September 8, 2023

Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Michael Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave. NW
Washington, DC 20551

Michael Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Sandra Thomson
Director
Federal Housing Finance Agency
400 7th Street SW
Washington, DC 20024

Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Marcia Fudge
Secretary
Department of Housing and Urban Development
451 7th Street SW
Washington, DC 20410

RE: REQUEST TO CONFIRM THE LEGALITY OF SPECIAL PURPOSE CREDIT PROGRAMS (SPCPS) AFTER THE SUPREME COURT'S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE*

Dear Chairman Gruenberg, Vice Chair Barr, Acting Comptroller Hsu, Director Chopra, Secretary Fudge, and Director Thomson,

The Independent Community Bankers of America (ICBA)[1] writes to your agencies to request a written confirmation of the continued legality of Special Purpose Credit Programs under the

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three

Equal Credit Opportunity Act (ECOA) and Regulation B.[2] SPCPs allow for-profit financial institutions to meet the financial needs of individuals who ordinarily would not receive credit or would receive it on less favorable terms.

ICBA supports allowing community banks to voluntarily create SPCPs to benefit economically disadvantaged or historically discriminated against customers and we are aware of community banks that currently offer such programs. Guidance issued by your agencies has proven useful for the community banks that have recently implemented SPCPs.[3] However, in light of a recent Supreme Court decision that directly impacts the legal authority behind SPCPs, ICBA believes that the guidance documents need to be renewed to reflect your support for the legality and permissibility of the program.

This June, the Supreme Court of the United States issued a decision in the case *Students for Fair Admissions v. Harvard*, which held that race-based affirmative action college admissions programs violate the Equal Protection Clause of the Fourteenth Amendment,[4]partly overruling the 1978 decision in *Regents of the University of California v. Bakke*, which permitted the use of race as a 'plus factor' in college admissions.

The *Students for Fair Admissions v. Harvard* decision rejected the constitutionality of considering race in college admissions on the basis that "[e]liminating racial discrimination means eliminating all of it" and that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[5] In essence, the Court reasoned that, because college admissions were a zero sum game, universities could not consider race as a plus factor for applicants of some races without creating a detriment for applicants of other races, therefore violating their right to equal treatment.

SPCPs allow lenders to create lending programs "to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to

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U.S. counties. Holding more than $5.8 trillion in assets, over $4.8 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

[2] 15 USC 1691(c)(3); 12 CFR 1002.8.

[3] "Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B" (Feb. 22, 2022), *available at* "https://www.fdic.gov/news/financial-institution-letters/2022/fil22008a.pdf.

[4] See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 143 S. Ct. 2141 (2023).

[5] *Supra* note 4 at 2147 (internal citations omitted).

other applicants."[6] All participating borrowers in such programs "may be required to share one or more common characteristics (for example, race, national origin, or sex)."[7] We believe that such programs continue to be permissible under the Equal Protection Clause of the Fourteenth Amendment, but are writing to your agencies to obtain additional clarification that such programs remain legally sound.

Unlike college admissions, lending is not a zero-sum game. A university has a relatively fixed number of admissions slots to fill, and granting a slot to one applicant likely means denying that slot to another applicant. By contrast, banks will make as many loans as they can profitably make. If a borrower in a SPCP receives a loan, it does not mean that a borrower of another race or sex must be denied a loan or that they will receive a loan on worse terms. SPCPs can be used by lenders to expand the pool of possible borrowers and reach customers they otherwise might not have reached. This can and should be a mutually beneficial arrangement where lenders establish relationships with new customers, underserved groups get access to credit at fair terms, and no applicant of any race is discriminated against on a prohibited basis.

An additional written confirmation of the continued permissibility of SPCPs and a legal analysis of their constitutionality in light of the Supreme Court's decision in *Students for Fair Admissions v. Harvard* would provide lenders who offer such programs additional certainty that they remain in compliance with fair lending laws.

Thank you in advance for your attention to this matter. Please feel free to reach out to me at Mickey.Marshall@icba.org if you or your staff have any questions about this request.

Sincerely,

Mickey Marshall
AVP and Regulatory Counsel

[6] 12 CFR 1002.8(a)(3)(ii).
[7] 12 CFR 1002.8(b)(2).