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Fair Lending—Renewed Emphasis?

CFPB and DFS Issuances Signal Potential Renewed Emphasis on Addressing Sex-Based Discrimination in Lending

SUMMARY

On March 9, 2021, the Consumer Financial Protection Bureau (“CFPB”) issued an interpretive rule (the “Interpretive Rule”) clarifying that the prohibition against sex discrimination in the federal Equal Credit Opportunity Act (“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. Two weeks later, on March 23, 2021, the New York Department of Financial Services (“DFS”) publicly [reported](#) (the “Report”) that it found no evidence of sex-based discrimination in the underwriting of the Apple Card co-branded credit card (“Apple Card”) offered by Apple Inc. and underwritten by Goldman Sachs Bank USA (“Goldman Sachs” or the “Bank”). While distinct developments, the Interpretive Rule and the DFS Report likely foreshadow a renewed emphasis in 2021 on fair lending by, at a minimum, these two agencies.

I. CFPB INTERPRETIVE RULE

ECOA and its implementing regulation, Regulation B, prohibit credit discrimination on the basis of race, color, religion, national origin, sex, marital status, or age.¹ Title VII of the Civil Rights Act of 1964 (“Title VII”), enacted roughly a decade prior to ECOA, prohibits employers from discriminating in employment decisions because of race, color, religion, sex, or national origin.² Given the similar language and purposes, courts often look to Title VII case law, which has substantial depth and breadth, in interpreting ECOA.^{3, 4}

On June 15, 2020, the Supreme Court held in *Bostock v. Clayton County, Georgia* (“*Bostock*”), that Title VII’s prohibition on sex-based discrimination encompasses discrimination on the basis of sexual orientation or gender identity.⁵ In a lengthy dissent, Justice Alito asserted, among other things, that the Court’s decision was “virtually certain to have far-reaching consequences[,]” specifically citing ECOA.⁶

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On March 9, 2021, less than a year later and within the first 60 days of President Biden's administration, the CFPB, "consistent with the Court's conclusion in *Bostock*," issued the Interpretive Rule clarifying that the prohibition against sex discrimination in ECOA and Regulation B "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."⁷ The Interpretive Rule became effective March 16, 2021.

According to the CFPB, five findings and conclusions underpin the Interpretive Rule, three of which align with the Court's "key findings" in *Bostock* and the remaining two of which are consistent with *Bostock*.

- First, sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex.
- Second, an applicant's sex must be a "but for" cause of the injury, but need not be the only cause.
- Third, discrimination against individuals, and not merely against groups, is covered.
- Fourth, the prohibition encompasses perceived sex- or gender-based discriminatory stereotyping.
- Finally, the prohibition extends to discrimination based on an applicant's associations.

Although the rationale underpinning the Interpretive Rule relies heavily on the Court's decision in *Bostock*, the CFPB stresses that it would reach the same conclusion based on its expertise in interpreting ECOA and Regulation B—a move that seems aimed at addressing any future court challenges to the extension of *Bostock* to claims under ECOA by emphasizing that the CFPB would have arrived at the same outcome independent of *Bostock*.⁸

II. DFS REPORT

In November 2019, allegations surfaced on social media, including by an Apple co-founder, that Goldman Sachs discriminated against women in extending credit for the Apple Card. In short order, DFS Superintendent Linda Lacewell announced that the DFS would "investigate what may have gone wrong."⁹ New York state anti-discrimination law, like ECOA, prohibits sex-based discrimination in lending.¹⁰

The DFS's investigation essentially focused on two categories of complaints. First, complainants argued that, due to sex-based discrimination, husbands were offered higher credit limits than wives with whom they shared finances. The DFS found no merit to this concern. According to the Report, women and men with equivalent credit characteristics had similar Apple Card application outcomes, indicating that the Bank is neither intentionally using sex in lending decisions (i.e., disparate treatment) nor utilizing facially neutral lending policies that result in unequal outcomes based on sex (i.e., disparate impact). The Bank was also able to identify, for each individual who submitted a discrimination complaint to the DFS, permissible factors that led to the credit decision. The DFS attributed the complainants' concerns to a "common misperception" that spouses are entitled to equal credit terms from credit card issuers if they share finances. However, for

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the couples in this category who complained, there were differences in credit profiles, and the DFS recognizes in the Report that differences in credit profiles can lead (permissibly) to differing credit offers. Accordingly, no anti-discrimination laws were violated in connection with these complaints.

Second, complainants expressed various forms of dissatisfaction with Apple Card policies or features. Complainants in this category argued that the Bank relied on opaque algorithms and machine learning for credit decision-making, and that this reliance resulted in unexplainable outcomes. They also complained that the Apple Card had unfair or frustrating policies that required new account holders to maintain the account for six months before being eligible for a credit limit increase and that did not allow authorized users. With regard to these concerns, the DFS concluded, in substance, that a better product roll-out and improved policies related to credit term review could have mitigated customer dissatisfaction, but, again, identified no violations of law. The DFS also pointed to the common misperception that adding an authorized user—something frequently done by couples who share finances—involves creditor review of the authorized user's credit history.

In the Report, the DFS acknowledges that Goldman Sachs and Apple took numerous steps to promptly address concerns raised by the complaints.

The Report concludes with a broader discussion—apparently unrelated to the Apple Card—of credit underwriting issues, particularly for underserved populations with a history of suffering from systemic racism. The DFS suggests that alternative underwriting methods may help reduce legacy bias in traditional credit underwriting, but recognizes that such methods also may present risks, including potential inaccuracy in assessing creditworthiness, discriminatory outcomes, and limited transparency. Pointing to the federal banking agencies' and CFPB's December 2019 interagency statement on the use of alternative data in credit underwriting, the DFS emphasizes the importance of robust compliance management to ensure consumer protection risks are understood and addressed.¹¹

IMPLICATIONS

Although *Bostock* and the Interpretive Rule were arguably foreshadowed by the CFPB during the Obama administration, the public issuance of the Interpretive Rule so soon after President Biden's inauguration and while the CFPB is led by an acting director could signal a near-term renewed emphasis on fair lending issues by the CFPB.

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As for the DFS Report, it is unusual that the DFS publicly issued a report that closed a previously disclosed investigation without finding any violations of the fair lending laws. The DFS's suggestion that alternative underwriting processes may reduce legacy bias in traditional credit underwriting could support innovation. However, President Biden's nominee for Director of the CFPB, Rohit Chopra, has expressed skepticism about alternative underwriting methods and their fair lending impact.

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ENDNOTES

- ¹ 15 U.S.C. § 1691; 12 CFR 1002.2(z). ECOA and Regulation B also prohibit discrimination on the basis of receipt of public assistance or the applicant's good faith exercise of a right under the Consumer Credit Protection Act. As originally enacted in 1974, ECOA prohibited only discrimination on the basis of sex or marital status. ECOA was amended in 1976 to include the additional prohibited bases.
- ² 42 U.S.C. § 2000e-2(a)(1). Like ECOA, Title VII also prohibits discrimination because of race, color, religion, or national origin.
- ³ See, e.g., *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Mays v. Buckeye Rural Electric Cooperative, Inc., et al.*, 277 F.3d 873, 876 (6th Cir. 2002). But see *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998).
- ⁴ This approach is consistent with Congressional intent. See, e.g., S. Rep. No. 589, 94th Cong., 2nd Sess. 1976, 4-5 (1976), 1976 U.S.C.C.A.N. 403, 406.
- ⁵ 140 S. Ct. 1731 (2020).
- ⁶ *Id.* at 1778.
- ⁷ 86 Federal Register 14363 (March 16, 2021).
- ⁸ *Id.* Indeed, the Interpretive Rule was issued under the CFPB's authority to interpret ECOA and Regulation B. The CFPB also references the February 2021 decision by the Department of Housing and Urban Development, which administers and enforces the Fair Housing Act ("FHA"), that the FHA prohibits discrimination on the basis of sexual orientation and gender identity, the numerous states that already prohibit discrimination on the basis of sexual orientation and/or gender identity, and an August 2016 unpublished and unbinding letter by then-CFPB Director Richard Cordray concluding that the state of Title VII law at the time supported arguments that ECOA's prohibition on sex-based discrimination encompasses discrimination on the bases of sexual orientation and gender identity and committed to monitoring legal developments to ensure that the CFPB's interpretation of ECOA reflects evolving precedents interpreting sexual discrimination law. Letter available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2016/09/SAGE-Letter.pdf>.
- ⁹ See *Building a fairer and more inclusive financial services industry for everyone*, available at <https://medium.com/@nydfs/building-a-fairer-and-more-inclusive-financial-services-industry-for-everyone-917183dae954>.
- ¹⁰ New York State Exec. Law § 296-a. Additional prohibited bases include sexual orientation or gender identity or expression, military status, disability, and familial status.
- ¹¹ According to the DFS, Goldman Sachs ran a program using alternative data in the months following the Apple Card roll-out, but terminated the program after concluding that the data did not improve underwriting.

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