December 1, 2020

Ms. Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

RE: Response to Notice and Request for Comments on ECOA and Reg B, Docket No. CFPB-2020-0026

Dear Director Kraninger:

We appreciate the opportunity to comment on the CFPB's Request for Information regarding ECOA and Regulation B. As a community development bank and a bank holding company advocating for banking reforms that better serve the public interest, we approach this comment letter with insights from operating a bank and from working in partnership with community groups to advance a fairer, more just, and equitable economy, and ultimately, society.

This year has truly highlighted racial injustice prevalent in the country, and the financial system continues to be a consistent contributor to these inequities. Beneficial State Bank and Foundation actively promote racial equity in the financial industry by working with community organizations, non-profits, and other financial institutions. Equitable access to fair and transparent credit is critical for this movement.

We strongly support the efforts of the Bureau to meet its joint mandate of protecting consumers from unlawful discrimination and fostering innovation. We appreciate the opportunity to provide feedback to maximize the effectiveness of ECOA and Regulation B for the benefit and protection of all consumers, but particularly, for the underserved communities across the country.

About Beneficial State Bank

Beneficial State Bank is a triple-bottom-line, values-based community development bank with branches in California, Oregon, and Washington. As a B Corp, we operate with a triple-bottom-line, which means we equally prioritize people, planet, and profit. Our goal is to optimize positive outcomes for our people (customers, employees, communities in which we operate) and our shared planet, instead of maximizing profits at their expense.

We were established at the nadir of the financial crisis in 2008, recognizing the outsized role banks play in determining outcomes in our economy and society, and the need for financial institutions to be truly aligned with the interests and financial wellbeing of their customers. For over a decade, we have provided fair and transparent banking services to help people, businesses, and nonprofits align their money with their values.

We believe that the banking industry should work for *everyone*, regardless of wealth, income, race, gender, nationality, age, religion, or marital status. Alongside partners, we advocate for a fair, inclusive, and just banking system. We believe community banks and community development financial institutions (CDFIs) are an essential part of this picture, and we work in concert with other CDFI banks and values-based banks to ever-strengthen our impact measurement and evaluation so that we can help hold the entire industry to higher standards.

Beneficial State Bank commits at least 75% of our loan portfolio to those that have a positive social or environmental impact, such as affordable housing, economic development, women-owned businesses, social justice nonprofits, environmental sustainability, and employee-owned businesses. The remaining 25% of our loans cannot work against our mission and includes projects like non-harmful commercial real estate loans. We aspire to 'do no harm,' and we ask for the same (in words and action) from other banks. Beneficial State Bank is wholly owned by not-for-profit organizations. Its primary owner is Beneficial State Foundation whose mission is to change the banking system for good. This ownership structure ensures we have no private shareholders seeking to maximize profits at the expense of our communities or our natural environment. We banks must be transparent about our social and environmental impact. We publish the impact of our lending so depositors can see what their deposits are funding, and we share detailed explanations of our financials so that a lay reader can understand them.

As a CDFI, we are deeply committed to investing in low- and moderate-income communities and ensuring underserved communities have access to fair and transparent financial products and services. We recognize the crucial importance that strong Fair Lending laws have to ensure the financial needs of these communities are met and that they are treated fairly.

Request for Information Responses

1. ***Disparate Impact:*** *Should the Bureau provide additional clarity regarding its approach to disparate impact analysis under ECOA and/or Regulation B? If so, in what way(s)?*

   For decades, disparate impact analysis has been utilized by the banking agencies and the Department of Justice under ECOA and Regulation B to establish discrimination in the extension of credit. The difficulties in proving overt acts of intentional discrimination, along with the obvious harm to consumers who are affected by statistical patterns of unfair discriminatory practices, have given rise to statistical analysis as a means of proving discrimination in a variety of areas, including employment discrimination, fair housing violations, and fair lending violations. This approach to enforcing the federal anti-discrimination laws was recently reviewed and upheld by the U.S. Supreme Court under the Fair Housing Act in the case of *Texas Dept of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

   The Bureau should reaffirm its commitment to disparate impact analysis and the use of statistical data in assessing whether prohibited discrimination has occurred. In addition, the Bureau should work with HUD and the other banking agencies to reaffirm their commitment to disparate impact analysis and the use of statistical data in assessing whether prohibited discrimination has occurred, in order to ensure consistency in how the agencies are approaching disparate impact reviews.

   The Bureau should also continue to proactively explore ways to ensure equity exists in the financial system, beyond simply eliminating disparate impact. In a world where so much inequity exists, equal treatment simply isn't enough. We strongly encourage the Bureau to pursue additional avenues for incorporating affirmative action into the financial system and to consider equity as a part of all CFPB initiatives (including those outlined in this RFI) going forward.

2. ***Limited English Proficiency:*** *The Bureau seeks to understand the challenges specific to serving LEP consumers and to find ways to encourage creditors to increase assistance to LEP consumers. Should the Bureau provide additional clarity under ECOA and/or Regulation B to further encourage creditors to provide assistance, products, and services in languages other than English to consumers with limited English proficiency? If so, in what way(s)?*

   As indicated in the RFI, regulatory uncertainties and perceived Fair Lending risks, along with limited resources, are the primary reasons that banks don't provide more products and services to those with limited English proficiency. The Bureau should provide additional guidance that outlines the most common situations that lenders may face when determining how to provide services to LEP communities and the correct way to handle them. These may include how to handle translators (translator services, client family members, etc.) and guidance around complying with both Federal and State laws. In addition, this guidance should also outline best practices seen in the industry, any material regulatory actions taken against lenders (what not to do/areas to avoid), and a way to contact the Bureau regarding questions on this topic.

   The Bureau in collaboration with the other Federal Regulatory Agencies should also proactively encourage financial institutions to provide products and services to serve LEP communities and find ways to allow banks to innovate in this area within certain guardrails to ensure consumers remain protected.

3. ***Special Purpose Credit Programs:*** *Should the Bureau address any potential regulatory uncertainty and facilitate the use of SPCPs? If so, in what way(s)? For example, should the Bureau clarify any of the SPCP provisions in Regulation B?*

   Special Purpose Credit Programs are a hidden gem in Regulation B and are significantly underutilized by banks. **Of all of the topics presented in this RFI, we believe the CFPB should make encouraging SPCPs the highest priority.** With the current spotlight on racial injustice, financial institutions are actively looking for ways to better serve communities dealing with the negative impacts of disinvestment, including and especially communities of color, and SPCPs would be a great way to accomplish that. Furthermore, the financial industry has a long history of discrimination in lending practices, which unfortunately remains an issue to this day. Neutrality, or simply not discriminating (in the definitive sense of the word) going forward, is not sufficient to correct these inequities. SPCPs have the potential to provide significant benefits to underserved communities.

   Despite the potential benefits of SPCPs, the majority of financial institutions haven't pursued them due to regulatory uncertainty and concerns about Fair Lending, legal, and reputation risks associated with the implementation of these programs. In particular, if the outcome of an SPCP isn't as successful as intended or if a lender causes inadvertent harm, the fact that an SPCP is targeted towards a protected class significantly increases potential risk to an institution that can often outweigh potential benefits to those communities. The Bureau must provide guidance on the following:

   - What financial institutions need to do in order to mitigate their risk, especially to ensure compliance with UDAAP and other Fair Lending laws and regulations;

- Additional clarity on the requirements of the program, including what a financial institution needs to do to demonstrate the SPCP will be beneficial rather than predatory for the community being served and how impact/success will be measured during and after the program; and,
- What the regulatory approval process looks like.

This guidance should be developed in collaboration with the other federal regulatory agencies to ensure consistency. In addition, the Bureau should explore the implementation of a sandbox-type structure for these programs, which will encourage innovation by providing *some* leeway for institutions, while remaining within certain bounds and conditions. Once additional guidance has been created, the Bureau should actively promote the approval and implementation of SPCPs in collaboration with the other federal regulatory agencies.

One way to further promote the use of SPCPs is to have a public database on what SPCPs exist, how they are structured, and what their impact was. Increased transparency in the process will allow for financial institutions to replicate successful programs and for community groups to have greater visibility into the process and ensure better accountability. The Bureau should collaborate with the other federal regulatory agencies to develop such a SPCP database.

4. ***Affirmative Advertising to Disadvantaged Groups:*** *Should the Bureau provide clarity under ECOA and/or Regulation B to further encourage creditors to use such Affirmative Advertising to reach traditionally disadvantaged consumers and communities? If so, in what way(s)?*

Regulation B appropriately recognizes that there is a need for financial institutions to proactively reach out to underserved communities that have been and continue to be excluded by the financial industry. Affirmative Advertising can be an effective method of informing underserved communities both about financial products and services that they may not be aware of and about how their financial needs can be met through these products and services. In order to ensure that this regulatory exception positively impacts disadvantaged communities as intended; the Bureau should provide additional guidance clarifying two items:

1) The Affirmative Advertising exception currently only addresses the concept of providing access as it relates to helping underserved communities. While access to financial services is important, there are now significantly more financial options for disadvantaged communities since the ECOA was written. Financial access has become more ubiquitous, but the quality of those financial products and services varies widely. Therefore, the type of financial products being marketed in these disadvantaged communities is critically important to ensure their financial needs are being met and that predatory products aren't being marketed to these communities under the guise of increasing financial access. The Bureau should provide additional guidance reaffirming that any Affirmative Advertising to disadvantaged groups must not only target "groups that might not normally seek credit from that creditor" but also that the products and services being offered are in the financial best interests of those groups and are meeting their financial needs.

2) Most financial institutions are risk-adverse, and therefore tend to steer clear of any initiatives, including marketing, that could potentially be linked to a prohibited basis and thus run afoul of Fair Lending laws. The Bureau should provide specific guidance to financial institutions about how

they can utilize this affirmative marketing exception while mitigating any Fair Lending concerns that might arise.

5. ***Small Business Lending:*** *In what way(s) might the bureau support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned?*

   There are two key efforts that the Bureau is in the process of implementing that will significantly help support the credit needs of minority- and women-owned small businesses:

   1) The Bureau should implement the data gathering and reporting requirements of Dodd-Frank Section 1071 so regulators, community groups, and financial institutions have better data to access their lending practices as it related to minority- and women-owned small businesses. This data will allow these stakeholders to better understand the challenges that small businesses face in accessing credit and hold financial institutions accountable for unfair treatment of minority- and women-owned small business owners.

   2) The Bureau should provide regulatory clarity to address the provisions of ECOA and Reg B highlighted above, especially regarding Special Purpose Credit Programs, Affirmative Advertising, and limited English Proficiency. In addition to providing additional guidance, the Bureau should actively promote these programs and encourage financial institutions to implement them.

6. ***Sexual Orientation and Gender Identity Discrimination:*** *Should the Supreme Court's decision in Bostock affect how the Bureau interprets ECOA's prohibition of discrimination on the basis of sex? If so, in what way(s)?*

   The Supreme Court's decision in Bostock v. Clayton County makes it clear that the term "sex" includes both sexual orientation and gender identity. As Justice Alito's dissenting opinion highlights, the Court's decision in the Bostock case applies to all federal statutes that prohibit discrimination based on "sex", which includes ECOA. Richard Cordray, Beneficial State Bank Board Director and former Director of the CFPB, highlights additional implications of the ruling in a USA Today article, which can be found here.[1]

   Based on the Bostock ruling, the CFPB should provide guidance affirming that ECOA prohibits discrimination based on both sexual orientation and gender identity. In addition, the CFPB should assess how it plans to examine financial institutions for potential discrimination on this expanded definition of "sex" given that regulators and financial institutions currently lack the data or ability to create proxies (as we would for race, ethnicity, and biological sex) that could identify discriminatory practices. Complaints will likely play a key role in assessing discrimination based on sexual orientation and gender identity, so the compiling and sharing complaints between the CFPB and consumer-protection departments within each state will be vital to identifying discriminatory trends.

[1] Full article link: https://www.usatoday.com/story/opinion/2020/06/25/supreme-courts-lgbtq-workplace-ruling-means-fairness-consumers-column/3237603001/

7. ***Scope of Federal Preemption of State Law:*** *What are examples of potential conflicts or intersections between state laws, state regulations, and ECOA and/or Regulation B, and should the Bureau address such potential conflicts or intersections? For example, should the Bureau provide further guidance to assist creditors evaluating whether state law is preempted to the extent it is inconsistent with the requirements of ECOA and/or Regulation B?*

   There should not be any Federal Preemption of State Law as it applies to protecting consumers and preventing discrimination. The Federal Government should dictate a national standard for protected classes and states should have the right to expand on those protections (i.e. the Unruh Civil Rights Act in California). The Bureau should further reemphasize as indicated in the RFI that state law is not inconsistent with ECOA or Regulation B if it is more protective of an applicant, as expressly provided in 12 U.S.C. 5551(a)(2), which states that "a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title [the Consumer Financial Protection Act of 2010] if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title."

   That being said, we recognize that there is a significant compliance burden associated with differing State consumer protection laws. It is inherently unfair that some consumers receive additional protections over others, and there is a possibility that certain products and services will not be offered in some states due to these additional compliance requirements. The Bureau should work with the States and the Federal Government to establish more unified consumer protections and provide guidance to provide additional clarity on mitigating risk and protecting consumers across the different State consumer protection frameworks.

8. ***Public Assistance Income:*** *Should the Bureau provide additional clarity under ECOA and/or Regulation B regarding when all or part of the applicant's income derives from any public assistance program? If so, in what way(s)? For example, should it provide guidance on how to address situations where creditors seek to ascertain the continuance of public assistance benefits in underwriting decisions?*

   The Bureau should provide additional guidance, perhaps in the form of FAQs or short examples, that outline the most common situations that lenders may face when assessing income from public assistance programs and the correct way to handle them. We welcome additional resources to determine probable continuance associated with varied sources of protected income (e.g. temporary disability can have widely varied timeframes and can be challenging for lenders to assess). Further guidance should also outline best practices seen in the industry, any material regulatory actions taken against lenders (what not to do), and a way to contact the Bureau regarding questions on this topic.

9. ***Artificial Intelligence and Machine Learning:*** *Should the Bureau provide more regulatory clarity under ECOA and/or Regulation B to help facilitate innovation in a way that increases access to credit for consumers and communities in the context of AI/ML without unlawful discrimination? If so, in what way(s)?*

   Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML? If so, in what way(s)?

   As underwriting models become more complex over time, there will be an increasing need for financial institutions to be able to provide interpretability and explainability around those models to demonstrate to themselves, clients and prospects, consumer advocacy organizations, and regulators that they are not inadvertently discriminating. Unfortunately, this will become increasingly difficult since machine learning and AI inherently make connections and decisions in ways that don't naturally lend themselves to human-centric explanation. Ultimately, regulators will need to have significantly increased technical knowledge in order to mitigate and examine these underwriting models. In addition, adverse action reasons tied to AI/ML based model decisions will likely need to be separated from the specific model factors and explained at a higher, less technical level in order for consumers to benefit from them.

   One interesting idea to combat discrimination proposed by Michael Kearns, Professor at the University of Pennsylvania, is that regulators should require financial institutions to include race, ethnicity, and sex as model factors as a way to test against bias. Rather than the assumed "neutrality" of decision making by not including protected class information, this proactive approach could allow financial institutions to better understand which model inputs, data sources, and outcomes are negatively impacting disadvantaged communities. This is one example of many on how to mitigate bias and ensure controls are built in from the very beginning of the model development process. The Bureau should continue to explore the feasibility of these different ideas and encourage financial institutions to innovate in this area, perhaps through a sandbox type structure with clear guardrails to limit consumer harm. The Bureau should also be focused on providing guidance and additional regulation as needed to ensure model development and outcomes are as fair and transparent as possible.

10. ***ECOA Adverse Action:*** *Should the Bureau provide any additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor, requiring a notification that includes a statement of specific reasons for the adverse action? If so, in what way(s)?*

    The Bureau should provide additional guidance, perhaps in the form of FAQs or short examples, that outline the most common missteps that lenders may face when providing notices of adverse action and the correct way to handle them. This guidance should also outline best practices seen in the industry, any material regulatory actions taken against lenders, and a way to contact the Bureau regarding questions on this topic.

    Financial institutions could use additional guidance on one specific topic: Automatic declines due to not meeting a minimum credit score or other bank minimum requirement. Section 1002.9(b)2 states that "adverse action…based on the creditor's internal standards or policies…are insufficient"; however, these minimum requirements may be the most direct and helpful reason for consumers to understand why they were declined. This statement is also inconsistent with the 1002.9(b)2 commentary #8 that requires banks that have automatic denial factors built into their models to disclose that specific factor.

Furthermore, combined ECOA-FCRA disclosures already include the reasons that a credit score may be insufficient to meet a bank's minimum requirements and thus providing the same information in both parts of the disclosure is redundant. Any guidance the Bureau can provide on this topic would be helpful and appreciated.

Thank you again for the opportunity to comment and for the Bureau's commitment to ensuring consumers have access to fair and transparent financial services. Please feel free to contact us with any questions.

Sincerely,

Randell Leach
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Erin Kilmer Neel
Executive Director, Beneficial State Foundation