



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Division of Financial Practices

January 26, 2021

Patrice Alexander Ficklin, Assistant Director  
Office of Fair Lending & Equal Opportunity  
Bureau of Consumer Financial Protection  
1700 G Street, N.W.  
Washington, D.C. 20552

Dear Ms. Ficklin:

This letter responds to your request for information concerning the Federal Trade Commission's (Commission or FTC) enforcement activities related to compliance with Regulation B and the Equal Credit Opportunity Act (ECOA).<sup>1</sup> You request this information for use in preparing the Bureau of Consumer Financial Protection's (CFPB) 2020 Annual Report to Congress. Specifically, you ask for information concerning the FTC's activities with respect to Regulation B during 2020. We are pleased to provide the requested information below.<sup>2</sup>

### **I. FTC Role in Administering and Enforcing Regulation B**

The Dodd-Frank Act, signed into law on July 21, 2010, substantially restructured the financial services law enforcement and regulatory system. Among other things, the Act made important changes to ECOA and other consumer laws, such as giving the CFPB rulemaking and enforcement authority for ECOA. Under the Act, the FTC retained its authority to enforce ECOA and Regulation B. In addition, the Act gave the Commission the authority to enforce any CFPB rules applicable to entities within the FTC's jurisdiction, which include most providers of financial services that are not banks, thrifts, or federal credit unions.<sup>3</sup> In accordance with the memorandum of understanding that the Commission and the CFPB entered into in January 2012 and reauthorized in 2015 and again in 2019, and consistent with the Dodd-Frank Act, the

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<sup>1</sup> ECOA is at 15 U.S.C. § 1691 *et seq.*; the CFPB's Regulation B is at 12 C.F.R. Part 1002; the Federal Reserve Board's (Board) Regulation B is at 12 C.F.R. Part 202.

<sup>2</sup> A copy of this letter is being provided to the Board's Division of Consumer and Community Affairs, in connection with its responsibility for some aspects of the Regulations after the transfer date of July 21, 2011. Among other things, the Board retained responsibility for implementing Regulation B with respect to certain motor vehicle dealers, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). *See, e.g.*, Dodd-Frank Act, § 1029 and Subtitle H.

<sup>3</sup> The FTC has authority to enforce ECOA and Regulation B as to entities for which Congress has not committed enforcement to some other government agency. *See* 15 U.S.C. § 1691c(c).

Commission has been coordinating certain law enforcement, rulemaking, and other activities with the CFPB.<sup>4</sup>

## II. Regulation B (ECOA)

In 2020, the FTC engaged in enforcement, research and policy development related to ECOA. Further, the Commission provided the public with business and consumer education materials to promote business compliance with the law and to help consumers protect themselves from noncompliant businesses. This letter provides information regarding some of the FTC's enforcement, research and policy development and educational initiatives.<sup>5</sup>

### A. Fair Lending: Enforcement

In 2020, the FTC brought an enforcement action in federal court against New York City car dealer Bronx Honda and its general manager, Carlo Fittanto, alleging that defendants violated ECOA and Regulation B by discriminating against African-American and Hispanic consumers who financed vehicle purchases.<sup>6</sup> According to the FTC's complaint, among other things, defendants charged African-American and Hispanic customers higher markups and fees for financing than similarly situated non-Hispanic white consumers.<sup>7</sup> In May, the defendants agreed to pay \$1.5 million to settle the charges.<sup>8</sup> In addition, along with relief for other illegal practices

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<sup>4</sup> See FTC, Press Releases, *Federal Trade Commission, Consumer Financial Protection Bureau Pledge to Work Together to Protect Consumers* (Jan. 23, 2012), available at <https://www.ftc.gov/opa/2012/01/ftccfpb.shtm>, and *FTC, CFPB Reauthorize Memorandum of Understanding* (Mar. 12, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-cfpb-reauthorize-memorandum-understanding>; see also *FTC and CFPB Reauthorize Memorandum of Understanding* (Feb. 26, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-cfpb-reauthorize-memorandum-understanding>, and Dodd-Frank Act, § 1024.

<sup>5</sup> Your letter also asks for specific data regarding compliance examinations, including the extent of compliance, number of entities examined, and compliance challenges experienced by entities subject to the FTC's jurisdiction. The Commission does not conduct compliance examinations or collect compliance-related data concerning the non-bank entities within its jurisdiction. As a result, this letter does not provide this information.

<sup>6</sup> *FTC v. Liberty Chevrolet, Inc.*, No. 20-CV-3945 (S.D.N.Y. filed May 21, 2020), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3238/bronx-honda>. Commissioners Chopra and Slaughter each issued concurring statements in this matter. See *Statement of Commissioner Rohit Chopra in the Matter of Liberty Chevrolet, Inc. d/b/a/ Bronx Honda* (May 27, 2020), available at <https://www.ftc.gov/public-statements/2020/05/statement-commissioner-rohit-chopra-matter-liberty-chevrolet-inc-dba-bronx>, *Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda* (May 27, 2020), available at <https://www.ftc.gov/public-statements/2020/05/statement-commissioner-rebecca-kelly-slaughter-matter-liberty-chevrolet>.

<sup>7</sup> *Id.* See also FTC, Press Release, *Auto Dealership Bronx Honda, General Manager to Pay \$1.5 Million to Settle FTC Charges They Discriminated Against African-American, Hispanic Car Buyers* (May 27, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/05/bronx-honda-to-pay-over-1-million-to-settle-charges>.

<sup>8</sup> *FTC v. Liberty Chevrolet, Inc.*, No. 20-CV-3945 (S.D.N.Y. May 27, 2020) (stipulated order for permanent injunction and other equitable relief as to defendant Carlo Fittanto), (S.D.N.Y. May 27, 2020) (stipulated order for permanent injunction and other equitable relief as to defendant Liberty Chevrolet), available at <https://www.ftc.gov/enforcement/cases-proceedings/162-3238/bronx-honda>.

charged by the complaint, defendants are also required to establish a fair lending program that will, among other components, cap the amount of any additional interest markup they charge consumers. The FTC issued refunds totaling nearly \$1.5 million to individuals affected by the allegedly unlawful financing and sales practices of defendants, with refunds averaging about \$371 each to 3,977 victims of Bronx Honda's practices.<sup>9</sup>

In 2020, the FTC and CFPB jointly filed an amici curiae brief with the U.S. Court of Appeals for the Second Circuit in *Tewinkle v. Capital One, N.A.*, an action by a consumer alleging discrimination under ECOA, addressing “whether a person ceases to be an ‘applicant’ under ECOA and its implementing regulation after receiving (or being denied) an extension of credit.”<sup>10</sup> The agencies disagreed with the district court’s dismissal of the consumer’s ECOA action and filed the amici curiae brief on behalf of the applicant.<sup>11</sup> Specifically, the agencies argued that ECOA’s protections apply to any aspect of a credit transaction, including those pertaining to an existing arrangement with a creditor, noting there is “no temporal qualifier in the statute.”<sup>12</sup> The brief also argues that ECOA’s implementing Regulation B has for nearly half a century expressly provided that the term “applicant” includes those who have received credit from a creditor.<sup>13</sup> This matter is pending in the Court of Appeals for the Second Circuit.

## **B. Fair Lending: Research and Policy Development**

### **1. Response to the CFPB Request for Information about Regulation B**

In 2020, FTC staff submitted a comment in response to the CFPB’s request for information to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under

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<sup>9</sup> See FTC, Press Release, *FTC Sends Nearly \$1.5 Million to Victims of Bronx Honda’s Illegal Financing and Sales Practices* (Nov. 10, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sends-nearly-15-million-victims-bronx-hondas-illegal>.

<sup>10</sup> See Brief of Amici Curiae Consumer Financial Protection Bureau and Federal Trade Commission in Support of Appellant and Reversal, No.20-2049 (2d Cir. Oct. 7, 2020), *Tewinkle v. Capital One, N.A.*, No. 20-2049 (2d Cir. June 29, 2020) (Notice of Civil Appeal Docketed), available at [https://www.ftc.gov/system/files/documents/amicus\\_briefs/bradley-tewinkle-v-capital-one-na/tewinkle\\_amicus\\_brief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/bradley-tewinkle-v-capital-one-na/tewinkle_amicus_brief.pdf).

<sup>11</sup> See generally *id.*

<sup>12</sup> See *supra* note 10 at 14.

<sup>13</sup> See *supra* note 10 at 20-22.

ECOA and Regulation B.<sup>14</sup> The comment addressed two topics and highlighted FTC work in these areas: 1) disparate impact analysis; and 2) small business lending.<sup>15</sup>

On the first issue, and in response to the CFPB's query as to whether it should provide additional clarity regarding disparate impact analysis, the comment noted that since 1977, Regulation B has explicitly incorporated disparate impact, and the Commentary accompanying the regulation provides further detail. The comment urged the CFPB, if it provides additional detail, to include a reminder that the information is intended to provide examples of how the agency might approach a fair lending matter, that approaches may vary based on the facts and circumstances of each situation, and that such information is not intended to bless any violations of ECOA and Regulation B. On the second issue, the comment highlighted a product known as a "Merchant Cash Advance" ("MCA"), referenced recent FTC enforcement actions involving MCAs, and noted that providers of these products may not believe the product is "credit" covered by statutes such as ECOA, although the arrangements come with other hallmarks of traditional credit including personal guarantees of payment. The comment urged the CFPB to remind entities offering credit to small businesses that credit statutes such as ECOA and Regulation B apply and that whether a particular statute applies depends on the facts and circumstances involved, and not solely on how one party characterizes the transaction or the benefits it claims to provide.

## **2. Thirteenth Annual Federal Trade Commission Microeconomics Conference**

In 2020, the FTC hosted the 13<sup>th</sup> Annual FTC Microeconomics Conference, which included a paper session and discussion on "Un"Fair Machine Learning Algorithms.<sup>16</sup> Among the issues addressed were that firms and institutions increasingly use machine learning algorithms in making decisions in areas with far reaching effects, including access to credit.<sup>17</sup> Also discussed was that anti-discrimination laws in the U.S. recognize two doctrines of discrimination - disparate treatment and disparate impact - and that several empirical studies have shown that enforcing equal treatment in algorithms often leads to different outcomes across

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<sup>14</sup> See CFPB, Request for Information on the Equal Credit Opportunity Act and Regulation B, 85 Fed. Reg. 46,600 (Aug. 3, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-08-03/pdf/2020-16722.pdf>, and Request for Information on the Equal Credit Opportunity Act and Regulation B; Extension of Comment Period, 85 Fed. Reg. 52,332 (Aug. 25, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-08-25/pdf/2020-18557.pdf>.

<sup>15</sup> See FTC Staff Comment – No. CFPB-2020-0026 (Dec. 1, 2020), *available at* <https://www.ftc.gov/policy/advocacy/advocacy-filings/2020/12/ftc-staff-comment-cfpb-regarding-regulation-b-implementing>.

<sup>16</sup> See Thirteenth Annual Federal Trade Commission Microeconomics Conference, *available at* <https://www.ftc.gov/news-events/events-calendar/thirteenth-annual-federal-trade-commission-microeconomics-conference>.

<sup>17</sup> See "Un" Fair Machine Learning Algorithms, Runshan Fu, Manmohan Aseri, Param Vir Singh, Kannan Srinivasan, at 2, *available at id*.

demographic groups if systematic differences in the groups exist.<sup>18</sup> The paper's study and results were also discussed.<sup>19</sup>

### **3. ECOA in the Military Area**

In 2020, the FTC's Military Task Force, comprised of a cross-section of agency representatives, continued work on military consumer protection issues.<sup>20</sup> The Task Force is part of the agency's ongoing collaborative effort to provide resources for military consumers and is aimed at identifying their needs and developing initiatives to empower servicemembers, veterans, and their families, including through law enforcement actions. Additional information concerning FTC initiatives to assist military consumers is included below.

The FTC staff is a liaison to the American Bar Association's Standing Committee on Legal Assistance for Military Personnel (ABA LAMP). The ABA LAMP Committee supports initiatives to deliver legal assistance and services to servicemembers, veterans, and their families. For example, during ABA LAMP trainings and meetings, FTC staff addressed issues related to military consumers' (and other consumers') rights to various types of notifications as applicants for credit, including for adverse action, and information about the anti-discrimination provisions, in ECOA and Regulation B.

### **4. Interagency Task Forces on Fair Lending**

The FTC continues to serve as a member of the Interagency Task Force on Fair Lending, a joint undertaking with the CFPB, the Department of Justice, the Department of Housing and Urban Development, and the federal banking regulatory agencies. Task Force members meet regularly to share information and discuss policy issues.

Starting in 2020, the FTC also began participating in the newly-formed Interagency Fair Lending Methodologies Working Group. The FTC staff, along with the staff of the CFPB, Federal Housing Finance Agency, U.S. Department of Housing and Urban Development, U.S. Department of Justice and the federal banking agencies, coordinate and share information on analytical methodologies used in enforcement of and supervision for compliance with fair lending laws, including ECOA, among others.

#### **C. Fair Lending: Consumer and Business Education**

In 2020, the Commission conducted efforts to provide education on significant issues, including those related to credit transactions to which Regulation B pertains. The Commission issued a blog post for consumers about the Bronx Honda case, providing guidance about the

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<sup>18</sup> See *supra* note 17 at 2.

<sup>19</sup> See generally *supra* note 17.

<sup>20</sup> See generally FTC, *Military Task Force*, available at <https://www.ftc.gov/policy/advocacy/military-task-force>.

discriminatory practices and fees, and tips on how to avoid paying too much for your next car.<sup>21</sup> The Commission also issued a blog post for businesses about the Bronx Honda case with information on the settlement which requires the company to implement a fair lending program that safeguards against discrimination - highlighting practices that other businesses overdue for an ECOA compliance check may want to consider.<sup>22</sup>

The Commission also released a blog post for businesses about the use of artificial intelligence (AI) technology, noting that the technology has potential to improve welfare and productivity but also presents risks, such as the potential for unfair or discriminatory outcomes or perpetuation of existing socioeconomic disparities.<sup>23</sup> Among other things, the blog post noted that the FTC has brought many cases alleging violations of the laws it enforces involving AI and automated decision-making, specifically noting ECOA, which addresses automated decision-making. The blog post emphasized that AI tools should be transparent, explainable, fair and empirically sound, while fostering accountability, and providing numerous tips to businesses to help them manage consumer protection risks of AI and algorithms.

We hope that the information discussed above responds to your inquiry and will be useful in preparing the CFPB's Annual Report to Congress. Should you need additional assistance, please contact me at (202) 326-2972, or Carole Reynolds at (202) 326-3230.

Sincerely,

Malini Mithal  
Associate Director  
Division of Financial Practices

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<sup>21</sup> See Ari Lazarus, NYC car dealer accused of discriminatory lending, FTC BUREAU OF CONSUMER PROTECTION BLOG (May 27, 2020), <https://www.consumer.ftc.gov/blog/2020/05/nyc-car-dealer-accused-discriminatory-lending>.

<sup>22</sup> See Lesley Fair, FTC says Bronx Honda discriminated against African-American and Hispanic consumers, FTC BUSINESS CENTER BUSINESS BLOG (May 27, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/05/ftc-says-bronx-honda-discriminated-against-african-american>.

<sup>23</sup> See Andrew Smith, Dir., FTC Bureau of Consumer Protection, Using Artificial Intelligence and Algorithms, FTC BUSINESS CENTER BUSINESS BLOG (Apr. 8, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms>.