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Powering Up While Powering Down: The CFPB Proposes Significant Overhaul of Fair Lending Despite Announcing It Will Soon Run Out of Funds

As we near the page turn for 2025, the paradox at the heart of the Consumer Financial Protection Bureau (CFPB)'s actions under the Trump Administration continues to attract attention. That is, the agency has been moving forward on an aggressive, 24-item rulemaking agenda to effectuate deregulatory change across a wide terrain of issues, while at the same time taking a multitude of rapid-fire steps to, in the words of Acting Director Russ Vought, shutter the agency by year-end.

No More CFPB Funding?

The most significant recent CFPB action took place on November 7, when the agency announced that it was no longer requesting funding from the Federal Reserve Board (Fed) because, according to a new U.S. Department of Justice Office of Legal Counsel (OLC) opinion, the Fed lacks "combined earnings" from which the CFPB may draw funding under the Dodd-Frank Act. The OLC opinion specifically provides that:

Congress has authorized the CFPB to draw funds from the "combined earnings of the Federal Reserve System," 12 U.S.C. § 5497(a)(1), and required the CFPB to report to Congress and the President if it determines that insufficient funds are available. Id. § 5497(e)(1). In this context, "earnings" are profits. Because the Director of the CFPB has determined that the Federal Reserve System has no available profits from which to draw, the proper recourse is for the Director to report to Congress and the President – not to draw funds from the Federal Reserve without a congressional appropriation.

The Federal Reserve has operated in a profitable manner since its creation in 1914, but its costs have exceeded revenue since 2022 due to the Fed raising interest rates to combat inflation.

Through these actions, the CFPB and OLC have embraced the so-called "earnings argument" that has gained traction among some commentators and defendants to CFPB enforcement actions as an alternative theory to challenge the CFPB's Dodd-Frank Act funding mechanism in wake of the U.S. Supreme Court's 2024 decision in *CFSA v. CFPB*, which upheld the CFPB's funding as valid under the Appropriations Clause. The agency previously rejected the earnings argument and no courts to date have accepted it either, although its proponents argue that the theory has not been properly tested judicially.

On November 23, the National Treasury Employees Union, which sued the CFPB earlier this year to prevent a mass reduction in force (RIF) and other actions NTEU alleges were taken to effectively shut down the agency without Congressional authorization, filed a motion with the federal district court in Washington, D.C. that initially enjoined the mass RIF. NTEU argued that CFPB's decision to embrace the earnings argument and allow the agency to run out of funds by year-end are tantamount to subverting the court's injunction, which remains in place while on appeal in the D.C. Circuit. With the legal battles around the CFPB's functions and operation continuing, Spencer Fane will keep apprised of these important developments.

ECOA Proposal

Even with the future of its funding unknown, on November 13, the CFPB published a Proposed Rule to overhaul Regulation B, which implements the Equal Credit Opportunity Act (ECOA). The proposal has three core components: (1) it would remove disparate impact (DI) from the regulation; (2) narrow the circumstances when a creditor "discourages" a prospective applicant; and (3) clarify when a creditor can offer "special purpose credit programs" (SPCPs).[1] The proposal is largely aimed at implementing the Trump Administration's Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, and Executive Order 14281, Restoring Equality of Opportunity and Meritocracy (EOs).

The CFPB's DI proposal would eliminate disparate impact claims under ECOA, which allow litigants to bring claims based on facially neutral policies if those policies disproportionately harm protected classes. The CFPB asserted in the proposal that ECOA's section 701(a) is clear on its face, as it prohibits discrimination on the basis of protected classes without any ambiguity or reference to "effects." Therefore, according to the CFPB, the reliance on the legislative history to support the previous conclusion by the CFPB (and the Fed before it) that ECOA permits DI liability is insufficient to override ECOA's plain language. The CFPB also cited textual differences between ECOA and other civil rights statutes such as the Fair Housing Act and Title VII and read the U.S. Supreme Court caselaw interpreting those statutes (*Harris* and *Inclusive Communities*) to support its position. The CFPB also expressed concern that in allowing DI claims, creditors may inadvertently be encouraged to consider protected characteristics in making lending decisions, which is contrary to ECOA's core purposes.

The proposal also would significantly narrow the Regulation B "discouragement" provision that prohibits discrimination against prospective applicants for credit. The discouragement provision as currently implemented functions as a broad prohibition pre-credit application and permits close scrutiny of lender advertising and marketing programs and lending patterns. The proposal would newly limit coverage to oral or written statements that a creditor "knows or should know" would cause a reasonable person to believe their credit application would be denied or that they would be granted less favorable terms based on protected characteristics. The CFPB cited concerns that a broadly worded and applied discouragement provision chills protected speech. The CFPB's legal and policy arguments underpinning these proposed changes closely align with those made by Townstone Mortgage in the CFPB's long-running ECOA case against the company, positions which new CFPB leadership now are publicly championing. The CFPB also is proposing this significant change notwithstanding the U.S. Court of Appeals for the Seventh Circuit's 2024 decision upholding the discouragement provision's validity against Townstone's challenge that it exceeded ECOA's statutory bounds, a decision notably issued in a post-*Loper Bright* statutory interpretation context.

Lastly, the CFPB proposal would significantly restrict, if not effectively eliminate, the ability of organizations to offer Special Purpose Credit Programs (SPCPs) that use protected characteristics as the common eligibility characteristic. Under the proposal, race, color, national origin, and sex would no longer be permissible criteria and to the extent other protected characteristics are used (e.g., religion, marital status, age, income), the proposal would impose additional restrictions and an increased burden on claimants. The CFPB noted that it had "reexamined" the use of race, color, national origin, and sex as participant eligibility criteria and tentatively concluded that the current regulations "authorize credit programs beyond what is necessary to meet the expressly limited congressional intent for such SPCPs," meaning the present standards "are working counter to ECOA's purpose of preventing discrimination and are potentially inconsistent with constitutional guarantees of equal protection." The CFPB also argued that SPCPs generally are not very prevalent and thus the impact of the changes should be low.

Next Steps

The ECOA Proposed Rule was published in the *Federal Register* on November 13, 2025, and comments are due 30 days later, on December 12, 2025. The proposed effective date would be 90 days after the final rule is published, a short time to orient to changing regulatory provisions in place for five decades.

One of the most notable aspects of the Proposed Rule is the insertion of increased uncertainty into the credit market and the importance of consulting with your trusted outside advisors before taking any meaningful actions to alter processes and procedures. Your organization should seek counsel on how to position your organization in view of these rapid-fire developments – including whether to submit comments to help shape the future of ECOA and Fair Lending, and how the new federal requirements would dovetail with ongoing fair lending compliance obligations at the state level.

Upcoming Webinar

Join the Spencer Fane Mortgage Regulatory and Consumer Banking teams for a webinar on Tuesday, December 16, at 12 p.m. CT, to discuss these and other fast-moving and significant regulatory developments affecting the financial services sector, including at the CFPB, HUD, and Federal Reserve, and how they will shape your organization's compliance and policy positioning strategies moving into 2026. Our emerging team of financial services regulatory experts will break down what has happened and offer insights and predictions going forward.

This blog was drafted by Mike G. Silver, Kirstin D. Kanski, Yana Rusovski, and Rachel Carr Shreves. For more information, visit spencerfane.com.

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[1] 90 FR 50901 (Nov. 13, 2025).

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