



Chairman Joseph J. Simons
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C)
Washington, DC, 20580
Re: Competition and Consumer Protection in the 21st Century Hearings
Project Number: P181201

Dear Chairman Simons:

The National Community Reinvestment Coalition (NCRC) appreciates the opportunity to comment in advance of the Federal Trade Commission's (FTC) public hearings on Competition and Consumer Protection. NCRC is a coalition of more than 600 community-based organizations with a mission to create opportunities for people and communities to build and maintain wealth. NCRC members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, fair housing and civil rights groups, minority and women-owned business associations, housing counselors, and social service providers from across the nation.

RE: Topic Number 4- The intersection between privacy, big data, and competition.

NCRC specifically seeks to comment on the topic of privacy, big data, and competition in regards to online marketplace lenders (FinTechs), and the FTC's enforcement of the Equal Credit Opportunity Act (ECOA) and the Fair Credit Reporting Act (FCRA). While FinTechs can offer innovation in credit access, their use of big data in underwriting raises several fair lending concerns.¹ NCRC urges the FTC to provide strong oversight and careful analysis regarding the use of consumer data. Specifically, the FTC should ensure

¹ U.S. Department of the Treasury, "Opportunities and Challenges in Online Marketplace Lending" p. 13 (May, 2016);
https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf

that this data is not being used by financial institutions in a way that harms consumers, should continue to provide robust enforcement of fair lending laws and continue to monitor and disclose trends in the FinTech market.

Fair Lending Laws and Big Data

ECOA and Disparate Impact

We strongly encourage the FTC to continue to rigorously enforce ECOA under both the disparate treatment and disparate impact theories. The disparate impact theory, which looks at the effects of a practice that appears non-discriminatory on its face, has long been recognized as a cognizable legal theory under ECOA, but recently some in the administration have cast doubt on continuing to properly enforce this critical anti-discrimination law. The use of big data reinforces the need for enforcing disparate impact, and maintaining the congressional intent that it be recognized under ECOA.

Disparate Impact claims under ECOA have found support in federal district courts, federal courts of appeal, and in ECOA's legislative history.² A Senate Report from when ECOA was amended in 1976 specifically noted that courts or agencies are free to look at, "the effects of a creditor's practices..."³ A practice may seem nondiscriminatory on its face, however in practice it can have grave implications for many consumers, and it is imperative that the FTC continue to uphold the intended purpose of ECOA by investigating and enforcing both disparate treatment and disparate impact claims.

Many FinTechs sell themselves on innovation by expediting the application process and possibly expanding credit for many underserved borrowers. However, a key element of this innovation relies on the use of proprietary, data driven algorithms. These algorithms are undisclosed and opaque, and often carry the risk of fair lending violations. Even when applied neutrally, without consideration of an applicants belonging to a protected class such as race, they may rely on other available data that can lead to disparate effects on certain underserved consumers. Due to the lack of transparency, it is impossible for consumers and advocates to know where the problem lies, and how to fix it. More transparency is needed in this process, and we must rely on regulatory agencies, such as the FTC, to use their enforcement powers to ensure that these underwriting determinations are not applied in ways that can lead to discrimination.

Studies have found that some of the algorithms used by FinTechs can unintentionally steer certain groups of people towards higher priced, predatory products or cut them out

² *Golden v. City of Columbus*, 404 F.3d 950, n. 11 (6th Circuit 2005); See Also, *Miller v. Am. Express Co.*, 688 F.2d 1235; *Guerra v. GMAC LLC*, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009).

³ S. Rep. 94-589, 2d Session, 1976.

of accessing credit at all.⁴ Some data used in underwriting include the post-secondary school an applicant attends, zip codes, and demographic information.⁵ None of these factors are reliable determinations of a borrower's ability to pay. Further, many of them can lead to whole communities being denied equal access. For instance, a reliance on zip codes in determining a borrower's ability to repay can ultimately lead to certain communities being denied access to affordable credit; it could result in a modern case of redlining.

If the effects test of disparate impact were not considered under ECOA, many violations would go unchecked with institutions being able to say none of their algorithms focus on race, sex, marital status, or national origin. While they may not be discriminatory on their face, in effect they may disproportionately target minorities. For these reasons, the FTC should continue to rigorously enforce ECOA both through disparate treatment and disparate impact, and as part of its investigations we encourage the FTC to look closely at the proprietary algorithms many of these nonbank financial intuitions are using.

Fair Credit Reporting Act

The Treasury Department highlighted the risks of big data in underwriting, specifically noting that data-driven algorithms carry risks of disparate impact in credit outcomes and a potential for fair lending violations.⁶ Specifically, that report highlighted the issue with applicants not having the opportunity to check and potentially correct data being used in underwriting decisions. The FTC should vigorously enforce the FCRA, especially in light of many FinTechs using data collected by Consumer Reporting Agencies (CRAs). Some FinTechs rely on this information in their underwriting determinations, using various consumer data, including social media.⁷ When this information is used to determine credit eligibility, the lender must comply with the FCRA.⁸

Specifically, we encourage the FTC to implement and enforce strong disclosure requirements requiring notice of adverse actions if a FinTech is denying credit based on the collection of data from a CRA or by acting as a CRA themselves. Additionally, FinTechs should disclose if the use of this consumer data led to risk-based pricing. The fear with these proprietary underwriting algorithms is that they are undisclosed, and a consumer needs to be able to check that the information relied on in determining his/her credit eligibility is both accurate and non-discriminatory.

⁴ FTC Report, "Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues" (January 2016); <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>

⁵ *Supra* n. 1 at p. 13, *Supra* n. 3

⁶ *Id.*

⁷ *Supra* n. 3

⁸ 15 U.S.C. § 1681a(d)(1)

Continued Research

In the past the FTC has held forums on FinTechs⁹, and released reports on issues related to the use of big data. As FinTechs influence and presence continues to grow in the market, we urge the FTC to continue to research and monitor the industry closely, and to publicly disclose its findings through reports. Specific areas of focus for these reports should include FinTechs use of big data, and the types of borrowers and customers (e.g. demographic factors such as age, income level, geography) accessing these online platforms and other innovative financial technologies. Are FinTechs providing more access and opportunities for the unbanked, underbanked or those underserved by traditional financial institutions?

Other areas where research could provide more insight would be around the type of data relied on most by FinTechs during the underwriting process or other decision points; whether the use of specific data results in particular trends in products, services, and customer outcomes. Better research will further promote transparency about how financial technology is evolving and whether it is responsible. It could also enable consumers to make more informed decisions.

NCRC appreciates the opportunity to comment on this important matter. If you have any questions about this comment letter, please contact Gerron Levi, Director of Policy and Government Affairs at NCRC at (202) 464-2708.

Sincerely,

Jesse Van Tol
Chief Executive Officer
National Community Reinvestment Coalition

⁹ <https://www.ftc.gov/news-events/blogs/business-blog/2016/08/fintech-forum-closer-look-marketplace-lending>