JOSH STEIN
ATTORNEY GENERAL

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, DC 20552

September 5, 2018

Dear Acting Director Mulvaney,

On behalf of the undersigned Attorneys General, we write to express grave concerns about portions of your May 21, 2018 statement that suggests the Consumer Financial Protection Bureau (CFPB) is considering unlawfully refusing to protect the residents of our states against credit discrimination. Specifically, you stated that CFPB "will be reexamining the requirements" of the Equal Credit Opportunity Act (ECOA).[1] Press reports indicate that your May 29 speech to the Women in Housing & Finance, Inc. Public Policy Luncheon reiterated this statement and expanded upon it by suggesting that CFPB is "no longer allowed" to enforce ECOA's prohibition against disparate impact discrimination with regards to auto lending.[2] This matter is of particular concern to the Attorneys General because we share authority with CFPB to enforce CFPB's regulations interpreting ECOA.[3] Additionally, many of our states have state antidiscrimination statutes modeled on ECOA.[4]

As you are certainly aware, our nation has a sordid history of credit discrimination some of which continues into the present day.[5] Therefore, Congress specifically charged CFPB with "oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities."[6] Enforcement of ECOA, which forbids discrimination by creditors on the basis of characteristics including race, color, religion, national origin, sex, marital status, and age,[7] is the primary authority by which CFPB can meet that Congressional charge. Although the Fair Housing Act (FHA) provides

[1] Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57 (May 21, 2018), https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/.
[2] Katy O'Donnell, *Mulvaney: Rate of violations to factor in future CFPB actions*, Politico, May 29, 2018.
[3] *See* 12 U.S.C. § 5552.
[4] *See, e.g.*, Md. Code Ann. Com. Law § 12-701 *et seq*.
[5] *See* Brief of Massachusetts et al. as Amici Curiae in Support of Respondent, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), at 24-26, *available at* https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-1371_amicus_resp_states.authcheckdam.pdf.
[6] 12 U.S.C. § 5493(c).
[7] 15 U.S.C. § 1691(a)(1).

complementary, robust protections against discrimination in home mortgage lending,[8] ECOA is the principle federal antidiscrimination law applicable to all other forms of credit.

One critically important feature of antidiscrimination law, particularly in light of the nation's history of credit discrimination, is disparate impact liability. Under this theory of liability, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminat[ion]."[9] Moreover, as the Supreme Court recently observed, disparate impact liability "plays a role in uncovering discriminatory intent: It permits plaintiffs' to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[10] The Attorneys General have regularly relied on disparate impact theories in recent years to combat lending discrimination and ensure greater equality of opportunity.[11]

Your May 21 statement intimates that in "reexamining the requirement" of ECOA, CFPB will be considering abandoning the federal government's longstanding interpretation that ECOA provides for disparate impact liability. Since 1977, the federal government's regulations interpreting ECOA, which were promulgated pursuant to notice-and-comment rulemaking, have continuously interpreted ECOA to provide for disparate impact liability.[12] Those regulations were adopted without substantive alteration by CFPB in 2011 when it became responsible for interpreting ECOA.[13] As your statement acknowledged, CFPB is "bound to enforce the law as written, not as we may wish it to be."[14] Any action by CFPB to ignore those formally promulgated regulations would show a lack of respect for the rule of law and violate the Administrative Procedure Act.[15] Whatever the effect of the recent passage of S.J. Res. 57 disapproving CFPB's March 2013 bulletin relating to indirect auto lending,[16] it certainly did not revoke the federal government's formal longstanding regulations interpreting ECOA to provide for disparate impact liability without limitation to the type of lending.

Moreover, there are no substantive grounds for CFPB reconsidering the federal government's more than 40 years of consistent interpretation that ECOA provides for disparate

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[8] 42 U.S.C. §§ 3604-3605.
[9] *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).
[10] *Inclusive Cmtys.*, 135 S. Ct. at 2522.
[11] *See* Brief of Massachusetts et al., *supra* note 5, at 26-29 (providing examples of such efforts).
[12] 42 Fed. Reg. 1242, 1246, 1255 (Jan. 6, 1977); *see also* 50 Fed. Reg. 48,018 (Nov. 20, 1985) (finalizing a revised version of the disparate impact provision to make non-substantive "structural or editorial" changes).
[13] 12 C.F.R. § 1002.6(a); 12 C.F.R. Part 1002 Supp. I § 1002.6(a)-2; *see also* 76 Fed. Reg. 79,442, 79,442 (Dec. 21, 2011) ("The interim final rule substantially duplicates the [Federal Reserve] Board's Regulation B as the Bureau's new Regulation B, 12 CFR Part 1002, making only certain non-substantive, technical, formatting, and stylistic changes.").
[14] *Supra* note 1.
[15] *See Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017).
[16] Georgetown Law Professor Adam Levitin has highlighted various uncertainties created by the passage of S.J. Res. 57. *See* Posting of Adam Levitin to Credit Slips, http://www.creditslips.org/creditslips/2018/04/congressional-review-act-confusion.html (Apr. 17, 2018 22:40).

impact liability.[17] The Supreme Court's 2015 ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*") dictates that the text of ECOA unambiguously provides for disparate impact liability. In that case, the Supreme Court held that disparate impact liability was provided for by the provision of FHA that declares that "[i]t shall be unlawful for any person or other entity whose business includes engaging in real estate-[lending] transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race color, religion, sex, handicap, familial status, or national origin."[18] The operative wording of that FHA provision is identical to the text of ECOA that declares that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, nation original, sex or marital status, or age."[19] Based on the identical "it shall be unlawful . . . to discriminate against" phrasing of the two statutes, they both must be read to provide the same answer on disparate impact liability.[20]

Your May 21 statement relies on the observation that "a recent Supreme Court decision distinguishing between antidiscrimination statutes that refer to the consequences of actions and those that refer only to the intent of the actor."[21] But the majority in *Inclusive Communities* held that the "discriminate against" provision of the FHA, which mirrors the language of ECOA, fell within the former type of statute.[22] Indeed, numerous courts have continued to recognize the validity of disparate impact claims under ECOA since the Supreme Court's ruling in *Inclusive Communities*.[23] As CFPB has no authority to overrule the Supreme Court's interpretation of unambiguous text, any action to reinterpret ECOA not to provide for disparate impact liability could be set aside by a court as arbitrary, capricious, and otherwise not in accordance with law.[24]

For the reasons stated above, we trust that CFPB's reexamination will determine that ECOA provides for disparate impact liability. But the Attorneys General will not hesitate to uphold the law if CFPB acts in manner contrary to law with respect to interpreting ECOA or to fulfilling its Congressional charge to ensure nondiscriminatory lending to the residents of our states.

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[17] *See supra* note 12; *see also* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269-70 (April 15, 1994) (joint interpretation that ECOA provides for disparate impact liability by 10 federal agencies then regulating lending institutions).
[18] *See Inclusive Cmtys.*, 135 S. Ct. at 2518-19 (quoting 42 U.S.C. § 3605(a)).
[19] 15 U.S.C. § 1691(a).
[20] *See, e.g.*, *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam).
[21] *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 & n.6 (2005) (plurality opinion); *see also Inclusive Cmtys.*, 135 S. Ct. at 2518.
[22] *Compare Inclusive Cmtys*., 135 S. Ct. at 2518-19 (holding 42 U.S.C. § 3605(a) provides for disparate impact liability) *with id*. at 2547-48 (Alito, J., dissenting) (arguing the majority erred in its interpretation of § 3605(a)).
[23] *See e.g., Pettye v. Santander Consumer, USA, Inc.*, 2016 U.S. Dist. LEXIS 21935, at *13-18 (N.D. Ill. Feb. 23, 2016) (St. Eve, J.).
[24] 5 U.S.C. § 706(2).

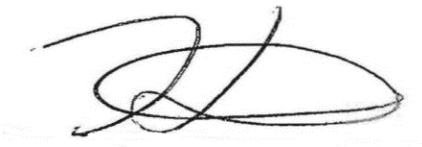
Sincerely,

Josh Stein
North Carolina Attorney General

Maura Healey
Massachusetts Attorney General

Xavier Becerra
California Attorney General

Lori Swanson
Minnesota Attorney General



Karl A. Racine
District of Columbia Attorney General

Gurbir Grewal
New Jersey Attorney General

Lisa Madigan
Illinois Attorney General

Barbara D. Underwood
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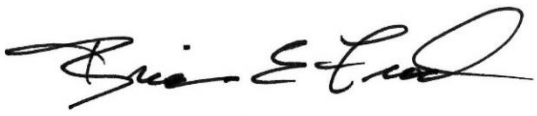
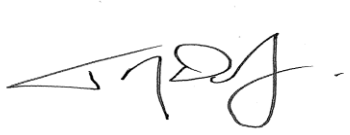
Ellen F. Rosenblum
Oregon Attorney General

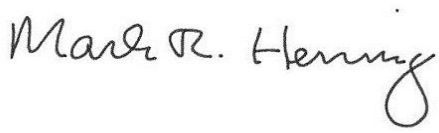


Brian E. Frosh
Maryland Attorney General

Peter F. Kilmartin
Rhode Island Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General



Mark R. Herring
Virginia Attorney General

cc: Patrice Ficklin
Assistant Director
CFPB Office of Fair Lending and Equal Opportunity