

CFPB Proposes Regulation B Amendments to Provide Compliance Flexibility

April 5, 2017

The Consumer Financial Protection Bureau (“CFPB”) has issued proposed amendments to Regulation B, the regulation implementing the Equal Credit Opportunity Act (“ECOA”), to permit creditors additional flexibility in collecting information about applicants for certain dwelling-secured loans. The proposed amendments also provide greater clarity regarding a creditor’s obligations under both ECOA and the Home Mortgage Disclosure Act (“HMDA”) and facilitate the future use of the new Uniform Residential Loan Application (“URLA”) issued in 2016 (the “2016 URLA”).

Under the proposed amendments, creditors would not need to maintain different practices standards for information collection under Regulation B and Regulation C, the regulation implementing HMDA. Overall, the proposed amendments are intended to provide clear and consistent compliance standards regarding information collection, which may ease certain compliance burdens on covered financial institutions.

The proposed amendments are discussed below.

I. Rules Concerning Requests for Information

Current Regulation B generally prohibits creditors from inquiring about a borrower’s demographic information, including race, color, religion, national origin, or sex in connection with a credit transaction. One exception is that creditors must collect and retain protected applicant-characteristic information including race, ethnicity, age, and marital status for certain dwelling-secured loans. Another exception is that creditors may obtain information required by a regulation, a court, or an enforcement agency. This exception includes requirements under Regulation C to collect and report applicant information for covered loans.

The CFPB issued amendments to Regulation C in October 2015 (“Revised Regulation C”), including changes to the collection of demographic information from applicants. In order to align with the Revised Regulation C requirements, the proposed Regulation B amendments would authorize creditors to collect information under the following additional circumstances:

1. A creditor may collect information regarding the ethnicity, race, and sex of an applicant for a closed-end mortgage loan or an open-end line of credit that is not subject to Regulation C if the creditor submits HMDA data regarding such transaction or submitted HMDA data for any of the preceding five calendar years.

2. A creditor that is not a covered financial institution under Regulation C but submitted HMDA data for any of the preceding five calendar years may collect information regarding the ethnicity, race, and sex of an applicant for a loan that would otherwise be a covered loan under Regulation C.
3. A creditor that is not a covered financial institution under Regulation C but exceeded an applicable loan volume threshold in the first year of a two-year threshold period set forth in Regulation C may collect information regarding the ethnicity, race, and sex of an applicant for a loan that would otherwise be a covered loan under Regulation C.

II. Information for Monitoring Purposes

Several current provisions of Regulation B with respect to obtaining government monitoring information do not align with provisions of Revised Regulation C which take effect on January 1, 2018. For instance, under current Regulation B, creditors must collect and retain certain protected applicant-characteristic information using aggregate ethnicity and race categories for certain dwelling-secured loans. However, Revised Regulation C requires creditors to permit applicants to self-identify using disaggregated ethnicity and race categories. Additionally, current Regulation B requires creditors to note on the application the ethnicity, race, and sex of the applicant on the basis of visual observation or surname to the extent possible if an applicant chooses not to provide the requested information. Revised Regulation C provides additional requirements regarding the collection of information based on visual observation or surname. Appendix B to Revised Regulation C specifically requires creditors to select from the aggregate ethnicity and race categories when collecting an applicant's ethnicity, race, and sex on the basis of visual observation or surname.

To provide clarity regarding differences between the two regulations and promote regulatory consistency, the proposed amendments revise Section 1002.13 of Regulation B to provide that a creditor must collect an applicant's information using either aggregate or disaggregated ethnicity and race categories. Under the proposed amendments, a creditor that is subject to both Regulation C and Regulation B requirements and collects information using the disaggregated race and ethnicity categories pursuant to Revised Regulation C, would not violate Regulation B requirements. The proposed revision to Regulation B Section 1002.13(b) includes a reference to Revised Regulation C so that a creditor that wishes to collect an applicant's information using Regulation C standards will be subject to the same restrictions as set forth in Appendix B to Revised Regulation C.

III. Record Retention

The CFPB proposes that if a creditor voluntarily collects an applicant's demographic information under the additional authorized circumstances being proposed, the creditor must comply with record retention requirements under Regulation B. Current Regulation B requires retention of records for 25 months (12 months for business credit) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness.

IV. Model Application Forms

Current Appendix B to Regulation B contains the 2004 URLA which adopts aggregate ethnicity and race categories in collecting demographic data. The CFPB published an Approval Notice on September 23, 2016, authorizing

creditors to use the 2016 URLA which adopts disaggregate ethnicity and race categories for demographic data collection without Regulation B violations. Accordingly, the CFPB proposes to insert a model form reference of Appendix B to Regulation C for creditors that collect information using the disaggregated race and ethnicity categories pursuant to the Revised Regulation C. This model form would be consistent with the 2016 URLA. Additionally, the CFPB proposes to remove the 2004 URLA as a model form in Regulation B on the Cutover Date (as defined below) for use of the 2016 URLA or January 1, 2022, whichever comes first.

Please note that Fannie Mae and Freddie Mac (collectively, the “Enterprises”) have indicated their intent to mandate the use of the 2016 URLA for all loans eligible for purchase by the Enterprises, but they have not yet provided the date on which use is required (the “Cutover Date”). The Enterprises issued guidance on November 1, 2016, stating that the 2016 URLA should not be used until the Enterprises establish the Cutover Date. Lenders may use a Demographic Information Addendum (which complies with the information collection requirements under Revised Regulation C) on or after January 1, 2017, as a replacement for section X in the current URLA dated 7/05 (revised 6/09).

V. Further Information

A copy of the proposed amendments can be found here:

<https://www.federalregister.gov/documents/2017/04/04/2017-06195/amendments-to-equal-credit-opportunity-act-regulation-b-ethnicity-and-race-information-collection>. Comments on the proposal must be submitted to the CFPB by May 4, 2017.

Please note that this advisory is a general overview of the proposed amendments to Regulation B and is not intended as a comprehensive explanation of all aspects of the amendments or as formal legal advice. If you have any questions regarding the proposed amendments, Regulation B, Regulation C or mortgage compliance issues in general, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at 516-296-9196 or via email at kpatterson@cullenanddykman.com, or Mandy Xu at 516-357-3850 or via email at mxu@cullenanddykman.com.

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