

Equality in Credit Decisions – “Sex” DOES include Sexual Orientation and Gender Identity

In 2020, the Supreme Court held in *Bostock v. Clayton County, Georgia* that an employer who fires an employee for being gay or transgender violates the Civil Rights Act of 1964 (“Title VII”). Though the list of protected classes covered by Title VII does not expressly include sexual orientation or gender identity, the Court found that firing an employee for being gay or transgender constituted discrimination based upon the person’s sex. The Equal Credit Opportunity Act (“ECOA”) and Regulation B likewise prohibit discrimination on the basis of sex. Following *Bostock*, many wondered whether the holding would extend to the ECOA and Regulation B.

Today we can answer that yes, “sex” does include sexual orientation and gender identity under the ECOA and Regulation B. On March 5, 2021, the Acting Director of the Bureau of Consumer Financial Protection (“Bureau”), issued an interpretive rule clarifying that ECOA and Regulation B’s prohibition against sex discrimination extends to discrimination on the basis of sexual orientation and gender identity. In reaching this conclusion, the Bureau noted that ECOA and Title VII are usually interpreted consistently with one another. The ECOA, like Title VII, prohibits discrimination on the basis of sex. And discrimination based on sexual orientation or gender identity “necessarily involve consideration of sex.” The Bureau also noted that neither ECOA nor Regulation B require that discrimination based on sex be the sole or primary reason for the discriminatory action – only that the applicant’s sex be a reason. Further, like the Court in *Bostock*, the Bureau found that the ECOA and Regulation B do not require discrimination on a group-basis – e.g., refusing to grant credit to all persons identified as male at birth. Instead, the ECOA and Regulation B are also violated when an individual applicant is denied based on their biological sex.

Finally, the Bureau noted that sex discrimination under the ECOA and Regulation B also includes discrimination “based on an applicant’s associations.” An example of associational discrimination is requiring a person married to an individual of the same biological sex to provide different documentation of the marriage than a person who is married to a person of the opposite biological sex is required to provide.

Based on the Bureau’s March 2021 interpretive rule, the Bureau can engage in an enforcement action against a creditor who discriminates against a credit applicant on the basis of sexual orientation or gender identity. Therefore, it is doubly important that creditors ensure their underwriting policies and procedures neither facially discriminate against such individuals, nor create a disparate impact. Creditors should also review customer complaints for allegations of discrimination and revise existing policies, procedures, and training materials to specifically state that the creditor does not discriminate on the basis of sexual orientation or gender identity.

Practicing equality in credit decisioning is not only required from a legal and regulatory perspective. Today’s consumers value social consciousness and failing to treat all consumers equally will also have reputational and financial consequences for a financial services provider.

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