

list income from alimony, child support, or separate maintenance, and to the collection of information about an applicant's national origin, race, sex, marital status, and age for mortgage credit. These disclosures are relevant primarily at the time of application. In addition, since the application will be submitted to the creditor, the only way to provide the disclosures to the applicant in retainable form would be to provide an extra copy of the application. The final rule exempts disclosures under §§ 202.5 and 202.13 (even if provided in writing) from the retainability requirement.

In addition, the Board issued an interim final rule in April 2001 concerning the electronic delivery of disclosures under Regulation B. (66 FR 17779, April 4, 2001.) A new § 202.4(b) was added in that rulemaking to provide rules on foreign-language disclosures. The present rulemaking re-designates that revision as § 202.4(e).

Section 202.5—Rules Concerning Requests for Information

Section 202.5 has been revised from the proposal. The final rule adopted by the Board retains the general prohibition against creditors' inquiring about, or noting, an applicant's sex, race, color, religion, or national origin for nonmortgage credit products, subject to some exceptions, including a new exception that permits collection for the purpose of conducting a self-test that meets the requirements of § 202.15, as discussed below.

Because the ECOA makes it unlawful for creditors to consider any prohibited bases of discrimination in a credit transaction, Regulation B has generally prohibited creditors from inquiring about, or noting, an applicant's sex, race, color, religion and national origin. This general prohibition was intended to discourage discrimination, based on the premise that if creditors cannot inquire about or note applicants' personal characteristics, such as national origin or race, they are less likely unlawfully to consider the information in connection with a credit transaction.

For home mortgage lending, there were specific concerns at the time the regulation was adopted in the 1970s about discrimination based on applicants' personal characteristics; and thus Regulation B requires creditors to record the applicant's national origin or race, marital status, sex, and age in applications for purchasing or refinancing home loans. (This requirement was added in 1977 when the regulation was amended to implement expanded coverage of the

ECOA to include national origin, race, and other prohibited bases of discrimination. As enacted by the Congress in 1974, the ECOA initially barred discrimination only on the basis of sex and marital status.) The data collection enables enforcement agencies to better monitor home mortgage lenders' compliance with the ECOA. In 1989, the Congress amended the Home Mortgage Disclosure Act (HMDA), implemented by the Board's Regulation C, to impose a similar data collection requirement that applies to mortgage loans more broadly, encompassing home improvement loans in addition to purchase-money and refinanced home loans.

In 1995, the Board proposed to remove the prohibition against noting applicants' personal characteristics for nonmortgage credit products. The proposed revision was published at the time the federal financial regulatory agencies were revising regulations that implement the Community Reinvestment Act to respond to concerns about whether creditors were meeting the needs of their communities, particularly for small business and small farm lending. The majority of commenters on the 1995 proposal opposed removal of the prohibition. After extensive deliberation, the Board withdrew the proposal in December 1996, and stated that, given the political sensitivity of the issues, the matter was better left to the Congress.

In 1998, the Board again solicited comment in its Advance Notice of Proposed Rulemaking on removal of the prohibition. The Board raised the issue in response to concerns that continued to be expressed by the Department of Justice and some of the federal financial regulatory agencies. These agencies pointed to anecdotal evidence of discrimination in connection with small business and other types of credit. Comments received in response to the Advance Notice were fairly evenly divided between those in support of, and those in opposition to, lifting the ban. Most of those who favored lifting the prohibition were focused, however, on removing it for small business lending only.

In its August 1999 proposed rule to amend Regulation B, the Board proposed to remove the general prohibition against inquiring about or noting information about an applicant's race, national origin, religion, color, or sex to allow voluntary collection of such data for nonmortgage credit products. Consideration of applicant characteristics such as race in evaluating creditworthiness, except as permitted by law, would continue to be

prohibited. The Board recognized that removing the prohibition could give loan officers access to information on applicants' personal characteristics that might not otherwise be available and, thus, could provide the opportunity for unlawful discrimination. Also, the usefulness of the data for fair lending enforcement would depend on whether creditors implemented standards for uniform collection of the data—such as by product, for all applicants, or for all borrowers. Nevertheless, the Board believed that removing the prohibition for all nonmortgage credit might allow issues of credit discrimination to be better addressed. Because data notation by the creditor would be on a voluntary basis, creditors could target those products where they might have particular concern about potential discrimination.

The proposed rule lifting the prohibition also provided that applicants could not be required to provide information about their race, national origin, religion, color, or sex. Creditors that chose to engage in data notation would have been required to disclose—at the time they requested the information—that providing the data was optional, and that the creditor would not take the information (or the applicant's decision not to provide it) into account in any aspect of the credit transaction. A proposed model notice was included.

More than 600 commenters addressed the issue of data notation raised by the 1999 proposal. Many commenters—including most of the federal financial regulatory agencies, the Department of Justice, the Department of Housing and Urban Development, small businesses and their trade associations, consumer advocates, community organizations, individual consumers, and a few banks—favored removing the prohibition. Enforcement agencies and others believed that creditors' ability to collect and analyze information about the ethnicity and race of applicants and an agency's ability to review that information could provide a better fair lending tool than prohibiting the notation of such information. A significant number of these commenters favored removing the prohibition for all nonmortgage credit products, but most of those who favored lifting the ban focused their comments on small business lending.

Most of the commenters favoring removal of the prohibition believed that mandatory collection is the more effective way to monitor and enforce fair lending compliance for small business and other nonmortgage loans. Consumer advocate and community group