LEGAL UPDATES

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CFPB Finalizes Major Regulation B Overhaul: Disparate Impact Out, Discouragement Narrowed, and SPCPs Restricted

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For the first time since its enactment and implementation nearly 50 years ago, the CFPB is taking the position that ECOA does not authorize disparate-impact liability. On April 22, 2026, the CFPB published its final rule amending Regulation B, the regulation implementing the Equal Credit Opportunity Act (ECOA). The Bureau adopted the rule as proposed back in November 2025, rejecting the roughly 64,500 comments it received during the comment period (most of them opposed, according to the CFPB's discussion in the final rule).

The rule, which takes effect July 21, 2026, makes three major changes:

(1) it removes the "effects test" from Regulation B and affirmatively states that ECOA does not recognize disparate-impact liability;

(2) it narrows the prohibition on "discouragement" to focus on statements of intent to discriminate rather than statements that merely create negative impressions; and

(3) it prohibits for-profit creditors from using race, color, national origin, or sex as common characteristics in SPCPs and imposes new participant-level documentation requirements.

But this is not the end of disparate-impact risk. In this post-*Loper Bright* world, the courts—not the CFPB—decide what ECOA means, and no circuit has definitively ruled out disparate-impact liability under the statute. The Fair Housing Act, state anti-discrimination laws, and private plaintiffs all remain active sources of effects-based liability. And the rule itself faces near-certain litigation that could delay or reverse it. Nonetheless, the rule is a

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significant recalibration of federal ECOA enforcement, and compliance programs should be reviewed accordingly.

Disparate impact is out

The Bureau is deleting the "effects test" language from § 1002.6(a), its commentary, and comment 2(p)-4 on the definition of "empirically derived and other credit scoring systems". In its place, the rule affirmatively states that ECOA does not recognize the effects test.

The Bureau applies the Supreme Court's statutory-interpretation method from *Inclusive Communities and Smith v. City of Jackson,* but reaches the opposite result. In both of those cases, the Court recognized disparate-impact liability because the statutes at issue (the Fair Housing Act and the Age Discrimination in Employment Act) contained effects-oriented phrases prohibiting conduct that would "otherwise make unavailable" or "otherwise adversely affect" housing opportunities or employment status." ECOA, by contrast, prohibits discrimination "on the basis of" protected characteristics. The Bureau reads that language as focusing on the actor's intent, rather than the effects of the action. That textual gap, the Bureau concludes, is fatal to disparate-impact liability under ECOA, and the legislative history on which Regulation B's effects test was originally based in 1977 cannot override the plain statutory text.

The rule expressly preserves disparate-*treatment* liability, including claims based on facially neutral criteria used as proxies for protected characteristics with discriminatory intent. In response to industry comments, the Bureau also signals that creditors can still perform proxy analysis and monitor demographic outcomes for their own compliance and business purposes.

Discouragement, narrowed

Regulation B § 1002.4(b) still prohibits creditors from making oral or written statements that would discourage applicants on a prohibited basis, but the final rule narrows the scope of that prohibition significantly. It clarifies that:

The prohibition targets statements of intent to discriminate in violation of ECOA, not statements that merely create negative consumer impressions.

Encouraging statements directed at one demographic group (for example, marketing credit products to women) do not count as discouraging people outside that target group.

The discouragement analysis uses a reasonable person standard that turns on the creditor's knowledge of what its statement would do, not on how a particular listener reacted to it.

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In practice, this means creditors can more safely engage in affinity marketing and outreach campaigns targeted at specific demographic groups.

SPCPs: new prohibitions and new conditions that apply to for-profit entities

The rule leaves nonprofit and government-backed SPCPs largely alone and targets for-profit SPCPs under § 1002.8(a)(3).

New prohibitions. For-profit SPCPs can no longer use race, color, national origin, or sex as common characteristics for program eligibility. Religion, marital status, age, receipt of public assistance income, and exercise of Consumer Credit Protection Act rights remain permissible common characteristics, subject to the program's written plan and needs analysis. But for-profit creditors using even these permissible characteristics face a significantly higher bar: they must now provide participant-level evidence that each participant would not receive credit, or would receive it on less favorable terms, absent the SPCP.

New conditions for permissible programs. For-profit SPCPs using the remaining permissible characteristics must satisfy three new requirements. First, the creditor must maintain a written plan that meets specific content requirements set out in the rule. This builds on the 2021 Advisory Opinion guidance, but in some respects replaces it. Second, the creditor must demonstrate, using a heightened evidentiary standard, that members of the targeted class would not receive credit (or would receive it on less favorable terms) under the creditor's customary underwriting standards. Third, the creditor must maintain participant-level documentation showing both the participant's common characteristic and why the participant qualifies for the program based on need.

Transition rules. Credit extended under an existing SPCP before July 21, 2026 is treated under the prior framework. However, creditors running active for-profit programs that use race, color, national origin, or sex as common characteristics must wind those programs down or restructure them before July 21, 2026. New originations on or after that date must comply with the new rule.

What still has teeth

Creditors shouldn't read the rule as the end of fair lending risk. Several things don't change:

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The Fair Housing Act still recognizes disparate-impact claims, and the Supreme Court reaffirmed that in Inclusive Communities. Mortgage creditors in particular still have federal disparate-impact exposure.

State antidiscrimination and fair lending statutes in California, New York, Massachusetts, and other states still authorize effects-based claims. State attorneys general have already signaled they'll keep bringing them.

Private plaintiffs can still pursue ECOA disparate-impact theories in court. The circuit-court landscape is unsettled. The Sixth Circuit has assumed, without definitively deciding, that disparate-impact claims are available under ECOA. The D.C. Circuit has expressly declined to resolve the question, noting in *Garcia v. Johanns* that ECOA lacks the "otherwise adversely affect" language present in Title VII and the ADEA, and stating it expressed no opinion on whether ECOA supports a disparate-impact claim. Earlier Ninth Circuit authority has recognized that courts may consider the effects of a creditor's practices in ECOA cases, but no circuit has issued a clean, modern holding unambiguously confirming ECOA disparate-impact liability in all contexts. Courts, not the CFPB, are the ultimate arbiters of what ECOA means, and plaintiffs will likely test the rule quickly.

The CRA obligations of depository institutions remain in force, and the prudential regulators' fair lending exam procedures still exist independently of Regulation B's text.

Disparate-treatment liability, including proxy-based theories, is untouched. The Bureau's rule confirms that intentional use of facially neutral criteria as proxies for protected characteristics still violates ECOA.

Litigation is coming

The rule will be challenged. Consumer advocacy groups, state attorneys general, and several Democratic members of Congress telegraphed their intent during the comment period. The core challenge will be straightforward: a combination of Administrative Procedure Act (APA), arbitrary-and-capricious claims (the Bureau changed a long-standing interpretation in a roughly one-month Thanksgiving-window comment period, November 13 to December 15, 2025), and merits challenges arguing that the statutory text, circuit precedent, and agency interpretive history all support disparate-impact liability under ECOA.

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The primary issue will involve APA arbitrary-and-capricious claims, focusing on the Bureau's rapid shift in interpretation during a brief comment period from November 13 to December 15, 2025. Merits challenges will assert that statutory language, circuit precedent, and agency history support disparate-impact liability under ECOA.

A preliminary injunction before the July 21 effective date is a realistic possibility. Creditors should plan for both scenarios: the rule taking effect on schedule and the rule being enjoined or vacated.

What this means to you

Creditors, fintechs, and banks should take the following steps over the next 90 days:

1. **Review your SPCPs.** If you offer a for-profit SPCP using race, color, national origin, or sex as a common characteristic, start planning the wind-down or restructure now. Credit extended before July 21, 2026 under an existing SPCP is governed by the prior framework, but new originations on or after that date must satisfy the new requirements.
2. **Update your fair lending compliance program, but don't gut it.** FHA claims, state-law claims, private plaintiff claims, and disparate-treatment proxy claims all still exist. Keep your proxy analysis, fair lending monitoring, and model governance in place. The analysis you've been running is still useful, just for a different set of downstream risks.
3. **Revisit marketing and outreach materials.** The narrower discouragement standard opens up some previously risky marketing approaches, but the analysis is fact-specific. Affinity marketing and targeted outreach campaigns that were previously flagged should get a second look.
4. **Watch the litigation.** If the rule is enjoined before July 21, compliance programs will need to keep the pre-rule framework in place. Build the flexibility to pivot either way.

Contact us

We'll continue monitoring the rule's implementation and the inevitable litigation challenges. In the meantime, reach out to Chris Friedman, Alex McFall, Leslie Sowers, or another member of Husch Blackwell's Consumer Financial Services or Financial Services Litigation teams for guidance tailored to your specific programs.

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