

commenters generally endorsed voluntary data collection, but often as a first step toward mandatory data collection and disclosure. These commenters also believed that standards for data collection were needed and urged the Board to develop HMDA-like standards for data collection on nonmortgage loans. These commenters said that allowing data notation would enable creditors and government agencies to monitor for possible discriminatory practices, and might enable creditors to better target underserved markets. Some commenters believed that, in the case of home mortgage lending, the mandatory collection and disclosure of data have increased access to those products for low-income and minority consumers.

Most industry commenters preferred to retain the general prohibition. A number of them indicated that they would not collect data if the prohibition were removed. These commenters expressed reservations about the Board's lifting the prohibition, including concerns about the likely pressure to collect data and the risk of litigation based on unreliable data. Commenters also expressed concern that creditors that obtained data about ethnicity, race, and other personal characteristics would be placed at a competitive disadvantage relative to other lenders because some consumers might find notation offensive. Some commenters expressed concern that a requirement for mandatory collection of data would soon follow the lifting of the prohibition, which would impose substantial burdens and costs on institutions. Many commenters criticized the lack of standards to ensure the collection of accurate and reliable data. They expressed concern, for example, that the lack of any uniform guidance regarding how to determine the minority-owned or women-owned status of small businesses would render any data meaningless. Some commenters believed the current rule has been effective in discouraging discrimination by denying creditors access to information that would enable them to discriminate on a prohibited basis. Some commenters, including individual consumers, asserted that data notation intrudes upon consumers' privacy.

Some commenters indicated that if the prohibition were removed, they would likely not collect information about applicants' personal characteristics unless collection was subject to the ECOA's self-test privilege, and urged the Board to extend the self-test privilege to information about applicants' personal characteristics.

(Under the statutory amendments of 1996, the self-test privilege protects creditors against disclosure of the results of a self-test to a government agency in an examination or investigation or by an agency or an applicant in any proceeding or lawsuit alleging a violation of the ECOA or Regulation B.) In the August 1999 proposal, the Board noted that creditors choosing to collect applicant characteristics would likely do so on the application form or in the application process, and therefore the privilege would not apply to this data collection. Industry commenters challenged this view of the scope of the self-test privilege.

Some congressional commenters submitted a legal analysis which included the argument that the prohibition against inquiring about applicants' personal characteristics is required by the ECOA and must be enforced by the Board, and which stated that creditors would continue to be barred from collecting information about personal characteristics even if the Board amended Regulation B to remove the regulatory prohibition. They argued in their legal analysis that the ECOA's enumeration of exceptions to the general prohibition against discrimination on the basis of race, color, sex, national origin, religion, age and certain other characteristics implied a prohibition on any other collection by creditors of data regarding these personal characteristics of applicants. The Board disagrees with this analysis; the fact that the ECOA provides that certain types of inquiries regarding personal characteristics are permitted does not mean that other inquiries are prohibited.

The Board believes that it has the authority under the ECOA to permit data collection. The Board has express authority under the ECOA to adopt regulations that carry out the purposes of the Act. The ECOA does not contain an express prohibition against inquiring about an applicant's personal characteristics; it prohibits the practice of discriminating on a prohibited basis, a prohibition that the Board's amendment does not change. The Board adopted its regulatory provision prohibiting collection of personal characteristics data in order to further the purpose of the ECOA. The Board believes it is well within its authority to adopt the self-testing exception to its regulatory prohibition because it better achieves the purposes of both the central prohibition against discrimination contained in the ECOA and the self-testing provision in the ECOA.

The fact that the ECOA provides that certain types of inquiries regarding personal characteristics are permitted does not imply that other inquiries are prohibited. The list of exceptions in the ECOA is needed for another purpose. The list allows creditors to inquire about characteristics of an applicant and to use that information in the credit decision—such as asking about marital status to determine property rights. Without expressly permitting these inquiries, a creditor could not use information about an applicant's personal characteristics in making its decision without violating the ECOA's central prohibition. Removal by the Board in whole or in part of the regulatory prohibition on inquiring about characteristics of applicants does not allow the creditor to consider this information in violation of the ECOA.

Based on comments received and its own analysis and for the reasons stated below, the Board has retained the general prohibition on inquiring about, or noting, information about nonmortgage credit applicants' personal characteristics, such as race and national origin; and has created an exception for collection of this information by a creditor for the purpose of conducting a self-test under § 202.15.

The Board adopted its regulatory provision prohibiting collection of personal characteristic data for nonmortgage credit in order to further the purposes of the ECOA. The Board believes that the existing prohibition, by restricting creditors' access to information about applicants' personal characteristics, contributes to reducing or avoiding credit discrimination. Lifting the prohibition and permitting creditors to collect and use data on applicant characteristics for any purpose without limitation, as was proposed, would create some risk of use of the data for discriminatory purposes. For example, lifting the prohibition without constraints could have resulted in selective inquiries or notation. Moreover, without standards, the reliability of voluntarily collected data is questionable.

At the same time, creditors desiring to monitor and assure compliance with the ECOA by collecting information about applicants' personal characteristics should not be prevented from doing so. The Board believes that creating an exception for collecting such information as part of a self-test would further the purposes of the ECOA by providing creditors with an additional tool for measuring and improving their levels of compliance with the ECOA and Regulation B. Permitting data notation