

CFPB Clarifies That Prohibition Against Sex Discrimination Includes Sexual Orientation and Gender Identity

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The US Consumer Financial Protection Bureau continues to focus on fair lending and is poised to increase enforcement actions. On March 9, the CFPB issued an interpretive rule to clarify that the prohibition against sex discrimination under the Equal Credit Opportunity Act and implementing Regulation B extends to discrimination involving sexual orientation and gender identity.

The ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction,” including “on the basis of...sex.”¹ Similarly, Regulation B prohibits a creditor from discriminating against an applicant on a prohibited basis, including “sex.”² Based on the “straightforward application of legal terms with plain and settled meanings,”³ and its own expertise in administering the ECOA and Regulation B, the CFPB concluded that “on the basis of sex” includes sexual orientation and gender identity.

The CFPB stated that it believes the interpretive rule aligns with the US Supreme Court’s understanding of sex discrimination under Title VII, which was announced in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), on June 15, 2020. In *Bostock*, the Supreme Court held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses sexual orientation discrimination and gender identity discrimination. Responding to this decision, in part, the CFPB issued a request for information on July 28, 2020, to solicit public comments and information to identify opportunities to prevent credit discrimination and encourage responsible innovation under the ECOA and Regulation B. The CFPB explained that this interpretive rule is both consistent with *Bostock* and supported by many of the public comments received in response to the ECOA RFI.

The interpretive rule also provides examples of prohibited sex discrimination, and the CFPB emphasizes its commitment to bring enforcement actions under the ECOA to hold financial institutions accountable for violations. For example, the CFPB explained that “if a creditor declines the loan forbearance application of a transgender person who was identified as male at birth but who now identifies as female, but approves the application of an otherwise similarly-situated applicant who was identified as female at birth and now continues to identify as female,” the creditor has engaged in sex discrimination under the ECOA. The CFPB said it plans to review and update publications and examination guidance to reflect the interpretive rule. The CFPB’s press release announcing the rule also expressed support for the Equality Act, which passed the House of Representatives on February 25. If enacted, the bill would codify protections from discrimination based on sexual orientation and gender identity in several areas, including in all financial products and services.

As part of the Interagency Task Force on Fair Lending, the Federal Trade Commission and other agencies have also focused on credit discrimination.

Notes

1. 15 U.S.C. 1691(a)(1).
2. 12 CFR 1002.2(z).
3. *Bostock*, 140 S. Ct. at 1743.

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