COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

CONSUMER FINANCIAL PROTECTION BUREAU

Request for Information on the Equal Credit Opportunity Act and Regulation B

85 FR 46600

Docket No. CFPB-2020-0026

October 2, 2020

Published on May 28, 2020 the Consumer Financial Protection Bureau ("CFPB") requests information on the Equal Credit Opportunity Act and Regulation B.[1] EPIC submits these comments to the CFPB in regards to Question 9 in the posted Notice and Request for information:

9. *Artificial Intelligence and Machine Learning:* As the Bureau noted in its annual fair lending report to Congress dated April 30, 2020 [36] and a blog post dated July 7, 2020,[37] financial institutions are starting to deploy artificial intelligence (AI) and machine learning (ML) across a range of functions. For example, they are used as virtual assistants that can fulfill customer requests, in models to detect fraud or other potential illegal activity, as compliance monitoring tools, and in credit underwriting. Should the Bureau provide more regulatory clarity under ECOA and/or Regulation B to help facilitate innovation in a way that increases access to credit for consumers and communities in the context of AI/ML without unlawful discrimination? If so, in what way(s)?

Another important issue is how lenders using complex AI/ML models satisfy ECOA's adverse action notice requirements. ECOA requires creditors to provide consumers with the principal reason(s) for a denial of credit or other adverse action.[38] These notice provisions serve important anti-discrimination, educational, and accuracy purposes. There may be questions about how institutions can comply with these requirements if the reasons driving an AI/ML decision are based on complex interrelationships.[39] Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more

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[1] Consumer Financial Protection Bureau, *Request for Information on the Equal Credit Opportunity Act and Regulation B*, 85 Fed.Reg. 46600 (Aug. 3, 2020), https://www.federalregister.gov/documents/2020/08/03/2020-16722/request-for-information-on-the-equal-credit-opportunity-act-and-regulation-b.

informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML? If so, in what way(s)?[2]

EPIC is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging privacy and related human rights issues and to protect privacy, the First Amendment, and constitutional values.[3] EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the release of reports, validation studies, and use of the Universal Guidelines for AI to guide requirements for trustworthy algorithms.[4] EPIC has litigated cases against the Department of Justice to compel production of documents regarding "evidence-based risk assessment tools"[5] and the Department of Homeland Security to produce documents about a program to assess the probability that an individual commits a crime.[6] EPIC has also published the second edition of the *AI Policy Sourcebook*, the first reference book on AI policy.[7]

EPIC recommends that CFPB revise its regulations and/or otherwise provide new guidance to financial institutions regarding their use of AI/ML systems in light of significant concerns about bias, transparency, and accountability. In particular, EPIC recommends that the Bureau build upon the principles outlined in the Universal Guidelines for Artificial Intelligence and the OECD AI Principles in their entirety to the CFPB to guide their regulations.

The Universal Guidelines for Artificial Intelligence ("UGAI"), a framework for AI governance based on the protection of human rights, were set out at the 2018 Public Voice meeting in Brussels, Belgium.[8] The Universal Guidelines have been endorsed by more than 250 experts and 60 organizations in 40 countries.[9] The UGAI comprise twelve principles:

1. **Right to Transparency.** All individuals have the right to know the basis of an AI decision that concerns them. This includes access to the factors, the logic, and techniques that produced the outcome.
2. **Right to Human Determination.** All individuals have the right to a final determination made by a person.
3. **Identification Obligation.** The institution responsible for an AI system must be made known to the public.
4. **Fairness Obligation.** Institutions must ensure that AI systems do not reflect unfair bias or make impermissible discriminatory decisions.
5. **Assessment and Accountability Obligation.** An AI system should be deployed only after an adequate evaluation of its purpose and objectives, its benefits, as well as its risks. Institutions must be responsible for decisions made by an AI system.

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[2] *Id.*

[3] EPIC, *About EPIC* (2019), https://epic.org/epic/about.html.

[4] *See* e.g. EPIC v. DOJ (D.C. Cir.) (18-5307), EPIC v CPB, EPIC v. DHS, FOIA requests, https://epic.org/foia/doj/criminal-justice-algorithms/.

[5] EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)* https://epic.org/foia/doj/criminal-justice-algorithms/.

[6] *See Id.* and EPIC, *EPIC v. DHS (FAST Program)* https://epic.org/foia/dhs/fast/.

[7] *EPIC AI Policy Sourcebook 2020* (EPIC 2020),https://epic.org/bookstore/ai2020/.

[8] *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018) [hereinafter *Universal Guidelines*], https://thepublicvoice.org/ai-universal-guidelines/

[9] *Id.*

6. **Accuracy, Reliability, and Validity Obligations.** Institutions must ensure the accuracy, reliability, and validity of decisions.
7. **Data Quality Obligation.** Institutions must establish data provenance, and assure quality and relevance for the data input into algorithms.
8. **Public Safety Obligation.** Institutions must assess the public safety risks that arise from the deployment of AI systems that direct or control physical devices, and implement safety controls.
9. **Cybersecurity Obligation.** Institutions must secure AI systems against cybersecurity threats.
10. **Prohibition on Secret Profiling.** No institution shall establish or maintain a secret profiling system.
11. **Prohibition on Unitary Scoring.** No national government shall establish or maintain a general-purpose score on its citizens or residents.
12. **Termination Obligation.**[10] An institution that has established an AI system has an affirmative obligation to terminate the system if human control of the system is no longer possible.

The OECD AI Principles[11] were adopted in 2019 and endorsed by 42 countries—including the United States, several European Countries, and the G20 nations.[12] The OECD AI Principles establish international standards for AI use:

1. **Inclusive growth, sustainable development and well-being.** AI should benefit people and the planet.
2. **Human-centered values and fairness.** AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and they should include appropriate safeguards – for example, enabling human intervention when necessary – to ensure a fair and just society.
3. **Transparency and explainability.** There should be transparency and a responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them.
4. **Robustness, security and safety.** AI systems must function in a robust, secure and safe way throughout their life cycles and potential risks should be continually assessed and managed.
5. **Accountability.** Organizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles.[13]

EPIC believes that these frameworks are among the best currently available resources for establishing regulations and guidance for use of AI/ML systems. The rights to transparency, fairness, accountability, accuracy, data quality, and a prohibition on secret profiling are particularly salient principles that EPIC recommends the CFPB incorporate into its regulatory guidance for

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[10] *Id.*

[11] *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019) [hereinafter *OECD AI Principles*], https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449;

[12] *U.S. Joins with OECD in Adopting Global AI Principles*, NTIA (May 22, 2019), https://www.ntia.doc.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles.

[13] *OECD AI Principles*, *supra* note 15.

financial institutions. EPIC also recommends that the CFPB proceed with caution when considering lowering a burden of defending disparate impact or other bias claims when lenders are using AI/ML.

As one of CFPB's core functions is "rooting out unfair, deceptive, or abusive acts or practices by writing rules, supervising companies, and enforcing the law," the Bureau is well positioned to be a leader among federal agencies regulating use of emerging AI/ML systems by approaching the regulatory response with a necessary degree of skepticism to those systems.[14] We have already seen reports of Apple Card's lending algorithm offering smaller lines of credit to women despite not using gender explicitly as an input, which illustrates the need for greater transparency, accountability, and testing of AI/ML systems in the financial industry.[15] This case, with gender, is just one example of documented algorithmic bias in lending that violates aspects of the ECOA. The huge volume of different data points used by many lending AI/ML tools, combined with the lack of diversity in the developers of the algorithms and the well-documented bias in historical data around lending[16] makes it especially important that the CFPB develop a robust regulatory plan to conduct much needed oversight.[17] Data points that are facially neutral but act as a proxy for protected classes under the ECOA are often used[18] and can have dangerous consequences, regardless of the intentions of the lender. That is why testing and algorithmic assessments are essential to the oversight process.

The National Institute of Science and Technology ("NIST") recently published a draft white-paper on principles of Explainable AI[19], in which they provide four helpful aspects of explainability that CFPB can use as a checklist of ensuring AI/ML models used by lenders satisfy accountability to borrowers:

1. That the system produce[s] an explanation;
2. That the explanation be meaningful to humans;[20]

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[14] Consumer Finance Protection Bureau, *About Us* (last visited Sep. 30, 2020) available at https://www.consumerfinance.gov/about-us/the-bureau/.

[15] Will Knight, *The Apple Card Didn't 'See' Gender – and That's the Problem*, WIRED (Nov. 2019) https://www.wired.com/story/the-apple-card-didnt-see-genderand-thats-the-problem/.

[16] Lisa Rice, Dierdre Swesnik, *Discriminatory Effects on Credit Scoring on Communiteis of Color*, Suffolk University Law School and National Consumer Law Center Symposium on Credit Scoring and Credit Reporting (June 6-7, 2012) https://nationalfairhousing.org/wp-content/uploads/2017/04/NFHA-credit-scoring-paper-for-Suffolk-NCLC-symposium-submitted-to-Suffolk-Law.pdf.

[17] Dan Ennis, Tim Cook, *Bias from AI lending models raises questions of culpability, regulation*, BankingDive (Aug. 16, 2019) https://www.bankingdive.com/news/artificial-intelligence-lending-bias-model-regulation-liability/561085/.

[18] Anya Prince, Daniel B. Schwarcz, *Proxy Discrimination of Artifiical Intelligence and Big Data*, 105 Iowa Law Review 1257 (2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347959.

[19] P. Jonathan Phillips et. al, *Four Principles of Explainable Artificial Intelligence,* National Institute of Standards and Technology (Aug. 2020) available at https://www.nist.gov/system/files/documents/2020/08/17/NIST%20Explainable%20AI%20Draft%20NISTIR8312%20%281%29.pdf.

[20] *Id* at 2-3.
"A system fulfills the Meaningful principle if the recipient understands the system's explanations. Generally, this principle is fulfilled if a user can understand the explanation, and/or it is useful to complete a task. This principle does not imply that the explanation is one size fits all. Multiple groups of users for a system may

3. That the explanation reflects the system's process accurately;
4. That the system expresses its knowledge limits.

       EPIC urges the CFPB to incorporate the guidance from NIST and other experts in algorithmic explainability, accountability, and transparency to develop standards and hold financial institutions accountable. These businesses should not incorporate AI/ML into their systems for making or aiding lending decisions without thorough vetting and regulatory oversight. In particular, the CFPB should issue rules addressing the potential of discrimination-by-proxy in AI/ML, requiring *actual* explainability and transparency around the factors considered in decision-making in light of this growing method, and establishing requirements for testing and auditing.

Conclusion
       As set forth above, EPIC recommends that the CFPB issue regulations in order to provide regularity clarity and impose minimum standards and transparency requirements on lenders using AI/ML tools to make credit determinations. Specifically, EPIC urges the CFPB to use the Universal Guidelines for AI and the OECD AI Principles as a guide for policy-making.

       Respectfully submitted,

   /s/ *Ben Winters*
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require different explanations. The Meaningful principle allows for explanations which are tailored to each of the user groups."