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August 30, 2016

Mr. Michael Adams, Chief Executive Officer
Mr. Aaron Tax, Director of Federal Government Relations
Services & Advocacy for GLBT Elders (SAGE)
1220 L Street, NW, Suite 800
Washington, DC 20005

RE: Application of the Equal Credit Opportunity Act to Credit Discrimination on the
Bases of Gender Identity and Sexual Orientation

Dear Messrs. Adams and Tax:

Thank you for your recent letter describing some of the work that SAGE has done to partner with the federal government to ensure that Lesbian, Gay, Bisexual, and Transgender (LGBT) older adults and their caregivers get the resources and information they need to protect themselves. Your partnership is producing expert training, technical assistance, and educational resources to aging providers, LGBT organizations, and LGBT older adults. We also have appreciated the perspective you have provided us in our discussions about various issues relevant to LGBT consumers, including the potential for these consumers, in particular, to experience various forms of discrimination in the extension of credit.

In your letter, you pose the question whether the Consumer Financial Protection Bureau views credit discrimination on the bases of gender identity and sexual orientation, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes, as forms of sex discrimination prohibited under the Equal Credit Opportunity Act (ECOA). Your question raises issues that we have been actively considering in light of recent developments in non-discrimination law in several contexts. Based on our consideration of these developments, we have determined that it would be appropriate and helpful to set out in more detail our current thinking about how the law is continuing to evolve in this area. For purposes of clarity, we understand “gender identity” to refer to one’s internal sense of one’s own gender, which may or may not correspond to the sex that is assigned to a person at birth, and which may or may not be made visible to others. We understand “sexual orientation” to refer to an individual’s physical, romantic, and/or emotional attraction to people of the same and/or opposite gender, such as straight (or heterosexual), lesbian, gay, or bisexual. Our understanding of these terms is consistent with recent guidance that has been issued by the U.S. Department of Labor. *See* Dep’t of Labor, Office of Fed. Contract Compliance, Frequently Asked Questions, EO 13672 Final Rule, https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

General Background on ECOA

As you know, the Consumer Bureau is responsible for administering and enforcing ECOA and its implementing regulation, Regulation B. *See* 15 U.S.C. §§ 1691-1691f; 12 C.F.R. pt. 1002. ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction,” on several enumerated bases, including on the basis of sex. 15 U.S.C. § 1691(a)(1). Accordingly, Regulation B prohibits a creditor from discriminating against an applicant regarding any aspect of a credit transaction, or making any oral or written statement to applicants or prospective applicants that would discourage a reasonable person from making or pursuing an application, where the discrimination or discouragement occurs on any of the bases prohibited by the law, including sex. 12 C.F.R. § 1002.4(a)-(b). The question you pose implicates whether the term “sex” as used in the statute and its implementing regulation can encompass discrimination that is based on gender identity or sexual orientation, including but not limited to discrimination that is based on any actual or perceived nonconformity with sex-based or gender-based stereotypes.

Actual or Perceived Nonconformity with Sex-Based or Gender-Based Stereotypes

A settled line of cases establishes that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes. The seminal precedent is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Although the case was later superseded on other grounds by enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, sec. 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)), it remains controlling law on the underlying discrimination issues that the Supreme Court addressed. In *Price Waterhouse*, six members of the Court agreed that Title VII prohibits discrimination against an employee because of the employee’s perceived nonconformity with sex-based or gender-based stereotypes. 490 U.S. at 250-51 (plurality op.); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O’Connor, J., concurring). The Court applied this reasoning to the facts before it in the case, which involved a female employee whom colleagues had perceived as “macho” or not “feminine” because she did not appear to conform to female sex or gender stereotypes. *Id.* at 235.

The lower courts have applied this precedent numerous times. For example, in *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004), the Sixth Circuit held that the plaintiff sufficiently pleaded sex discrimination by producing evidence of perceived nonconformity with sex or gender stereotypes where he “express[ed] less masculine, and more feminine mannerisms and appearance” and was regarded as not “masculine enough.” *Id.* at 572; *see also id.* at 574 (“After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, [is] engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”). In a similar case brought under the Gender Motivated Violence Act, 42 U.S.C. § 13981, the Ninth Circuit read that statute to “parallel” Title VII and concluded that the plaintiff had produced evidence sufficient to show that an attack was motivated because of the plaintiff’s sex, where the plaintiff had been perceived by the perpetrator as exhibiting “a feminine rather than a typically masculine appearance or demeanor.” *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000);

see also id. (discussing *Price Waterhouse* and concluding that “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII”).

In recent years, courts have increasingly concluded that the statutory proscriptions on sex discrimination encompass discrimination motivated by perceived nonconformity with sex-based or gender-based norms, preferences, expectations, principles, or stereotypes, including those related to gender identity and sexual orientation. For example, the Ninth Circuit has held that workplace harassment directed toward a male plaintiff in a Title VII action constituted a sex-based hostile environment where the conduct included coworkers describing him as walking and carrying a tray “like a woman,” referring to him as “she” or “her,” criticizing him for not having sexual intercourse with a female, and calling him a “fa[—]ot.” *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001). Similarly, the full panel of the Fifth Circuit concluded that the employee in a Title VII action had produced sufficient evidence to support a jury’s determination that he had been harassed “because of sex” where his supervisor had characterized him as “not a manly-enough man,” called him sex-based epithets such as “fa—ot” and “queer,” and perceived and described him as “kind of gay” and “like a homo.” *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 457-58 (5th Cir. 2013) (en banc). The Sixth Circuit affirmed a verdict for a transgender employee who brought a sex discrimination claim under Title VII based on perceived nonconformity with sex-based or gender-based stereotypes, such as a remark made by the employer that the employee “did not appear to be ‘masculine.’” *Barnes v. City of Cincinnati*, 401 F.3d 729, 735-37 (6th Cir. 2005). And the Eleventh Circuit concluded that the employee in an Equal Protection action under 42 U.S.C. § 1983 had produced sufficient evidence to affirm a lower court’s determination that the employer acted on the basis of the employee’s gender nonconformity where the evidence showed that the employer perceived the employee as “a man dressed as a woman and made up as a woman” and found the employee’s appearance “unsettling” and “unnatural.” *Glenn v. Brumby*, 663 F.3d 1312, 1314, 1320-21 (11th Cir. 2011).

ECOA Implications

Actual or Perceived Nonconformity with Sex-Based or Gender-Based Norms, Preferences, Expectations, Principles, or Stereotypes

There is no apparent reason why the same reasoning that the Supreme Court and the courts of appeals have applied to discrimination on the basis of “sex” under Title VII would not equally apply to discrimination on the basis of “sex” under ECOA as well. Indeed, consistent with ECOA’s legislative history and case law, the approach that the courts have taken to the interpretation of ECOA and Regulation B traditionally has been guided by precedents under Title VII. *See* S. Rep. No. 94-589, 94th Cong., 2d. Sess., 4-5 (1976) (“judicial constructions of anti-discrimination legislation in the employment field . . . are intended to serve as guides in the application of this Act”); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (“In interpreting the ECOA, this court looks to Title VII case law, that is, to federal employment discrimination law.”).

Gender Identity

Based on the same principles highlighted above, the First Circuit concluded that gender identity discrimination fits within discrimination on the basis of “sex” under ECOA. Sixteen years ago,

the court held that discrimination against a transgender person who was a prospective applicant for credit may give rise to a claim of sex discrimination under ECOA. *Rosa*, 214 F.3d at 215-16. The plaintiff alleged that the creditor's employee refused to give the plaintiff a loan application upon request. The plaintiff was a biological male who was dressed in "traditionally feminine attire" and service was refused until he "went home and changed" because his "attire did not accord with his male gender." *Id.* at 214-15 (internal quotation marks omitted). This case stands as clear precedent that gender identity claims can be brought under ECOA.

Sexual Orientation

There is yet another legal doctrine that is pertinent to sexual orientation discrimination. Federal agencies have, for decades, recognized the principle of credit discrimination based on one's associations. The basic principle is that credit discrimination on a prohibited basis includes discrimination against an applicant because of the protected characteristics of individuals with whom he or she is affiliated or associated. Consumers usually engage in a wide variety of affiliations and associations with other people of various sexes, including spouses, domestic partners, dates, friends, coworkers, and more.

Over thirty years ago, the official interpretation of Regulation B, first promulgated by the Federal Reserve, affirmed this concept. It expressly provides that discrimination on a "prohibited basis refers not only to characteristics – the race, color, religion, national origin, sex, marital status, or age – of an applicant (or officers of an applicant in the case of a corporation) but also to the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates," or because of the characteristics of people with whom an applicant has "personal or business dealings." *See* Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,049 (Nov. 20, 1985) (Federal Reserve). The principle of associational discrimination was reaffirmed by nine agencies in the Interagency Policy Statement on Discrimination in Lending. *See* 59 Fed. Reg. 18,266, 18,268 (Apr. 15, 1994) ("A lender may not discriminate on a prohibited basis because of the characteristics of: [a] person associated with a credit applicant (for example, a co-applicant, spouse, business partner, or live-in-aide); or [t]he present or prospective occupants of the area where property to be financed is located."). The Consumer Bureau reaffirmed this principle when it restated Regulation B. *See* 76 Fed. Reg. 79,442, 79,473 (Dec. 21, 2011); 81 Fed. Reg. 25,323, 25,325 (Apr. 28, 2016); Official Staff Commentary, 12 C.F.R. pt. 1002, Supp. I, ¶ 2(z)-1. Accordingly, creditors are prohibited from discriminating against applicants based on the sex of the people with whom an applicant is affiliated or with whom an applicant associates, or because of the sex of people with whom an applicant has personal or business dealings.

Recent EEOC Decisions

While a number of federal agencies have issued relevant rulings and guidance under the civil rights laws they administer or enforce, the Equal Employment Opportunity Commission has issued some of the most significant analyses of gender identity discrimination and sexual orientation discrimination as forms of sex discrimination *per se* under Title VII. In doing so, the EEOC has laid out its reasoning about how discrimination on these bases necessarily involves sex-based considerations. And here again, the EEOC's views on what constitutes discrimination on the basis of "sex" under Title VII are highly relevant to the similar statutory analysis of what it means to discriminate based on "sex" under ECOA.

On gender identity, a leading EEOC decision is *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012). There the agency held that when “an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim.’” *Id.* at *7 (quoting *Schwenk*, 204 F.3d at 1202). As it explained: “This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.” *Id.* The agency relied squarely on *Price Waterhouse* to hold that in “each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that ‘an employer may not take gender into account in making an employment decision.’” *Id.* (quoting *Price Waterhouse*, 490 U.S. at 244).

On sexual orientation, a leading EEOC decision issued recently is *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). We find this decision to be highly persuasive in its explanation of how discrimination based on sexual orientation is inextricably intertwined with discrimination based on sex. As the agency explained:

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation and sex discrimination in a number of ways.

Id. at *6. And in fact, the EEOC’s further explanation drew on both the core concept of discrimination on the basis of “sex” and on the principle of associational discrimination that was discussed above. The agency’s apt framing of the issue, in both respects, is worth quoting in full:

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a

picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex. . . .

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

Id. at *7-8. The agency also grounded its interpretation of Title VII in settled precedent by tying its approach on this issue back to the Supreme Court's controlling analysis of actual or perceived nonconformity with sex-based or gender-based stereotypes in the *Price Waterhouse* case:

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In *Price Waterhouse*, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). In the wake of *Price Waterhouse*, courts and the [EEOC] have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed – based on their appearance, mannerisms, or conduct – as insufficiently "masculine" or "feminine." But as the [EEOC] and a number of federal courts have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

Id. at *9-10 (footnotes omitted). Some of the agency decisions and federal court cases that the EEOC cited in *Baldwin* involved plaintiffs who were perceived as not conforming with sex-based or gender-based norms, preferences, expectations, principles, or stereotypes. Among the norms, preferences, expectations, principles, or stereotypes addressed in those matters were the following: (1) "real" men should date women, and not other men, *Centola v. Potter*, 183 F. Supp. 2d 402, 410 (D. Mass. 2002); (2) homosexuality is not consistent with acceptable gender roles, *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); (3) marrying a woman is an essential part of being a man, *Veretto v. U.S. Postal Serv.*, EEOC Appeal No. 0120110873, 2011 WL 2663401 at *3 (July 1, 2011); and (4) having relationships with men is an essential part of being a woman, *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810 at *3 (Dec. 20, 2011).

We note that while there are a number of adverse lower court decisions under Title VII, these cases themselves either predate or rely in turn on precedents that predated the EEOC's more careful analyses of these issues in its *Macy* and *Baldwin* rulings. The judicial rulings also generally predate many of the most significant advances in legal protections for the LGBT community that have occurred in recent years, including notable constitutional decisions issued by the Supreme Court. Indeed, a panel of the Seventh Circuit recently acknowledged the logical shortcomings of its own earlier adverse precedents on this issue, while indicating that it was nonetheless constrained to follow them at this point. *Hively v. Ivy Tech Cmty. Coll.*, 2016 WL 4039703 (7th Cir. Jul 28, 2016). Unlike Title VII, the logical interpretation of ECOA is not beset by a comparable history of adverse early precedents.

In sum, the current state of the law supports arguments that the prohibition of sex discrimination in ECOA and Regulation B affords broad protection against credit discrimination on the bases of gender identity and sexual orientation, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes as well as discrimination based on one's associations. The Consumer Bureau recognizes and supports these recent developments in the law. We regard them as important and relevant to ensuring fair, equitable, and nondiscriminatory access to credit for both individuals and communities. We will continue to monitor these legal developments closely as we strive to ensure that our interpretation and application of laws and rules under our jurisdiction, including ECOA and Regulation B, appropriately reflect the evolving precedents interpreting sexual discrimination law.

The Consumer Bureau also handles complaints about financial products and services. Those consumers who believe they may have been discriminated against on these grounds, or on any other bases prohibited under ECOA or Regulation B, can submit complaints online (<http://www.consumerfinance.gov/complaint>) or by calling us toll-free at 1-855-411-CFPB (2372). Consumers can also go online to our Tell Your Story tool (<http://www.consumerfinance.gov/your-story/>) and share their experiences – good or bad – even if they do not have a complaint to submit.

We would be interested to know about any situations in which creditors treat applicants less favorably because of gender identity or sexual orientation. For example, we would be interested in knowing if any creditors require married same-sex couples who apply for credit to provide different documentation of their marriage than married opposite-sex couples. We likewise would be interested in knowing if any creditors impose obstacles on transgender applicants who may submit applications designating their sex consistent with their gender identity.

I trust this discussion is responsive to your inquiry. For further information, please do not hesitate to contact us at 855-411-2372. Thank you again for your leadership, and I look forward to working with you on these and other issues of common concern in the future.

Sincerely,



Richard Cordray
Director