May 4, 2017

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G. St. NW
Washington, D.C. 20552

RE: Docket No. CFPB-2017-0009
82 Fed. Reg. 16307 (Apr. 4, 2017)

Dear Ms. Jackson:

The undersigned organizations appreciate the Consumer Financial Protection Bureau's (CFPB's) proposal to align the requirements of the Equal Credit Opportunity Act (ECOA) with the data collection requirements of the Home Mortgage Disclosure Act (HMDA). The Equal Credit Opportunity Act is a critical tool used to identify and address discrimination in credit transactions on the basis of race, color, religion, national origin, sex, marital status, age and other protected characteristics.

We welcome the CFPB's update of Regulation B, which implements the ECOA, and have joined in the comprehensive comments filed by the National Community Reinvestment Coalition. More changes are needed to Regulation B, however, to give consumers stronger protections against discrimination in the credit marketplace. The improvements summarized below would further the ECOA's goal of promoting the availability of credit to all creditworthy applicants on a non-discriminatory basis. We encourage the Bureau to further examine these issues and consider additional rulemaking.

The Bureau should:

- Amend Regulation B to remove the prohibition on data collection for auto finance loans and require the collection, maintenance, reporting and public dissemination of such data.
- Amend the regulation to clarify that an applicant should be sent an adverse action notice when the creditor refuses to grant credit on substantially the same terms requested, regardless of whether the consumer accepts a counteroffer.
- Expand the regulation's record keeping requirements beyond creditors to brokers and dealers.
- Coordinate this rulemaking with the Federal Reserve Board, which retains rulemaking authority under the ECOA over dealers.

A. Regulation B should be amended to address auto lending discrimination and allow for the collection and dissemination of protected-class data for auto finance transactions.

Financing the purchase of an automobile increasingly consumes a significant portion of the average American's financial resources. Auto loans are the third largest source of outstanding household debt, behind mortgages and nearly on par with student loans. In the sheer number of loans made, however, auto lending outstrips the other sources of household debt. In 2014, for example, there were almost three times as many families financing the purchase of an automobile as borrowers taking out student loans, and more than three times the number of auto finance originations as mortgage originations.[1] As Americans take out more auto loans, and finance a greater portion of the vehicle's cost through loans, they are vulnerable to abusive and deceptive marketplace practices, including discrimination.

About 80 percent of consumers obtain financing for the vehicle's purchase at a dealership.[2] Dealers typically engage a bank or finance company as the ultimate creditor on the transaction. In that interaction the creditor usually allows the dealer the discretion to mark up the interest rate, and keep much of the markup as profit. As a result, consumers with the same credit risk can pay dramatically different interest rates.

Several nationwide cases brought by NCLC and co-counsel against automobile financers exposed the discriminatory and abusive practice of dealers' markup of interest rates.[3] These discretionary markup cases, settled between 2003 and 2007, exposed a stark disparity in interest rate markups between African-American and white consumers. Data from race-coded loans analyzed by Professor Ian Ayers of Yale Law School demonstrated the disparate impact on African-Americans of larger and more frequent interest rate markups when compared to white consumers of equal creditworthiness.[4] Dealers were twice as likely to add a markup to the loans of African-Americans than to loans taken out by comparable white borrowers. When African-American and comparable white borrowers both were marked up, African-American borrowers paid significantly more. For example, in Wisconsin, black Ford buyers paid an average $1,041 markup, while white buyers paid $156. In Alabama, black GMAC buyers paid markups that averaged $836, but markups for white buyers averaged only $276.[5]

The CFPB and the Department of Justice have challenged auto financers' policy of giving dealers discretion to mark up the interest rate as discriminatory against borrowers of color. In

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[1] National Consumer Law Center, *New Ways to Understand the Impact of Auto Finance on Low-Income Families*, May 2016.
[2] Raj Date and Brian Reed, *AUTO RACE TO THE BOTTOM: Free Markets and Consumer Protection in Auto Finance*, Cambridge Winter, November 16, 2009.
[3] For more information see: http://www.nclc.org/action_agenda/cocounseling/examples_litigation.shtml#auto.
[4] *See, e.g.*, Ian Ayers, Expert Report, June 2004, available at: http://www.consumerlaw.org/issues/cocounseling/content/AHFCIanAyresReportExhibits.pdf. *See also* Cohen, Mark A. *Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation*, Available at http://ssrn.com/abstract=951827.
[5] *See Racial Disparities in Auto Loan Markups, State by State Data*, June 2015, available at http://www.nclc.org/images/pdf/car_sales/ib-auto-dealers-racial_disparites.pdf

enforcement actions against Ally Bank, American Honda Finance Co. and Fifth Third Bank, the agencies found that borrowers of color paid higher interest rates than white borrowers with similar creditworthiness. The CFPB has called on auto financers to eliminate dealer discretion to mark up rates, and to develop a different mechanism—one that does not result in discrimination—to compensate dealers for arranging auto credit.[6]

Though the CFPB has acknowledged that auto financers are liable under the ECOA for discrimination, and has taken aggressive enforcement action, the Bureau has yet to mandate the data collection necessary to uncover and rectify this problem.[7] Indeed, Regulation B prohibits lenders from asking about or documenting a consumer's race or ethnicity, except with respect to mortgage lending.[8] Though creditors, on their own, may collect such information as a self-test, it is unclear if creditors routinely avail themselves of this provision of the Act.[9] Thus, auto financing lacks the transparency and scrutiny provided to mortgage lending even though it is a more common financial transaction.

The success of HMDA in uncovering discriminatory lending patterns and shedding light on general trends in the housing market is undisputed. This publically available data source has been invaluable in demonstrating whether lenders are serving the housing needs of their communities, and it gives public officials information that helps them to make reasoned decisions and develop appropriate policies. The Bureau's efforts to shore up the collection of mortgage related data in Regulation B, and better align the regulations with the collection of HMDA data, is laudable. Moreover, the updates to both Regulation C and B reflect an incremental approach that takes into account all stakeholders. The proposed rule, however, represents a missed opportunity to use this incremental approach to expand the data collection requirements to another form of lending that the Bureau has acknowledged through its publications and enforcement actions is subject to predatory and discriminatory behavior.

A robust requirement to collect and publicly report protected-class data in auto finance transactions is needed to protect consumers in the auto lending marketplace. Greater scrutiny of auto lending practices is needed given the size and scope of the industry in the economy and the loans' increasing share of consumers' budgetary resources, especially that of low-income consumers. Indeed, auto finance is fraught with unique risks for the consumer as the decision maker – the person charged with setting the rate of the loan - sits across from the consumer and can readily make a quick decision based on immutable characteristics. The Bureau should remove the regulatory barriers which prohibit the collection of race and ethnicity data with respect to auto loans; require that creditors (whom the Bureau has acknowledged include indirect auto lenders) collect such information and report the data; and make such data sets available to the public.

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[6] CFPB Bulletin 2013-02 (March 21, 2013), available at http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.
[7] *See* 12 C.F.R. §1002.5.
[8] *See* 12 C.F.R. §§ 1002.5, 1002.13.
[9] *See* 12 C.F.R. § 1002.5(b)(1).

A narrow exception to the 12 C.F.R. §1002.5 collection standards to require the collection of auto financing data would serve the statute's broad remedial purpose and help ensure that creditworthy customers have access to credit. The data will be instrumental in identifying and rooting out discriminatory lending patterns and enforcing the ECOA and other anti-discrimination statutes.

At present, this data is essentially unobtainable. Much of it is proprietary. To the extent it is available at all, it is prohibitively expensive or requires extensive analysis. The plaintiffs in the discretionary markup cases obtained data on individual loans, and hired an expert witness to match the loans to drivers' license data in states that collected the driver's race. A dwindling number of states collect racial information, making this analysis difficult in the future. Although advocates observed disparities for Hispanics on a national level, Hispanic origin was not coded on enough loans to analyze state by state. Without adequate data, documenting disparate impact has required needlessly complicated and expensive methods, which are unavailable to many concerned stakeholders.

It is within the Bureau's authority to impose a requirement on auto lenders to collect the data. Section 1691b authorizes the Bureau to promulgate regulations to carry out the purpose of the Act, *i.e.,* to require that financial institutions and other firms that engage in the extension of credit make that credit equally available to all creditworthy customers. The current prohibition against asking about or documenting a consumer's race or ethnicity appears only in Regulation B, not in the statute. The Government Accountability Office has noted that the Federal Reserve Board adopted this prohibition in 1975 as a means of discouraging discrimination in lending, based on its belief that if lenders could not inquire about or note such information then they would be less likely to unlawfully consider it when making lending decisions.[10] This rationale has not proven prescient, and in fact has had the opposite effect in the auto marketplace. Discrimination is flourishing in the dark.

Moreover, the direct collection of race and ethnicity data would answer the Bureau's critics who question the use of proxy analysis in enforcement actions. Loan files used in past enforcement actions did not disclose the race of individual borrowers, so the Bureau and DOJ conducted statistical analyses based on consumers' last names and geographic location. This analysis, which was conducted on data from millions of auto finance transactions and found patterns and differences based on race, is appropriate. Requiring creditors to report the data directly, however, would facilitate the ability of all regulators to monitor and enforce compliance with fair lending laws on a timely basis, and would likely be less costly to the government. Although this requirement would impose some costs on creditors, some of those costs may be absorbed with other updates to technology and may be minimized by automation in the industry.

Requiring creditors to collect and publicly report data on protected characteristics for auto lending will address current data limitations that hamper consumers, stakeholder groups, researchers, and prudential regulators in their efforts to evaluate and redress discrimination.

[10] Statement of Orice M. Williams, Director, Financial Markets and Community Investment, Testimony before the Subcommittee on Oversight and Investigations, Committee on Financial Services, House of Representatives (July 17, 2008).

Collecting this data at origination is vital as this is typically the point at which abuses occur, though consumers pay for these abusive practices over the life of the loan. Since an effective rule should impose data collection requirements not just on entities that offer auto financing who fall within the Bureau's jurisdiction, but also on auto dealers who are generally excluded from the Bureau's jurisdiction,[11] the Bureau should coordinate this rulemaking with the Federal Reserve Board, which retains rulemaking authority under the ECOA over dealers.

B. Regulation B should be amended to provide protection for applicants who are offered less advantageous credit than that for which they applied, and applicants should receive a written adverse action notice regardless of whether they accept the creditor's counteroffer.

The ECOA requires that a creditor who takes adverse action on an application for credit must give the applicant an adverse action notice.[12] This notice tells the consumer of the creditor's decision and must include either a statement of the reasons for the decision or a disclosure of the consumer's right to request such a statement, and it must be in writing.[13]

A written adverse action notice would be particularly helpful to consumers when the creditor rejects the consumer's application but makes a counteroffer of credit on less favorable terms. Without an adverse action notice pointing out that the credit offered is not on the terms that the consumer sought, many consumers will be unaware that the terms have changed, thereby facilitating bait-and-switch tactics by creditors.[14] However, in its current form Regulation B eliminates this potential benefit by defining "adverse action" in a manner that is inconsistent with its statutory definition.

Specifically, the ECOA defines "adverse action" as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested."[15] This definition would apply to a counteroffer where the loan the consumer is offered or receives at the loan's closing is substantially different and less advantageous than the loan requested. But Regulation B defines an adverse action as a "refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) *and* the applicant uses or expressly accepts the credit offered."[16]

This regulatory revision of the statute's definition is disadvantageous to consumers. Many borrowers who are presented with different loan terms or amounts at closing are not aware of the changes or are induced or coerced into accepting the "new" loan. The new loan may have a higher rate or other disadvantageous terms. The regulation does not provide for a written adverse action notice in this circumstance if the borrower accepts or uses the credit offered.

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[11] 12 U.S.C. § 5519.
[12] 15 U.S.C. § 1691(d).
[13] 15 U.S.C. § 1691(d)(2). *See also* 12 C.F.R. § 1002.9(a)(1)(iii), (2).
[14] *See, e.g.*, Newton v. United Companies Finance Corp., 24 F. Supp. 2d 444, 462 (E.D. Pa. 1998).
[15] 15 U.S.C. § 1691(d)(6).
[16] 12 C.F.R. § 1002.2(c)(1)(i).

Instead, courts have interpreted Regulation B to allow a creditor to give merely oral notice of a counteroffer.[17] The reasoning is that, while 12 C.F.R. § 1002.9(a)(1)(i) requires a creditor to notify the consumer of a counteroffer, § 1002.9(b)(2) requires only notice of an adverse action to be in writing. Since the regulation defines rejection of a consumer's application not to be an adverse action when accompanied by a counteroffer, these courts conclude that the notice of such an action may be oral.

By creating this loophole for rejections accompanied by counteroffers, Regulation B encourages bait-and-switch tactics. For example, borrowers can be presented with different loan terms shortly before the loan closes, without any other indication that the terms have changed, and when it may be difficult to find another lender. Moreover, this loophole creates substantial proof problems. Without a written notice requirement, lenders have claimed that they orally informed the borrower of a counteroffer. Unfortunately the only evidence that a counteroffer notice was not given is the borrower's testimony, which may or may not be accepted by the factfinder.

In some circumstances, this gap will be filled by the risk-based pricing notice required by the Fair Credit Reporting Act (FCRA), but only when the offer of less favorable credit terms is due to a credit report or score—not when it is based on the discriminatory factors that the ECOA is intended to address.[18]

The Bureau should amend Regulation B to clarify that an applicant should be sent a written adverse action notice when the creditor refuses to grant credit on substantially the same terms requested, regardless of whether it makes a counteroffer that the consumer accepts. This amendment would strengthen the regulatory protections for consumers in the credit marketplace. It would also clarify the regulation, leading to greater predictability for both consumers and creditors.

C. The definition of creditor should be expanded to require that persons who refer applicants to creditors are subject to ECOA record-keeping requirements.

The ECOA defines the term "creditor" broadly. It includes any person who regularly extends, renews, or continues credit, but also any person who regularly arranges for an extension, renewal, or continuation of credit, or any assignee of the original creditor who participates in the credit decision.[19] Regulation B, however, interprets this statutory definition narrowly. Under Regulation B, a person who refers applicants to creditors but does not participate in the credit decision is considered a "creditor" only for purposes of the ECOA's anti-discrimination provisions, but not its other requirements, including its record-keeping requirements.[20] For loan applicants, the regulation requires creditor to retain the application, related materials used to evaluate the application, and written notifications provided to the applicant for 25 months.[21]

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[17] Diaz v. Virginia Housing Development Authority, 117 F.Supp. 2d 500 (E.D. Va. 2000).
[18] *See* 15 U.S.C. § 1681m(h).
[19] 15 U.S.C. § 1691a.
[20] 12 C.F.R. § 1002.2(l).
[21] 12 C.F.R. § 1002.12(b).

Discrimination by loan brokers, automobile dealers, and others can prevent creditworthy consumers from receiving credit. The actions of brokers, dealers and similar entities fall along a continuum, with some being sufficiently involved in the credit decision to be considered creditors for all purposes. However, it is difficult to prove that a broker, for example, should be considered a creditor for all purposes without the availability of records (including application materials and notifications to the applicant).

Extending the recordkeeping requirement to arrangers of credit is essential to facilitate the central purpose of this Act, to avoid discrimination. As was well documented during the foreclosure crisis, mortgage loan brokers contributed mightily to the problem of equity skimming, predatory lending and other abuses. Loans originated by brokers, compared to loans originated directly by lenders, were more likely to default, contain high rates and fees and onerous terms. African Americans and Hispanics were particularly overcharged by brokers.[22] As front line agents working with consumers brokers are thoroughly familiar with lending policy and guidelines, and greatly influence whether credit will be granted. Even if the broker does not make the ultimate credit decision, the Bureau should consider and study further whether eliminating the recordkeeping exception for brokers will result in the collection of meaningful information that will combat discrimination. Documentation will aid in investigating and targeting the origins of discrimination to develop more effective solutions.

The definition of creditor should be expanded to require that persons who refer applicants to creditors are subject to ECOA record-keeping requirements. Since such a rule would likely impose record-keeping requirements on auto dealers, who are generally excluded from the Bureau's jurisdiction,[23] the Bureau should coordinate this rulemaking with the Federal Reserve Board, which retains rulemaking authority under the ECOA over dealers.

Conclusion

The proposed rule will strengthen compliance with the ECOA and HMDA and provide valuable information that will facilitate the enforcement of fair lending laws. Additional changes are needed to Regulation B, however, to protect vulnerable consumers from discriminatory credit practices. We encourage the Bureau to amend the regulation to enhance data collection efforts and add protections for consumers to further the ECOA's central mission of promoting the availability of credit on a non-discriminatory basis.

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[22] *See, e.g.,* Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield Spread Premiums*, 12 Stan. J.L. Bus. & Fin. 289, 350 (2007) (African Americans and Hispanics pay more, on average, in broker compensation than whites); Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. Rev. 677, 691 (2009); Press Release, Office of the New York State Attorney General, *Countrywide Agrees to New Measures to Combat Racial and Ethnic Disparities in Mortgage Loan Pricing* (Dec. 5, 2006), available at www.ag.ny.gov (pricing disparities between whites and minorities highest for broker originated loans). *See also* Debbie Gruenstein, Bocian, Keith S. Ernst & Wei Li, *Ctr. for Responsible Lending, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, 21–23 (May 31, 2006), available at www.responsiblelending.org (discussing evidence and analysis that links pricing disparities with broker activity and incentives).

[23] 12 U.S.C. § 5519.

We thank the CFPB for the opportunity to comment on the proposed rule. If you have any questions regarding these comments, please contact Alys Cohen (acohen@nclc.org) or Odette Williamson (owilliamson@nclc.org) at the National Consumer Law Center at 617 542-8010.

Sincerely,

Americans for Financial Reform

Center for Responsible Lending

Consumer Action

Consumer Federation of America

Empire Justice Center

Jacksonville Area Legal Aid, Inc.

The Leadership Conference on Civil and Human Rights

NAACP

National Association of Consumer Advocates

National Community Reinvestment Coalition

National Consumer Law Center (On behalf of its low-income clients)

National Fair Housing Alliance

National Housing Law Project

National Urban League

New Economy Project

Woodstock Institute