

December 1, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552
Submitted via *regulations.gov*

**RE: Request for Information: Equal Credit Opportunity Act and Regulation B
(CFPB-2020-0026)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Bureau of Consumer Financial Protection (the “Bureau”) on its Request for Information (the “Request”)¹ issued regarding the Equal Credit Opportunity Act (the “ECOA”)² and its implementing regulation, Regulation B.³

The undersigned are scholars with substantial expertise related to discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) people. We are affiliated with the Williams Institute, a research center at the UCLA School of Law dedicated to conducting rigorous and independent academic research related to sexual orientation and gender identity, including on legal protections against sexual orientation and gender identity discrimination (collectively, “SOGI discrimination”). Additionally, the Institute has produced widely cited best practices for the collection of sexual orientation and gender identity information on population-based surveys⁴ and has long worked with federal agencies to improve federal data collection on the LGBT population.

As an initial matter, we wish to acknowledge that the Request invites public comment on a number of pre-written questions provided by the Bureau, as well as on other topics of interest to commenters. Given our expertise, the undersigned submit these comments exclusively in response to the following question provided by the Bureau:

6. Sexual Orientation and Gender Identity Discrimination: On June 15, 2020, in *Bostock v. Clayton County*, the Supreme Court ruled that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) encompasses sexual orientation discrimination and gender identity discrimination. The majority opinion in *Bostock* interpreted Title VII and did not address ECOA. Should the Supreme Court's

¹ 85 Fed. Reg. 46,600 (Aug. 03, 2020).

² 15 U.S.C. §§ 1691–1691f.

³ 12 C.F.R. pt. 1002.

⁴ *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf>.

decision in *Bostock* affect how the Bureau interprets ECOA's prohibition of discrimination on the basis of sex? If so, in what way(s)?⁶

RESPONSE TO QUESTION #6

In Part I, we establish that the decision in *Bostock* should control the Bureau's interpretation of the ECOA's prohibition of sex discrimination—specifically, that it should lead the Bureau to interpret that prohibition as encompassing SOGI discrimination. First, we explain that the Court's reasoning in *Bostock* is premised on general principles applicable to contexts outside of employment, including the ECOA. Additionally, we discuss case law finding that Title VII matters are instructive for interpreting analogous provisions in laws including the ECOA, and note the existence of other authorities—including those issued by past Bureau leadership—which together suggest that a proper reading of the ECOA's sex discrimination prohibition should encompass SOGI discrimination.

In Part II, we provide research illustrating the widespread discrimination that LGBT people have reported in credit and related contexts, supporting the need for regulatory action on behalf of the Bureau. In particular, we note that such research supports the Bureau issuing revisions to Regulation B to (1) clarify to creditors that the ECOA's prohibition of sex discrimination encompasses SOGI discrimination, and (2) to allow the Bureau to collect the data necessary to enforce SOGI non-discrimination requirements in the future. Such revisions would allow the Bureau, within its existing authority, “to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under ECOA and Regulation B”⁷ with regard to LGBT people.

I. The Bureau Should Apply *Bostock* to Interpret the ECOA's Sex Discrimination Prohibition as Encompassing SOGI Discrimination

In June 2020, the U.S. Supreme Court decided in *Bostock v. Clayton County*⁸ that Title VII's prohibition on sex discrimination includes sexual orientation and gender identity discrimination.⁹ As suggested by the Request, this decision is particularly relevant to the Bureau given its enforcement of the ECOA, which similarly provides that it is unlawful for “any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of . . . sex”¹⁰ Of note is that both laws—similar to various other state and federal non-discrimination laws—prohibit discrimination on the basis of “sex” without defining the term “sex.”¹¹

While *Bostock* was decided within the context of employment discrimination under Title VII, the reasoning in the Court's decision will inform—and in fact, already has informed—

⁶ 85 Fed. Reg. at 46,602 (internal citation omitted).

⁷ *Id.* at 46,601.

⁸ 140 S. Ct. 1731 (2020).

⁹ 42 U.S.C. § 2000e-2(a).

¹⁰ 15 U.S.C. § 1691(a).

¹¹ CHRISTY MALLORY ET AL., WILLIAMS INST., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 4 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>.

courts'¹² and agencies'¹³ interpretation of sex discrimination prohibitions in other settings. Indeed, nothing in the *Bostock* Court's reasoning hinged on employment-specific language or principles of interpretation;¹⁴ instead, its analysis of the term "sex" is equally applicable to other non-discrimination laws.¹⁵

Courts interpreting the meaning and breadth of federal civil rights laws have historically turned to Title VII case law for guidance,¹⁶ including in cases involving the ECOA.¹⁷ For example, in *Rosa v. Park W. Bank & Trust Co.*, the First Circuit reversed the dismissal of sex discrimination claim filed by a transgender person who alleged being denied a loan application for failing to appear in clothing consistent with the sex reflected on their identification cards.¹⁸ In finding that the plaintiff "may be able to prove a claim under the ECOA[]" under such facts, the court noted the importance of Title VII cases in reaching its result, stating that "[i]n interpreting the ECOA, this court looks to Title VII case law, that is, to federal employment discrimination law."¹⁹ Similarly, courts and state agencies have long relied on Title VII case law when interpreting analogous state-level non-discrimination laws that prohibit discrimination based on sex.²⁰

Notably, explicit support for relying upon Title VII case law to interpret the ECOA appears within the Act's legislative history. In 1976—when the ECOA was modified into its current form by Congress to explicitly encompass acts of credit discrimination beyond those involving sex and marital status—the Senate Committee on Banking, Housing and Urban Affairs

¹² See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *23 (4th Cir. Aug. 26, 2020), as amended (Aug. 28, 2020) (applying *Bostock* to find that acts of gender identity discrimination violate an analogous prohibition on sex discrimination within Title IX of the Education Amendments of 1972); *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 968 F.3d 1286 (11th Cir. 2020) (same).

¹³ See, e.g., *NDDOLHR Now Accepting and Investigating Charges of Discrimination Based on Sexual Orientation and Gender Identity*, ND.GOV, <https://www.nd.gov/labor/nddolhr-now-accepting-and-investigating-charges-discrimination> (last visited Nov. 23, 2020) ("It is the Department's opinion the *Bostock* definition of sex, may and should be applied to the North Dakota Human Rights Act, as amended, and the Housing Discrimination Act, as amended. Therefore, effective June 15, 2020, the Department will be accepting and investigating complaints of discrimination, based on sexual orientation and gender identity, in all human rights laws the Department enforces, including employment, public services, public accommodations, credit transactions, and housing.").

¹⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

¹⁵ See, e.g., *id.* at 1738 (noting the Court's deference to the "ordinary public meaning" of the terms contained within Title VII—in particular, its prohibition on discrimination "because of . . . sex"—in determining whether SOGI discrimination is encompassed within said terms).

¹⁶ See, e.g., *Doe v. Univ. of Dayton*, 766 F. App'x 275, 282 (6th Cir. 2019); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468 (8th Cir. 1996); *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97, 101 (D. Mass. 2019); *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1128 (D. Kan. 2017) (citing *Mabry v. St. Bd. of Comm. Colls. & Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987)); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (citing *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)).

¹⁷ See, e.g., *Lewis v. ACB Bus. Servs. Inc.*, 135 F.3d 389 (6th Cir. 1998) (applying Title VII's burden-shifting regime to the ECOA); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890 (1st Cir. 1992) (same); but see *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712 (7th Cir.1998) (rejecting application of the Title VII burden-shifting model under the ECOA).

¹⁸ 214 F.3d. 213 (1st Cir. 2000).

¹⁹ *Id.* at 215.

²⁰ See, e.g., *Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 806 (Tex. 2018); *Campbell v. Garden City Plumbing & Heating, Inc.*, 97 P.3d 546, 549 (Mont. 2004); *Radtke v. Everett*, 501 N.W.2d 155, 162 (Mich. 1993).

reported that “judicial constructions of anti-discrimination legislation in the employment field . . . are intended to serve as guides in the application of this Act”²¹

In line with these principles and under reasoning similar to that of the *Bostock* Court, the Bureau has previously interpreted the ECOA’s prohibition of sex discrimination to encompass SOGI discrimination. In 2016, then-Director of the Bureau Richard Cordray issued a letter concluding 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, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes”²³ Notably, former Director Cordray stated in his letter that he saw “no apparent reason why the same reasoning that the Supreme Court and the courts of appeals have applied to discrimination on the basis of ‘sex’ under Title VII would not equally apply to discrimination on the basis of ‘sex’ under ECOA as well.”²⁴ Various materials present on the Bureau’s website similarly note that, “[c]urrently, the law supports arguments that the prohibition against sex discrimination also affords broad protection from discrimination based on a consumer’s gender identity and sexual orientation.”²⁵

Together, these authorities support that *Bostock*’s reasoning applies to the sex non-discrimination provision of the ECOA, and that enforcement of the ECOA which fails to be inclusive of SOGI discrimination would be in conflict with the Supreme Court’s decision. As such, the Bureau should adopt the Court’s reasoning in *Bostock* to interpret the ECOA’s prohibition on sex discrimination as fully encompassing acts of SOGI discrimination.

II. Research on LGBT People and Credit Discrimination Supports Need for Bureau’s Exercise of Regulatory Authority to Improve Enforcement Against SOGI Discrimination

In the United States, approximately 4.5% of the adult population identifies as LGBT.²⁶ Younger people are more likely than older people to identify as LGBT, including 8.2% of millennials (born 1980–1999).²⁷ We estimate that approximately 11 million adults in the U.S. identify as LGBT.²⁸

²¹ S. Rep. No. 94-589, 94th Cong., 2d. Sess., 4–5 (1976).

²³ Letter from Richard Cordray, Director, Bureau of Consumer Fin. Prot., to Michael Adams, CEO, Servs. & Advocacy for GLBT Elders at 7 (Aug. 30, 2016), <https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf>.

²⁴ *Id.* at 3.

²⁵ *What Protections do I have Against Credit Discrimination?*, BUREAU OF CONSUMER FIN. PROTECTION, <https://www.consumerfinance.gov/fair-lending/> (last visited Nov. 23, 2020); *see also Helping Consumers Understand Credit Discrimination*, BUREAU OF CONSUMER FIN. PROTECTION, https://files.consumerfinance.gov/f/documents/201703_cfpb_handout_ECOA_helping_consumers.pdf (last visited Nov. 23, 2020).

²⁶ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

²⁷ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

²⁸ CONRON & GOLDBERG, *supra* note 26.

Existing research suggests that, throughout their lives, LGBT adults will face the prospect of being discriminated against within the broad range of credit-related activities.²⁹ For example, some LGBT people report being denied lines of credit and home sales solely because of their sexual orientation or gender identity.³⁰ Research also suggests that LGBT people are more likely to be charged higher rates for mortgages even when approved.³¹

Below, we discuss research indicating that LGBT people face widespread discrimination in credit-related activities. Additionally, available research suggests that this discrimination contributes to lower homeownership rates among same-sex couples and LGBT people. The range of these experiences and their impacts—compounded by the fact that not all states maintain analogues to the ECOA—support the need for improved enforcement of the ECOA with respect to SOGI discrimination. Based on this research, and in line with the Request seeking comment related to both ECOA and its implementing Regulation B, below we offer suggestions for how the Bureau can modify Regulation B to assist in its enforcement work consistent with both *Bostock* and the Bureau’s mission to “both protect[] consumers from unlawful discrimination and foster[] innovation.”³²

A. *LGBT People and Credit Discrimination*

Research on LGBT people’s experiences with credit discrimination is quite limited—in part because creditors are not currently required by the Bureau to collect data specifically on applicants’ sexual orientation or gender identity.³³ However, the Bureau does require the collection of data on applicants’ sex,³⁴ allowing for analyses comparing borrowing between same-sex and different-sex couples. Available evidence indicates that same-sex couples experience widespread discrimination in mortgage lending,³⁵ which could in turn be contributing to lower homeownership rates observed among same-sex couples and LGBT people more broadly.³⁶ Two recent studies in particular provide strong evidence that same-sex couples face systemic discrimination in mortgage lending.

The first study³⁷—analyzing data collected pursuant to the Home Mortgage Disclosure Act (“HMDA”) and from Fannie Mae—found that compared to different-sex borrowers of similar profiles, same-sex borrowers experienced a 3% to 8% lower approval rate.³⁸ Further, among the loans approved, same-sex borrowers were charged higher interest and/or fees, equivalent to between \$8.6 million and \$86 million more in interest and fees over time.³⁹ Such

²⁹ See generally ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 19–23 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

³⁰ *Id.*

³¹ *Id.* at 23.

³² 85 Fed. Reg. at 46,600.

³³ See 12 C.F.R. § 1002.13 (noting the elements creditors are currently required to collect by the Bureau).

³⁴ *Id.*

³⁵ ROMERO ET AL., *supra* note 29, at 22–23.

³⁶ *Id.* at 11–13.

³⁷ Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT’L ACAD. SCI. U.S.A. 9293, available at <https://www.pnas.org/content/pnas/116/19/9293.full.pdf>.

³⁸ *Id.*

³⁹ *Id.* at 9294.

decisions were made by creditors despite a lack of statistical evidence that same-sex borrowers presented a greater level of risk than comparable different-sex borrowers.⁴⁰ Instead, both sets of borrowers were found to present similar risks of default, and same-sex borrowers in fact presented *lower* prepayment risk.⁴¹

The second study⁴²—analyzing over 5 million applications for mortgages backed by the Fair Housing Administration (“FHA”) utilizing data made available through the HMDA—found that same-sex male couples of every racial configuration were significantly less likely to have their applications accepted compared to White heterosexual couples,⁴³ even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.⁴⁴ This occurred despite loans being FHA insured and, therefore, carrying limited risk to lenders, regardless of any underlying characteristics of the applicants.⁴⁵ Same-sex female couples of every racial configuration were found to be either statistically indistinguishable from White heterosexual couples or in some cases were treated more favorably.⁴⁶ Race was found to play a role, as:

black-male pairs [were] the least likely to be approved (-7.5 percentage points [than the White heterosexual baseline]), followed by the interracial pairs of black male/white male (-6.8), white male/black male (-4.3) and white male pair (-2.5). Interestingly, the exact same pattern holds for female pairs. From the least to most likely to be approved are black female pairs, followed by interracial black female/white female and white female/black female pairs, and white female pairs.⁴⁷

Additional evidence suggests that LGBT people often encounter challenges while attempting to buy homes—including discrimination. According to a recent nationally representative survey, for example, LGB adults in the United States are significantly more likely than their heterosexual peers to report being prevented from buying or moving to a house or apartment (15% and 6%, respectively).⁴⁸ According to another representative survey, 22% of LGBT adults reported experiencing discrimination based on their sexual orientation or gender identity while attempting to buy or rent housing at some point in their lives.⁴⁹

⁴⁰ *Id.* at 9300.

⁴¹ *Id.* at 9301.

⁴² J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1 (2019), available at <https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination>.

⁴³ *Id.* at 53.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 35.

⁴⁶ *Id.* at 54.

⁴⁷ *Id.* at 53. As noted by the study authors, these findings suggest the existence of a statistically significant “primary applicant” effect when same-sex couples apply for FHA-backed mortgages, wherein an interracial same-sex couple appears more likely to have their application approved when the White partner is the primary applicant as opposed to the Black partner. *Id.*

⁴⁸ ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE US 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

⁴⁹ NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 1 (2017), <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

Such discrimination may be even more prevalent against transgender individuals, especially transgender women and transgender women of color. Among respondents to the 2015 U.S. Transgender Survey (“USTS”)—the largest survey of transgender and gender non-conforming people to date—6% of respondents reported being denied a home or apartment,⁵⁰ and 5% reported being evicted,⁵¹ because of their gender identity in the previous year. Even higher percentages of transgender women of color and undocumented respondents reported such discrimination: For example, 18% of undocumented transgender residents reported an eviction due to anti-transgender bias in the past year,⁵² and 17% of Black transgender women reported being denied a home or apartment in the past year due to being transgender.⁵³

Controlled experiments specifically designed to test for the presence of SOGI discrimination in real-world scenarios related to credit and obtaining housing have also found evidence of widespread discrimination against LGBT people.⁵⁴ According to one recent study—a randomized matched-pair email correspondence test of 6,490 unique property owners in 94 U.S. cities—same-sex male couples were 4.6 percentage points less likely to receive an active response to their housing inquiry than were heterosexual couples.⁵⁵ The study did not find evidence of discrimination against female same-sex couples, however, but race was found to play a factor.⁵⁶ Compared to White couples, Black and Hispanic couples fared worse regardless of sexual orientation.⁵⁷ Black and Hispanic same-sex male couples were 5.6 and 5.2 percentage points, respectively, less likely to receive a response than their same-race heterosexual counterparts, whereas White same-sex male couples were less likely to receive a response than White heterosexual couples by approximately 4 percentage points.⁵⁸

Finally, while limited, the few instances of credit-related SOGI discrimination that have been reported in published cases and the media offer additional insight into the types of experiences same-sex couples and LGBT people more broadly have had with creditors. In one notable example, a same-sex female couple was asked to close their existing accounts and leave a bank while filling out an application to refinance their home because of “bank policy” to not “offer home loans to gay applicants.”⁵⁹

⁵⁰ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 179 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁵¹ *Id.* at 180.

⁵² *Id.*

⁵³ *Id.* at 179.

⁵⁴ *See, e.g.*, DIANE K. LEVY ET AL., THE URBAN INST., A PAIRED- TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized.pdf; SAMANTHA FRIEDMAN ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES (2013), https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.

⁵⁵ David Schwegman, *Rental Market Discrimination Against Same-Sex Couples: Evidence From a Pairwise-Matched Email Correspondence Test*, HOUSING POL’Y DEBATE (2018), available at <https://nlhc.org/sites/default/files/Rental-Market-Discrimination-Against-Same-Sex-Couples.pdf>.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

⁵⁹ Rebekah Coleman, *Gay Discrimination in the Mortgage Industry*, LOANS.ORG (Apr. 12, 2013), <https://loans.org/mortgage/articles/gay-discrimination-housing-industry>.

B. *Homeownership Among Same-Sex Couples and LGBT People*

Homeownership among same-sex couples and LGBT people is relevant to the Request and the Bureau's enforcement activities under the ECOA in light of the tie many credit activities have to the process of homebuying. In a recent report, we estimated homeownership among same-sex and different-sex couple-headed households in the United States, using nationally representative data on household composition and homeownership collected through the American Community Survey.⁶⁰ According to those data, collected between 2015 and 2017:

[S]ame-sex couples are less likely to own their homes than different-sex couples. Specifically, 63.8% of same-sex couples reported owning their home (with an additional 0.5% under contract), compared with 75.1% of different-sex couples. Among those who owned their homes, same-sex couples were more likely than different-sex couples to be carrying a mortgage (77% vs. 68.2%, respectively).⁶¹

Existing evidence indicates that LGBT adults more broadly are also less likely to own their homes. According to our analysis of representative data from 35 states, nearly half (49.8%) of LGBT adults own their homes, compared to 70.1% of non-LGBT adults.⁶² Our findings reflect those of other studies' from both population-based and non-representative samples. For example, according to a 2018 survey of LGBT adults (aged 22–72) conducted by Freddie Mac, 49% of respondents reported owning their home, compared to a 64% homeownership rate among the general U.S. population that year.⁶³ Another study, analyzing data from a representative sample of adults aged 24–32 in 2008, found that among females, sexual minorities were less likely to be homeowners than heterosexual women, and that women who were sexual *and* racial minorities reported the lowest rates of homeownership.⁶⁴ Among males, sexual minorities were also less likely to be homeowners than their heterosexual counterparts.⁶⁵ Recent studies suggest that homeownership is particularly low among transgender people: one study analyzing the first nationally representative sample of transgender adults found that only a quarter (25%) reported being homeowners, compared to 58% of cisgender adults.⁶⁶

⁶⁰ ROMERO ET AL., *supra* note 29, at 11–13.

⁶¹ *Id.* at 12.

⁶² KERITH CONRON, WILLIAMS INST., FINANCIAL SERVICES AND THE LGBTQ+ COMMUNITY: A REVIEW OF DISCRIMINATION IN LENDING AND HOUSING. TESTIMONY BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf>.

⁶³ FREDDIE MAC, THE LGBT COMMUNITY: BUYING AND RENTING HOMES 3 (2018), http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf.

⁶⁴ Kerith J. Conron et al., *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1016, available at <https://pubmed.ncbi.nlm.nih.gov/30190439/>.

⁶⁵ *Id.*

⁶⁶ ILAN H. MEYER ET AL., WILLIAMS INST. FINDINGS FROM A U.S. TRANSGENDER POPULATION STUDY, PRESENTATION AT THE UNITED STATES PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH CONFERENCE, WASHINGTON, D.C.

Access to mortgage financing greatly impacts many people’s ability to purchase a home.⁶⁷ Research suggests that denials of access to financing based on one’s sexual orientation or gender identity—in addition to related acts of discrimination and other factors, including higher rates of poverty reported among LGBT people—⁶⁸ may partially explain why lower homeownership rates are being observed among same-sex couples and LGBT people specifically.⁶⁹ Importantly, however, acts of SOGI discrimination do not have to actually occur to have an impact on LGBT people’s ability to “access . . . markets for consumer financial products,”⁷⁰ as even the expectation of discrimination can deter LGBT people from becoming homeowners.⁷¹

According to a 2019 survey of members of the National Association of Gay and Lesbian Real Estate Professionals, for example, 58% of respondents believed that their LGBT clients’ fear of experiencing discrimination during the buying process had an impact on LGBT homeownership levels.⁷² Specifically, 31% percent believed fear of discrimination had caused their LGBT clients to remain renters; 22% reported their clients’ fears that discrimination would lead their housing offer to be rejected; 20% reported their clients’ fears that discrimination would prevent approval for a mortgage; and 13% reported their clients’ fears that discrimination prevented them from receiving the lowest available mortgage rate.⁷³ These expectations of discrimination—including by covered creditors “before, during, and after the extension of credit”—⁷⁴ appear well founded based on the research discussed above.

C. *Recommendations for Revising Regulation B*

We recommend that the Bureau exercise its regulatory authority:

- To clearly state through revisions or guidance that the ECOA and Regulation B’s prohibition on sex discrimination encompass SOGI discrimination;
- Through revisions or guidance, to provide information sufficient to inform creditors as to the specific types of SOGI discrimination likely to violate the ECOA and Regulation B;

⁶⁷ JOINT CTR. FOR HOUSING STUDIES OF HARV. U., *THE STATE OF THE NATION’S HOUSING 3* (2019), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf.

⁶⁸ See M. V. LEE BADGETT ET AL., WILLIAMS INST., *LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>; M. V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S. Population*, 37 *POPULATION RESEARCH & POL’Y REV.* 667 (2018); see also Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, *INDUSTRIAL & LABOR RELATIONS REV.* (2020), doi:10.1177/0019793920902776 (volume not yet assigned); see generally BIANCA D.M. WILSON ET AL., WILLIAMS INST., “WE’RE STILL HUNGRY”—LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>.

⁶⁹ ROMERO ET AL., *supra* note 29, at 11–13.

⁷⁰ 85 Fed. Reg. at 46,600.

⁷¹ See generally ROMERO ET AL., *supra* note 29, at 21.

⁷² NAT’L ASS’N OF GAY & LESBIAN REAL ESTATE PROFS., *LGBT REAL ESTATE REPORT 2019-20* (2019), <https://naglerep.com/wp-content/uploads/2019/03/2019-naglerep-lgbt-real-estate-report.pdf>.

⁷³ *Id.* at 8.

⁷⁴ 85 Fed. Reg. at 46,601.

- To amend 12 C.F.R. § 1002.13, which provides the specific demographic measures on applicants that creditors are required to collect for Bureau monitoring purposes, to include sexual orientation and gender identity measures. Such measures should be collected consistent with best practices identified previously by the federal government;⁷⁵ and
- To issue accompanying guidance to the suggested revision of 12 C.F.R. § 1002.13 to ensure that creditors will be equipped to properly collect, record, and report such measures to the Bureau.

Applying *Bostock* to the ECOA would further the Bureau’s goals of “identify[ing] how it can continue to create a regulatory environment that expands access to credit, help[ing] to ensure that all consumers and communities are protected from discrimination in all aspects of a credit transaction, and develop[ing] approaches to address regulatory compliance challenges[]”⁷⁶ in at least two respects.

First, it is noted that among the estimated 11 million LGBT adults in the United States, over 7.7 million live in states without explicit statutory protections against SOGI discrimination in credit.⁷⁹ Only thirty states have enacted analogues to the federal ECOA in their own efforts to address credit discrimination.⁸⁰ While all thirty bar sex discrimination in credit, only half explicitly prohibit SOGI discrimination.⁸¹ Notably, even if each of the remaining fifteen state analogues of the ECOA which explicitly prohibit sex discrimination—but not SOGI discrimination—were to be interpreted consistent with *Bostock*, we estimate that only an additional 2,530,000 LGBT adults would gain protection from credit discrimination under state law.⁸² This would still leave over 5 million LGBT adults in the United States without protection from credit discrimination if the Bureau were to decline to read the ECOA in line with *Bostock*.⁸³

Second, while the Bureau is empowered to address credit discrimination, limitations in existing data have hindered the Bureau’s ability to meaningfully enforce the law against SOGI discrimination. In particular, the Bureau does not have creditors collect sexual orientation and gender identity measures from applicants,⁸⁵ which in turn likely impacts its ability to observe for patterns and practices indicating discrimination against LGBT people.

Fortunately, the Bureau has ongoing regulatory authority to ensure the administrative enforcement of the ECOA⁸⁶ and to collect demographic information from creditors and other relevant parties to support such enforcement.⁸⁷ Accordingly—and in response to the Request

⁷⁵ See *supra* note 5.

⁷⁶ 85 Fed. Reg. at 46,601.

⁷⁹ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST. LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

⁸⁰ MALLORY ET AL., *supra* note 11, at 16.

⁸¹ *Nondiscrimination Laws – Credit*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/credit (last visited Nov. 23, 2020).

⁸² See *id.*; MALLORY ET AL., *supra* note 11, at 16.

⁸³ MALLORY ET AL., *supra* note 11, at 16.

⁸⁵ See 12 C.F.R. § 1002.13.

⁸⁶ See 15 U.S.C. §§ 1691b(a), 1691c.

⁸⁷ See 15 U.S.C. § 1691b(d).

seeking comment related to both ECOA and Regulation B in implementing *Bostock*—we recommend that the Bureau enhance its existing data collection activities to support its enforcement efforts against acts of SOGI discrimination.

III. Conclusion

In sum, we submit to the Bureau that it would be a proper application of the Court’s reasoning in *Bostock*, consistent with a robust body of case law speaking to the relevance of Title VII cases when interpreting the ECOA, and consistent with past and current Bureau guidance to interpret the prohibition on sex discrimination contained within the ECOA and Regulation B as inclusive of SOGI discrimination. Thank you for your consideration. Please direct any correspondence to vasquezl@law.ucla.edu.

Respectfully Submitted,

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