

Special Purpose Credit Programs

Best Practices for Nonprofit Organizations

The National Fair Housing Alliance offers the following best practices for nonprofit organizations establishing special purpose credit programs (“SPCPs”). These practices are intended to help nonprofits develop programs that are safe and responsible, facilitate partnerships with for-profit institutions where appropriate, and mitigate legal and reputational risks.

SPCPs allow nonprofit and for-profit organizations broad discretion in designing credit assistance programs that increase access to credit and provide favorable terms and conditions to economically disadvantaged groups, including participants that may possess one or more common characteristics, such as race, national origin, or sex.¹ However, Regulation B does not provide significant guidance regarding nonprofit SPCPs. The Regulation states only that ECOA and Regulation B “permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under . . .

(2) Any credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons.”²

There are no official CFPB interpretations of this nonprofit-focused provision (unlike the more detailed separate provision governing SPCPs offered by for-profit organizations, which does include official interpretations). The CFPB Advisory Opinion (“AO”) on SPCPs issued in December 2020 (“CFPB December 2020 AO”) only applies to SPCPs offered by for-profit institutions.³ The best practices offered here are informed by the text of Regulation B and tailor the CFPB’s guidance for for-profit institutions to the nonprofit context.

- (1) **Prepare a written plan:** For-profit institutions that offer SPCPs must develop a “written plan” that identifies the class of persons the program is designed to benefit and sets forth the procedures and standards of the program. Nonprofit organizations are not required to have a written plan under the regulation.⁴ Nevertheless, although not legally required under ECOA, nonprofits should develop a written plan to document the intent behind the program; its design (including eligibility criteria); and other details (such as whether the SPCP will involve a pilot-based approach, whether future enhancements are under consideration, and the like).

¹ 12 C.F.R. § 1002.8(c).

² 12 C.F.R. § 1002.8(a)(2).

³ See CFPB Advisory Opinion, Equal Credit Opportunity (Regulation); Special Purpose Credit Programs at 6-7 (Dec. 21, 2020), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

⁴ Compare 12 C.F.R. § 1002.8(a)(2) with 12 C.F.R. § 1002.8(a)(3).

- (2) **Demonstrate nexus to the extent it is relevant:** The CFPB December 2020 AO explains that a for-profit institution should demonstrate a “nexus to the organization’s customary credit standards.”⁵ The nexus connects public research and data about the need for the program with the institution’s business-as-usual standards. Regulation B does not require a “nexus” to be shown for a nonprofit offering an SPCP on its own. Instead, it is acceptable for a nonprofit to target an SPCP to a class of persons who may receive similar credit offers, so long as that class of persons still is “economically disadvantaged” or “members” of the nonprofit. This distinction—that nonprofit programs need not show a nexus—is sensible because these organizations often are established with a mission to promote the interests of traditionally underserved communities, and so it may not be the case that applicants from those communities would be denied or receive worse terms under the nonprofit’s customary standards. In the absence of a clear nexus to customary credit standards, a nonprofit can still connect the demonstrated need of its target class with the SPCP by showing that the program will benefit the nonprofit’s “members or . . . an economically disadvantaged class of persons,” and it should be able to do so by connecting these benefits to its own nonprofit mission.

Nonprofit written plans should address a nexus to customary credit standards to the extent it is relevant. It will be straightforward, for example, for a nonprofit credit union to demonstrate nexus based on an analysis of its own data.

- (3) **Document both “an economically disadvantaged class of persons” and “special social needs” whenever a for-profit organization is involved:** Regulation B authorizes SPCPs offered by nonprofit organizations, so long as they are “for the benefit of its members” or for “an economically disadvantaged class of persons.”⁶ In contrast, SPCPs offered by for-profit organizations must be created to “meet special social needs.”⁷ The distinction between “special social needs” and “economically disadvantaged” is unclear. While application of the CFPB December 2020 AO is explicitly limited to SPCPs offered by for-profit institutions, the CFPB described its hope in issuing the guidance that “broader creation of special purpose credit programs by creditors will help expand access to credit among disadvantaged groups and will better address special social needs.”⁸ The data and analysis needed to demonstrate that an

⁵ CFPB Advisory Opinion at 12.

⁶ 12 C.F.R. § 1002.8(a)(2); see also 12 C.F.R. § 1002.8(a)(1), which provides for SPCPs “expressly authorized by Federal or state law for the benefit of an economically disadvantaged class of persons.”

⁷ 12 C.F.R. § 1002.8(a)(3).

⁸ See Consumer Financial Protection Bureau Advisory Opinion, *Equal Credit Opportunity (Regulation B); Special Purpose Credit Programs* at 7, 3 (Dec. 21, 2020), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_special-purpose-credit-program_2020-12.pdf.

SPCP benefits “an economically disadvantaged class of persons” or “meets special social needs” are likely similar but may not be synonymous. The written plan for an SPCP dependent upon both nonprofit and for-profit participation should state both standards.

- (4) **Document the nonprofit’s mission and needs of its constituents:** The written plan for an SPCP designed to serve a nonprofit’s members should document the nonprofit’s mission and constituents served (whether or not they are members), whether those constituents are “economically disadvantaged,” any difficulties that they have accessing credit, and how the SPCP will help overcome those difficulties. For example, the written plan can describe the nonprofit’s demonstrated history of advocating to address racial inequities created by the historical redlining by lenders and other housing service provider of communities of color, to close the racial homeownership and wealth gaps, and to find solutions to overcome challenges caused by credit deserts⁹ in communities of color.
- (5) **Ensure objective benefits to the borrower:** SPCPs generally include a mix of favorable underwriting criteria, pricing benefits, and/or other beneficial features designed to ensure loans are affordable (e.g., down payment assistance grants, etc.), preferable to other credit options that might be available, designed to succeed, and sufficiently attractive that they can help increase representation of underserved groups in an applicant pool. SPCP terms should be objectively favorable as compared to terms available through other programs. The benefit(s) to the borrower should be made explicit in the written plan. More specifically, the written plan should demonstrate that the SPCP does not raise the risk of “steering,” which includes the risk of targeting an underserved borrower or community for less favorable or even predatory credit products.
- (6) **Establish a timeframe for offering and/or evaluating the SPCP:** The nonprofit should determine in its written plan a timeframe on which it commits to evaluating the operation of the SPCP, including monitoring its effectiveness, updating data or information relating to the economic disadvantage of the beneficiary classes, and assessing the performance of the SPCP relative to the nonprofit’s goals.
- (7) **Develop monitoring metrics:** The nonprofit should develop performance metrics and monitor its elements—across all partners, if applicable—to identify whether its standards and procedures require modification. These metrics will vary depending on the nature of the SPCP and the nonprofit itself. For SPCPs based on race or other protected class, the regulation makes clear that the

⁹ See, *Access to Credit: Not Everyone has Equal Access to Our Financial Markets*, National Fair Housing Alliance, <https://nationalfairhousing.org/issue/access-to-credit/>

creditor will not violate Regulation B by requesting that the applicant provide such demographic information for eligibility purposes.¹⁰ Such information can then be used for monitoring purposes as well. In sum, the nonprofit should monitor whether there is a continuing need for the SPCP, and whether the SPCP meets the needs of those intended to benefit.

- (8) **Consider other laws:** The best interpretation of antidiscrimination laws is that compliance with ECOA and Regulation B guards against an alleged violation of overlapping laws like Section 1981 or the Fair Housing Act.¹¹ However, a nonprofit should be mindful of structuring its plan to minimize both legal and reputational risk. A nonprofit should also ensure its SPCP comports with HUD's Guidance on SPCPs.¹² Regulation B's requirements for SPCPs offered by for-profit institutions—such as specifying a timeframe for the program and demonstrating that the program intervention remedies documented need—reflect generally applicable principles in antidiscrimination law. Thinking through these requirements can help a nonprofit mitigate other potential risks.

Nonprofits should also be aware that the ECOA and Regulation B SPCP provisions do not excuse compliance with other federal and state legal and regulatory requirements that are not related to discrimination, such as the Truth-in-Lending Act and Regulation B requirements to provide adverse action notices.

- (9) **Consider presenting to regulators for preview:** Although regulators will not formally approve SPCP plans, previewing an SPCP with regulators can be beneficial. The CFPB has directed consumer, community, civil rights, and nonprofit advocacy groups to submit their questions and requests for meetings and consultations regarding SPCPs to the CFPB's Public Engagement and Community Liaison at PublicEngagement@cfpb.gov.¹³

¹⁰ Regulation B, 12 C.F.R. § 1002.8(c): "If participants in a special purpose credit program described in paragraph(a) of this section are required to possess one or more common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirement of paragraph (a) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program."

¹¹ See NHFA and Relman Colfax, PLLC, *Special Purpose Credit Programs: How a Powerful Tool for Addressing Lending Disparities Fits within the Antidiscrimination Law Ecosystem* (Nov. 2020), https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA_Relman_SPCP_Article.pdf.

¹² Damon Smith, Office of General Counsel Guidance on the Fair Housing Act's Treatment of Certain Special Purpose Credit Programs That Are Designed and Implemented in Compliance with the Equal Credit Opportunity Act and Regulation, December 6, 2021, https://www.hud.gov/sites/dfiles/GC/documents/Special_Purpose_Credit_Program_OGC_guidance_12-6-2021.pdf.

¹³ Tim Lambert, CFPB, *Using special purpose credit programs to serve unmet credit needs* (July 19, 2022), <https://www.consumerfinance.gov/about-us/blog/using-special-purpose-credit-programs-to-serve-unmet-credit-needs/>.

- (10) **Conduct and expect due diligence and third-party risk management:** Financial regulators expect financial institutions to practice effective risk management of third-party relationships.¹⁴ As such, nonprofit organizations should be prepared to facilitate reasonable due diligence. For example, the nonprofit should expect to show a long-term dedication to its mission, including a demonstrated history of effective operations and sound financial statements. In addition, the nonprofit should expect ongoing monitoring by for-profit partners. Similarly, nonprofits should consider due diligence on their for-profit partners. What constitutes reasonable due diligence for a nonprofit to request will depend on the level of involvement of the for-profit and the complexity of the SPCP.

©2023 National Fair Housing Alliance and Relman Colfax, PLLC. All rights reserved.

¹⁴ See, e.g., OCC, *Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29* (Mar. 5, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-10.html>; CFPB, *Compliance Bulletin and Policy Guidance; 2016-02, Service Providers* at 4–5 (Oct. 19, 2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.