



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-0500

GENERAL COUNSEL

**Office of General Counsel Guidance on  
the Fair Housing Act's Treatment of Certain  
Special Purpose Credit Programs  
That Are Designed and Implemented in Compliance with  
the Equal Credit Opportunity Act and Regulation B**

**I. Introduction**

Lenders, stakeholders, and other federal agencies have asked the Department of Housing and Urban Development (HUD) whether the Fair Housing Act<sup>1</sup> (Act) forbids Special Purpose Credit Programs (SPCP)<sup>2</sup> for real estate loans or credit assistance that are compliant with the Equal Credit Opportunity Act (ECOA)<sup>3</sup> and its implementing regulation, Regulation B.<sup>4</sup> These questions arose because SPCPs are explicitly authorized by ECOA and Regulation B, but are not mentioned by the Act, which regulates some of the same conduct and prohibits discrimination against many, of the same classes of persons as those protected from discrimination by ECOA.<sup>5</sup> For the reasons set forth below, this guidance concludes that SPCPs, where instituted in conformity with ECOA and Regulation B, generally would not violate the Act.<sup>6</sup> This guidance does not address whether such loans or credit assistance could violate any other laws, nor does it opine on ECOA's relevant requirements for SPCPs, which are addressed by Consumer Financial Protection Bureau (CFPB) regulations and guidance.<sup>7</sup> Furthermore, this guidance does not address SPCPs created by non-profit organizations for the benefit of their members as that was outside the scope of the question presented to this office as requiring guidance.

**II. The Act**

The Act prohibits discrimination in the sale or rental of housing, in residential real estate-related transactions, such as mortgage lending transactions, and in other housing-related activities based on race, color, religion, sex, disability, familial status, or national origin.<sup>8</sup> The

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<sup>1</sup> 42 U.S.C. §§ 3601-3619.

<sup>2</sup> 15 U.S.C. § 1691(c) (authorizing Special Purpose Credit Programs).

<sup>3</sup> 15 U.S.C. §§ 1691-1691f.

<sup>4</sup> See 12 C.F.R. pt. 1002 (2021). CFPB has rulemaking authority over ECOA. See 15 U.S.C. § 1691b(a).

<sup>5</sup> Compare 42 U.S.C. § 3605(a), prohibiting discrimination under the Act because of race, color, religion, sex, disability, familial status or national origin with 15 U.S.C. § 1691, prohibiting discrimination under ECOA on the basis of, among other things, "race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." The Act is chiefly administered and enforced by HUD pursuant to the terms of the Act and HUD's implementing regulations at 24 C.F.R. pt. 100 (2021).

<sup>6</sup> This guidance relates to loans or credit assistance provided by a non-profit organization to benefit an economically disadvantaged class of persons or by a for-profit organization to meet special social needs.

<sup>7</sup> See 12 C.F.R. § 1002.8 (2021); Advisory Opinion on Special Purpose Credit Programs, 86 Fed. Reg. 3762 (2021).

<sup>8</sup> 42 U.S.C. §§ 3601-3619.

Act is not limited to preventing discrimination alone, as Congress included an affirmative provision requiring the Federal government to take a proactive role in redressing longstanding housing discrimination. Specifically, the Act requires HUD and other executive departments and agencies to administer programs and activities relating to housing and urban development “in a manner affirmatively to further the purposes” of the Act.<sup>9</sup>

### III. ECOA and SPCPs

Six years after passing the Act, Congress enacted ECOA, which prohibited lending discrimination based on sex and marital status, not only in mortgage lending, but also in a broad swath of lending transactions unrelated to real estate such as car loans, credit cards, student loans, and business loans.<sup>10</sup>

In 1976, Congress expanded ECOA coverage to prohibit discrimination in credit transactions based upon race, color, religion, and national origin, as well as age, receipt of public assistance, and exercise of rights under the Consumer Credit Protection Act.<sup>11</sup> Recognizing that ECOA and the Act provided overlapping protections in certain credit transactions, Congress explicitly prohibited a party from recovering for a violation based on a single transaction under both ECOA and Section 805 of the Act, which prohibits discrimination in residential real estate-related transactions.<sup>12</sup>

In expanding these protections to new protected classes, Congress also provided that it would not be considered discriminatory for creditors to establish targeted credit assistance programs for certain purposes. Specifically, ECOA provides that it does not constitute discrimination for a creditor to refuse to extend credit to certain persons if such refusal is required by or made pursuant to one of the following programs:

- (1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
- (2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or
- (3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau.<sup>13</sup>

Examples of specific programs that Congress expressly contemplated in the legislative history include government-sponsored housing credit subsidies for low-income individuals and seniors.<sup>14</sup> In clarifying that compliant SPCPs do not constitute barred discrimination, Congress chose not to disturb the status quo or undermine existing programs “designed to prefer members

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<sup>9</sup> 42 U.S.C. § 3608(d).

<sup>10</sup> Equal Credit Opportunity Act, Pub. L. 93-495, § 701 *et seq.*, 88 Stat. 1500, 1521 (1974).

<sup>11</sup> Equal Credit Opportunity Act Amendments of 1976, Pub. L. 94-239, § 701(a), 90 Stat. 251 (1976).

<sup>12</sup> *See* 90 Stat. 251, 254-55 (1976); 15 U.S.C. § 1691e(i).

<sup>13</sup> 15 U.S.C. § 1691(c).

<sup>14</sup> *See* S. REP. NO. 94-589, at 7 (1976).

of economically disadvantaged classes.”<sup>15</sup> Congress further understood that SPCPs offered by profit-making organizations are “designed to increase access to the credit market by persons previously foreclosed from it.”<sup>16</sup> Congress thus specified that it would not constitute discrimination to offer such targeted programs where otherwise many of “the consumers involved would effectively be denied credit.”<sup>17</sup>

In 1977, the Federal Reserve Board (FRB) amended Regulation B, ECOA’s implementing regulation, to implement ECOA’s 1976 amendment.<sup>18</sup> Over ensuing decades, the FRB initially and then the CFPB (after that agency assumed responsibility for ECOA) have periodically reviewed and revised Regulation B.<sup>19</sup> However, the language relevant to this discussion has remained largely unchanged. Today, Regulation B specifies that a program qualifies as an SPCP:

only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program was not established and is not administered with the purpose of evading the requirements of [ECOA] or this part.<sup>20</sup>

Thus, as one court has articulated, although an SPCP’s “participants may be required to share one or more of those characteristics’ ordinarily considered prohibited bases . . . they may be required to share only those factors inextricably tied to the need being addressed.”<sup>21</sup>

Further elaborating on Regulation B’s requirements, the FRB explained:

[A] creditor may determine eligibility for a special purpose credit program using one or more of the prohibited bases; but, once the characteristics of the class of beneficiaries are established, a creditor may not discriminate among potential beneficiaries on a prohibited basis. For example, a creditor might establish a credit program for impoverished American Indians. If the program met the requirements of [12 C.F.R. § 1002.8(a)], the creditor could refuse credit to non-Indians but could not discriminate among Indian applicants on the basis of sex or marital status.<sup>22</sup>

More recently, the CFPB provided additional guidance to for-profit institutions regarding what could constitute a “class of persons” under Regulation B’s SPCP requirements:

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<sup>15</sup> S. REP. NO. 94-589, at 7 (1976); *see also* *United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 175 (3d Cir. 1984) (noting specifically that “the Committee does not intend to undermine these programs”) (quoting S. REP. NO. 94-589, at 7 (1976)).

<sup>16</sup> S. REP. NO. 94-589, at 7 (1976); *see also* *Am. Future Sys., Inc.*, 743 F.2d at 175 (quoting S. REP. NO. 94-589, at 7 (1976)).

<sup>17</sup> *Am. Future Sys., Inc.*, 743 F.2d at 174–75 (quoting H.R. REP. NO. 94-873, at 8 (1976)).

<sup>18</sup> 42 Fed. Reg. 1242, 1256 (Jan. 6, 1977).

<sup>19</sup> *See, e.g.*, 50 Fed. Reg. 48,018 (Nov. 20, 1985); 68 Fed. Reg. 13,144 (Mar. 18, 2003); 76 Fed. Reg. 79,442 (Dec. 21, 2011).

<sup>20</sup> 12 C.F.R. § 1002.8(b)(2) (2021).

<sup>21</sup> *Am. Future Sys., Inc.*, 743 F.2d at 179 (quoting Regulation B).

<sup>22</sup> 42 Fed. Reg. 1242, 1248 (Jan. 6, 1977).

Such a class could be defined with or without reference to a characteristic that is otherwise a prohibited basis under the ECOA. For example, if need is determined in accordance with part I.D.2 below [“Determination of Need for a Special Purpose Credit Program”], a for-profit organization’s written plan might identify a class of persons as minority residents of low-to-moderate income census tracts, residents of majority-Black census tracts, operators of small farms in rural counties, minority- or woman-owned small business owners, consumers with limited English proficiency, or residents living on tribal lands.<sup>23</sup>

ECOA’s text and legislative history and the CFPB’s implementing regulations and guidance thus set forth important limiting requirements that must be met for lending programs to qualify as SPCPs and not be discriminatory. For example, any such qualifying SPCP must be established and administered so as not to discriminate against an applicant because of a protected characteristic that is not a specifically articulated preference for the SPCP, and it must ensure there is no accompanying restriction of credit available to applicants not in the categories of preferred applicants under the SPCP. Accordingly, this guidance regarding the Act is limited to certain SPCPs that meet the requirements of ECOA and Regulation B.

#### IV. Analysis

It is well recognized that when two statutes regulate the same topic, rules of statutory construction instruct that they be interpreted in a manner that harmonizes them so that they are both given effect.<sup>24</sup> Here, the Act and ECOA both bar certain discriminatory mortgage lending practices. Consistent with Congress’s design, the Act and ECOA have harmoniously coexisted for more than four decades and should be read together so each law achieves its remedial and non-discriminatory purposes.

Congress enacted ECOA’s SPCP-authorizing language against the background of an already existing Fair Housing Act. It intended the Act and ECOA to coexist harmoniously and complement each other rather than create any conflict between these laws.<sup>25</sup> Congress intended both statutes to operate similarly (albeit sometimes with respect to different subject matters), both prohibiting certain discriminatory conduct and encouraging affirmative conduct to address long unmet needs and disparities.<sup>26</sup>

Since its 1974 inception, ECOA has complemented the Act where they overlap. In 1974, Congress amended the Act by adding sex as a protected class.<sup>27</sup> Two months later, Congress

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<sup>23</sup> 86 Fed. Reg 3762, 3765 (Jan. 15, 2021).

<sup>24</sup> See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“[T]his Court is not at ‘liberty to pick and choose among congressional enactments’ and must instead strive ‘to give effect to both.’” (quoting *Morton v. Mancari*, 417 U. S. 535, 551 (1974))).

<sup>25</sup> See, e.g., H.R. REP. 94-210, at 3 (1975).

<sup>26</sup> *Id.*

<sup>27</sup> See Housing and Community Development Act of 1974, Pub. L. 93-383, § 527, 88 Stat. 633, 727 (1974) (amending Fair Housing Act).

enacted ECOA, prohibiting, among other things, discrimination based on sex.<sup>28</sup> While the Act covers residential real estate-related transactions, ECOA covers a broader range of credit transactions. Congress's 1976 amendment to ECOA further reflected that ECOA and the Act are complementary statutes intended to harmoniously coexist. In ECOA's 1976 amendment, Congress recognized that enforcement of the Act and ECOA could overlap when it explicitly prohibited a party from recovering under both ECOA and Section 805 of the Act for a violation based on the same transaction.<sup>29</sup>

Indeed, the U.S. Department of Justice, an agency charged with enforcement of both the Act and ECOA, has treated ECOA-authorized SPCPs offered by for-profit organizations as a means of remedying the exclusion of people of color and others from mortgage credit markets rather than a form of discrimination that violates the Act.<sup>30</sup> For example, in *United States v. KleinBank*, the U.S. Department of Justice alleged that KleinBank violated the Act and ECOA by engaging in a pattern or practice of unlawful redlining "to avoid serving the credit needs of neighborhoods where a majority of residents are individuals of racial and ethnic minorities . . ."<sup>31</sup> In the May 2018 settlement agreement through which the Department of Justice resolved the case, KleinBank committed to meet the credit needs of residents in majority-minority census tracts in Hennepin County, Minnesota and to make its mortgage lending products and services available in a nondiscriminatory manner.<sup>32</sup> Additionally, the parties agreed that KleinBank would establish at least one SPCP "to help residents of majority-minority tracts establish or remediate consumer credit . . ."<sup>33</sup> The parties also agreed that KleinBank would invest at least \$300,000 in an SPCP "that will offer residents of majority-minority census tracts in Hennepin County home mortgage loans and home improvement loans on a more affordable basis than otherwise available from KleinBank."<sup>34</sup> The settlement in *United States v. KleinBank* is exemplary of the harmonious enforcement of the Act and ECOA, consistent with Congress's design.<sup>35</sup>

For the foregoing reasons, SPCPs offered by non-profit organizations to serve economically disadvantaged classes and those offered by for-profit organizations to meet special social needs that are carefully tailored and targeted to meet ECOA and Regulation B's specifications will generally

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<sup>28</sup> Equal Credit Opportunity Act, Pub. L. 93-495, § 701(a), 88 Stat. 1500, 1521 (1974).

<sup>29</sup> See 90 Stat. 251, 254-55 (1976); 15 U.S.C. § 1691e(i).

<sup>30</sup> See Settlement Agreement Between the United States of America and KleinBank at 1, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. May 8, 2018), <https://www.justice.gov/crt/case-document/file/1061061/download>; see also Consent Order, *United States v. Union Sav. Bank*, No. 1:16-cv-1172 (S.D. Ohio Jan. 3, 2017), <https://www.justice.gov/crt/case-document/file/922551/download> (resolving claims under the Fair Housing Act and ECOA that defendant banks' policies and practices denied or discouraged an equal home mortgage opportunity to residents of majority African-American census tracts in certain MSAs by providing for, among other things, a special purpose credit mortgage program limited to properties located in majority African-American census tracts).

<sup>31</sup> Complaint at 1, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/927076/download>.

<sup>32</sup> See Settlement Agreement Between the United States of America and KleinBank at 1.

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.*

<sup>35</sup> See also Consent Order, *United States v. Union Sav. Bank*, No. 1:16-cv-1172 (S.D. Ohio Jan. 3, 2017), <https://www.justice.gov/crt/case-document/file/922551/download> (resolving claims under the Fair Housing Act and ECOA that defendant banks' policies and practices denied or discouraged an equal home mortgage opportunity to residents of majority African-American census tracts in certain MSAs by the bank agreeing to, among other things, a special purpose credit mortgage program limited to properties located in majority African-American census tracts).

not “discriminate” within the meaning of the Act, just as they do not constitute discrimination under ECOA.

**V. Conclusion**

While the Act and ECOA regulate overlapping but different types of credit activity and entities, the statutes are complementary and should generally be harmonized. Accordingly, a non-profit organization’s Special Purpose Credit Program established to serve an economically disadvantaged class of persons or a for-profit institution’s Special Purpose Credit Program designed and implemented in compliance with ECOA and Regulation B generally do not violate the Act.

  
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