

Client Alert

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CFPB Forgoes Traditional Rulemaking Process in Announcing that the Equal Credit Opportunity Act and Regulation B Prohibit Discrimination Based on Gender Identity and Sexual Orientation

By Leonard N. Chanin and Amanda J. Mollo

Richard Cordray, director of the Consumer Financial Protection Bureau (“CFPB”), issued a [letter](#) dated August 30, 2016 (“Cordray Letter”), expressing the CFPB’s views on whether credit discrimination on the basis of gender identity and sexual orientation violates the Equal Credit Opportunity Act (“ECOA”) and Regulation B. The Cordray Letter was issued in response to an inquiry from Services & Advocacy for GLBT Elders (“SAGE”). Specifically, the Cordray Letter addresses whether discrimination on the basis of an applicant’s sex under the ECOA and Regulation B includes discrimination based on gender identity and sexual orientation, including discrimination based on “actual or perceived nonconformity” with gender-based stereotypes. The Cordray Letter concludes that the ECOA and Regulation B prohibit such actions.

It is worth noting, in particular, that the CFPB issued its interpretation about this issue in a “private” letter to SAGE, rather than by proposing changes to Regulation B and allowing the public to comment on the interpretation. And, oddly enough, the Cordray Letter does not appear to be available on the CFPB’s website.

FOCUS OF THE LETTER

The Cordray Letter takes the form of an advocate’s legal brief, and analyzes court decisions (primarily in the employment field) in determining whether discrimination on the basis of gender identity and sexual orientation constitutes discrimination on the basis of sex under the ECOA and Regulation B. The Cordray Letter sets forth legal arguments supporting the CFPB’s view that the term “sex” under the ECOA should include gender identity and sexual orientation, based on what Director Cordray characterizes as “recent developments in the law.” The interpretation of the scope of the term “sex” under the ECOA and Regulation B pronounced in the Cordray Letter is primarily based on interpretations of the prohibition on discriminating on the basis of “sex” in the employment law context. Much of the letter is dedicated to describing case law and Equal Employment Opportunity Commission interpretations of “sex” that include gender identity and sexual orientation. The director notes that courts have been guided by decisions under Title VII in their interpretations of the ECOA and Regulation B, consistent with the legislative history of the ECOA and prior case law.

Although the Cordray Letter does not directly characterize any particular action as a violation of Regulation B, the conclusion of the Cordray Letter is clear and states that “the current state of the law supports arguments that the prohibition of sex discrimination in ECOA and Regulation B affords broad protection against credit discrimination on the bases of gender identity and sexual orientation.” The Cordray Letter further states that such discrimination would include “discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes, as well as discrimination based on one’s associations.”

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ISSUANCE OF INTERPRETATION BY LETTER RATHER THAN BY RULE

For an agency that prides itself on openness and transparency, it is peculiar, to say the least, that the CFPB provided an important and significant new interpretation of the ECOA and Regulation B through a process that is neither open nor transparent. First, the CFPB chose not to issue the interpretation via a proposed amendment to Regulation B, thus depriving the public of the opportunity to be apprised of the proposed interpretation and provide views and comments on the approach. Issuance of a proposed rule could well have provided commenters with the opportunity to raise practical compliance and operational issues, and enabled the CFPB to address issues and questions that creditors will no doubt face in complying with the newly-announced interpretation. By choosing not to publish the interpretation via a change to Regulation B, the CFPB also failed to provide creditors with any advance opportunity to establish policies and procedures to ensure compliance and take other steps, such as by training employees, about the issue. This is not the first time the CFPB has issued a legal interpretation of Regulation B without using the regulatory process; one can only hope, however, that it is the last time.

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