertainty, we point to the recently published work of the NFHA and Relman Colfax PLLC.[72] This work explains how ECOA coexists within the regulatory framework with the Fair Housing Act and sections 1981 and 1982 of the Civil Rights Act of 1866.

The Bureau should coordinate with HUD and the Department of Justice to ensure lenders have confidence that SPCPs do not conflict with other civil rights laws; rather, they promote the purposes of those laws. In addition, as noted below, we urge the Bureau to provide further clarity that state laws prohibiting inquiries required for SPCPs are preempted.

At the same time, the Bureau must emphasize that SPCPs are for responsibly designed programs. They are not a license to offer borrowers a slightly less predatory version of a predatory product, which is more likely to extract wealth than to promote financial stability.

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http://stopthedebttrap.org/wp-content/uploads/2015/08/lcchr_resolution_payday_deposit_advance_lending_12dec2015.pdf; http://stopthedebttrap.org/wp-content/uploads/2015/08/naacp_letter_obama_payday_15december2014.pdf; https://www.unidosus.org/about-us/media/press/releases/NCLR-CFPB-Payday-Lending-Rule-Release; http://ourfinancialsecurity.org/2011/04/hilary-shelton-cfpb-testimony/; http://www.responsiblelending.org/payday-lending/policy-legislation/states/Letter-JBond_Rendell-012306.pdf; https://nalcab.org/nalcab-new-pay-day-rule-step-forward-latino-consumers-businesses/; http://stopthedebttrap.org/blog/cfpb-payday-lending-rule-will-disrupt-abusive-lending-protect-families-financial-predators/.

[70] Testimony of Nikitra Bailey, Executive Vice President, Center for Responsible Lending, Before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Housing, Community Development, and Insurance, *A Review of the State of and Barriers to Minority Homeownership* (May 8, 2019), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba04-wstate-baileyn-20190508.pdf.

[71] *See*, *e.g.*, Lisa Rice, President and CEO, *Using Special Purpose Credit Programs to Expand Equality*, Nov. 4, 2020, https://nationalfairhousing.org/using-spcps-blog/.

[72] Relman Colfax LLC and National Fair Housing Alliance, *Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits Within the Antidiscrimination Law Ecosystem* (Nov. 2020), https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

V. Preemption Issues Warrant Emphasis to Ensure Consumers are Protected as Intended

The RFI asks whether further guidance may assist creditors in evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B. We are aware that some jurisdictions, state and municipal, explicitly prohibit discrimination on the basis of immigration status. These laws are more protective of the applicant than ECOA, which permits consideration of immigration status, and are thus not inconsistent with ECOA. Though we hope it is already clear that these state and municipal laws are not preempted by ECOA, it could be useful for the Bureau to emphasize in Regulation B's Official Interpretations that this is the case.

At the same time, as the Bureau encourages special purpose credit programs (SPCPs), it should clarify that to the extent state laws prohibit considering characteristics in credit decisions when such consideration is needed to administer a SPCP, those state laws are preempted.

VI. The Bureau Should Require Collection of Demographic Data on Non-Mortgage Loans

We urge the Bureau to amend Regulation B to require lenders to collect and report demographic information for non-mortgage consumer loans, including auto loans, payday loans, installment loans, and credit cards. Currently, lack of demographic data on these loans poses a challenge to effective supervision and enforcement of fair lending laws. Yet targeting by race has long been a problem in certain markets; for example, numerous studies have found that payday lenders disproportionately locate in communities of color, even after controlling for income.[73] Demographic data on consumer loan borrowers, including the terms and pricing of the loans they receive, would enable far more robust supervision and enforcement of ECOA.

VII. The Case for Small Business Lending Data Collection and Reporting

There are profound disparities in how business owners fund their enterprises. Research from the Federal Reserve found that in the previous five years, 46% of white-owned businesses with employees accessed credit from a bank, and 6% accessed credit from a credit union. During that same time, just 23% of Black-owned employer firms accessed credit from a bank, and 8% from a credit union and 32% of Latino-owned employer firms accessed credit from a bank and 4% from a credit union.[74] Lacking access to credit can be harmful in the normal course of business, but in the midst of a pandemic, lack of access can have disastrous consequences for microbusinesses, the owners and employees who depend on them for their livelihoods. The COVID-19 pandemic small business relief program is the most recent example of these disparities. The design of the program, which relied on banks to originate the loans, unfairly put Black, Latino, and Native American business owners at a distinct disadvantage in attempting to access PPP funds when so many were already on precarious financial footing. In the period April 26

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[73] Brandon Coleman and Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law*, Center for Responsible Lending at 7, Chart 2 (March 2016); Delvin Davis and Lisa Stifler, *Power Steering: Payday Lenders Targeting Vulnerable Michigan Communities*, Center for Responsible Lending (Aug. 2018), https://www.responsiblelending.org/research-publication/power-steering-payday-lenders-targeting-vulnerable-michigan-communities; Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color*, Center for Responsible Lending (Aug. 2017; amended Feb. 2018), https://www.responsiblelending.org/research-publication/mile-high-money-payday-stores-target-colorado-communities-color.

[74] Small Business Credit Survey: Report on Employer Firms (2020), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/2020-sbcs-employer-firms-report.

to May 2, the U.S. Census reported that 30.1% of businesses had less than two weeks of cash on hand for business operations and 48% had less than four weeks. While the cash on hand position for many businesses has improved as of the period November 16 to November 22, with 14% reporting two weeks or less, 29.4% of businesses still reported that they had four weeks or less of cash on hand.[75]

A. Disparate Treatment and Impact is Baked In

A recent study by the National Community Reinvestment Coalition found steep reductions in SBA 7(A) lending to Black businesses between 2008 and 2016. That same study also found that Black and Hispanic testers when applying for loans were required to produce more documentation to support their loan application and received less information about fees, and less friendly service when visiting a small business lender.[76] Research from the Federal Reserve also found that business owners of color were more likely to rely on personal funds and personal credit scores to finance their business. Twenty-eight percent of Black and Asian owners and 29% of Latino owners relied on personal funds as the primary funding source for their business, compared to 16% of white business owners. Black and Latino business owners were also more likely to use their personal credit scores when obtaining financing with 52% and 51% doing so, respectively, compared to 45% of white and 43% of Asian business owners.[77] In addition, in SBA's fiscal years ending September 30, 2019 and 2018, for all SBA 7(a) loans made, only 5% were made to Black-owned businesses, and only 9% were made to Hispanic-owned businesses.[78]

B. Section 1071 is Part of the Solution

Ten years ago, Congress took steps to address this issue through Section 1071 of the Wall Street Reform and Consumer Protection Act, requiring the collection of key data elements, including demographic data, with respect to applications for small business loans. We are pleased that the Bureau is now moving forward implementing Section 1071, having convened the SBREFA panel and released a proposed outline. While we will submit more detailed comments on the proposal through the specified procedures for the rule, below we highlight a few important recommendations and comments as well as other ways the CFPB can support businesses owned by people of color and women.

We urge the CFPB to ensure robust data collection that covers lenders representing at least 95% of small business loans, including depositories, credit card providers, and other lenders. The Bureau should not exempt any lenders based on asset size. Further, the Bureau should cover all forms of typical business credit, especially those that are more likely to be used by business owners of color, including merchant cash advances and factoring. Merchant cash advances are high-cost loans that are disproportionately

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[75] Small Business Pulse Survey, April 26 to May and November 16 to November 22, https://portal.census.gov/pulse/data/#data.

[76] National Community Reinvestment Coalition, *Disinvestment, Discouragement and Inequity in Small Business Lending* (2019), https://ncrc.org/wp-content/uploads/2019/09/NCRC-Small-Business-Research-FINAL.pdf.

[77] Federal Reserve, *Small Business Credit Survey: Report on Minority-Owned Firms* (2019), https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf.

[78] Small Business Administration, *SBA Business Loan Approval Activity Comparisons for Fiscal Years 2012 to 2019, for the Period Ending 08-30-2019*, https://www.sba.gov/sites/default/files/aboutsbaarticle/WebsiteReport_asof_20190830.pdf.

made to business owners of color. Factoring, or an advance on accounts receivable, are also a form of high-cost credit. The fees – and thus the effective interest rate – tend to be very high and small businesses who use factoring are generally those with little cash on hand to stay afloat and fund their growth and have trouble accessing traditional loans elsewhere. Additionally, consistent with Regulation B, an "application" should be defined as a request for credit made in accordance with the creditor's procedures, not solely a completed application. We also fully support all of the data points currently included for collection and commend the CFPB for the breadth of the data it proposes to collect. Finally, "small business" should be defined in alignment with SBA standards and guidelines of 500 or fewer employees for manufacturing businesses and less than $8 million in revenue for other industries.

The recent rollout of the Paycheck Protection Program illustrated how important a robust rule under this section is. One of the largest economic support components of the federal response to this pandemic has been the PPP, representing a $670 billion investment in small businesses which serve as the backbone to the American economy. However, despite this substantial investment, many small businesses were unable to access this vital relief. At the outset of the program and during the first round of funding from April 3 to April 16, 2020, it was clear that structural inequities were built-in to the administration of the program, the application process, and the fee structure. These structural inequities made it extremely difficult for small businesses—and particularly businesses owned by people of color – to qualify for assistance or receive it in time to save their businesses and the jobs of the employees that depend on them. The expected effects of these policies have already been borne out.

To receive a PPP loan during the first phase of the program, applicants were required to apply with an eligible SBA-approved lender, almost all of which are conventional banks. While additional financial institutions could become PPP lenders, the process to approve these additional lenders took several weeks. By requiring applicants to go through an SBA-approved lender, rather than directly applying to the PPP program, the program ensured that those businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently, especially in a program where "speed" was the first priority. Relationship banking may have also played a role in lenders' application processing decisions, and thus pre-existing disparities in access to capital have posed further disadvantages for business owners of color. These disparities made it less likely that they would have the commercial lending relationships necessary to access the PPP program and discouraged many from applying. Yet because the Bureau had not moved forward to implement 1071, lenders were not required to collect the data needed to comprehensively assess the impact of the PPP program.

C. Working with the SBA and the Prudential Regulators

We recognize that it will take time before a final rule is issued and implemented. That makes it especially important during this interim period for the CFPB to support businesses owned by people of color by working closely with the SBA to implement and require a robust data collection and public reporting process for all PPP loans and to ensure that SBA and lenders are adequately serving all small businesses and markets. As the PPP forgiveness process continues, and if PPP is extended in subsequent legislative practices, the CFPB should work with SBA to ensure collection and reporting of demographic information on race, national origin, and gender of principal owners of each applicant and each approved loan. As reported by the SBA Inspector General in its Flash Report of May 8, 2020, the SBA has not implemented the program in a way that aligns with the provisions of the CARES Act. The report specifically identified four areas that need strengthening: prioritizing underserved and rural markets, providing clear guidance for forgiveness, providing guidance on loan deferments, and establishing a

registry of loans. Transparency is essential to this program, and true transparency and impact can only be determined if data is collected and analyzed.

Beyond working with SBA and its own rulemaking, the Bureau should help ensure robust data collection on small business lending going forward. Even before the transparency issues with the massive influx of government support through the PPP, the dearth of data on small business lending has been a major obstacle for ensuring equity for decades. The limited data masks the lack of equitable investment of taxpayer-supported funds and access to business capital for communities of color and those in rural markets. In fact, in addition to data collection being one of the much-needed improvements to the PPP program, robust data collection is also needed for existing laws enacted to incentivize community investment and job creation through access to business capital. Without publicly available data, it is difficult to prove or disprove, or adequately address, inequities in small business lending.

The Community Reinvestment Act (CRA), enacted in 1977 to encourage federally regulated depository institutions to meet the credit needs of all families and communities, mandates some small business data disclosure, but CRA data only provides the aggregate dollar volume of loans originated to businesses with revenues less than $1 million, not individual loan amount or type of loan, and is only required from institutions with assets over $1.2 billion (as of 2019).[79] A recently released Office of the Comptroller of the Currency final rule took steps to weaken the effectiveness of the Community Reinvestment Act and its ability to encourage lending in low- and moderate-income communities and to small business owners and did not sufficiently improve the disclosure of small business data. The final rule will not require the collection of data on race and ethnicity. The CFPB should work with all financial regulators to ensure that equitable small business lending is considered in CRA evaluations.

Furthermore, we believe that the CFPB should work with the Treasury, the SBA and the prudential regulators to establish, monitor, and enforce an affirmative duty to fairly serve all small business borrowers; and establish affordable small business lending goals for all credit providers. The CRA should include a robust small business reinvestment requirement for all creditors that includes loans approved for small businesses and for business owners where the business credit runs through the personal credit profile.

Conclusion

We thank the Bureau for consideration of our comments and would be happy to discuss them further.

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[79] National Community Reinvestment Coalition, *Disinvestment, Discouragement and Inequity in Small Business Lending* (2019), https://ncrc.org/wp-content/uploads/2019/09/NCRC-Small-Business-Research-FINAL.pdf.