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**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** CFPB Issues Interpretive Rule on Sex Discrimination under ECOA and Regulation B on the Bases of Sexual Orientation and Gender Identity

In the March 16, 2021 issue of the *Federal Register* ([86 FR 14363](#)), the Consumer Financial Protection Bureau issued an interpretive rule to clarify that, with respect to any aspect of a credit transaction, the prohibition against sex discrimination in the Equal Credit Opportunity Act (ECOA) and Regulation B, which implements ECOA, encompasses sexual orientation discrimination and gender identity discrimination, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations. This interpretive rule is effective on March 16, 2021.

The Bureau's interpretation is consistent with the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020) regarding sex discrimination under Title VII of the Civil Rights Act of 1964, in which the Court ruled that the prohibition against sex discrimination in Title VII encompasses sexual orientation discrimination and gender identity discrimination.

ECOA does not require that sex (or other protected characteristics) be the sole or primary reason for an action to be discriminatory. ECOA applies to sex discrimination against individuals, not just to situations where a group of people with a common protected characteristic are discriminated against categorically. Regulation B clarifies that ECOA prohibits discrimination based not only on the characteristics of an applicant but also based on the characteristics of a person with whom an applicant associates.

Even though the term "sex" is not defined in ECOA or Regulation B, the prohibitions against discrimination on the basis of "sex" under ECOA and Regulation B are correctly interpreted to include discrimination based on sexual orientation and/or gender identity.

Under ECOA and Regulation B: (1) Sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex; (2) an applicant's sex must be a "but for" cause of the injury, but need not be the only cause; and (3) discrimination against individuals, and not merely against groups, is covered. Also, ECOA's and Regulation B's prohibition against sex discrimination encompasses discrimination motivated by perceived nonconformity with sex-based or gender-based stereotypes, as well as discrimination based on an applicant's associations.

The interpretive rule provides the following examples of sex-based discrimination based on sexual orientation, gender identity, nonconformity with sex-based or gender-based stereotypes, and an applicant's associations.

- A creditor declines male applicant's loan application on the basis that he is attracted to men. The creditor discriminated against him for traits or actions it tolerates in female applicants. And this discrimination is also partly motivated by the applicant failing to fulfill traditional sex stereotypes.

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- A creditor declines the loan forbearance application of a transgender person who identified as male at birth but who now identifies as female, but approves the application of an otherwise similarly-situated applicant who identified as female at birth and continues to identify as female. The creditor discriminated against the person identified as male at birth for traits or actions that it tolerates in an applicant identified as female at birth.
- A creditor rejects an applicant based on the applicant being gay or transgender. Two discriminatory causal factors have been met—both the individual’s sex and the sex to which the individual is attracted or with which the individual identifies.
- A creditor rejects a woman’s application because the loan officer regards her as insufficiently feminine and rejects a man’s application because the loan officer regards him as being insufficiently masculine. In both scenarios, the creditor discriminated against an applicant by rejecting the applicant in part because of sex.
- A small business lender discourages a small business owner appearing at its office from applying for a business loan and tells the prospective applicant to go home and change because, in the view of the lender, the small business owner’s attire does not accord with the owner’s gender. The creditor discriminated against the small business owner because of a perceived nonconformity with sex-based or gender-based stereotypes.
- A creditor requires a person applying for credit who is married to a person of the same sex to provide different documentation of the marriage than a person applying for credit who is married to a person of the opposite sex. The creditor has engaged in associational discrimination.

To summarize the interpretive rule, it interprets the ECOA and Regulation B prohibition against discrimination on the basis of “sex” to include discrimination or discouragement based on sexual orientation and/or gender identity, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant’s associations.

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