UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chairman

Concurring Statement of Chairman Andrew N. Ferguson
Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador
In the Matter of Asbury Automotive Group, Inc., et al.
Matter Number 2223135

July 17, 2025

In August 2024, the Commission approved the filing of an administrative complaint containing four counts against Asbury Automotive Group, several of its subsidiary car dealerships, and one of its executives in his individual capacity (collectively, Asbury), in which Commissioner Holyoak and I concurred.[1] Most relevant to today's Commission decision is Count IV and its related allegations.[2] In that count, complaint counsel claimed that Asbury violated the Equal Credit Opportunity Act (ECOA) by "impos[ing] higher costs on … applicants" of certain races "[i]n connection with motor vehicle credit transactions."[3] Complaint counsel supported that claim with facts alleging "disparities" in costs faced by consumers of different races and that Asbury "treat[s] … consumers differently" on the basis of race.[4]

Asbury subsequently sued in federal district court, collaterally challenging the Commission's authority to adjudicate the claims.[5] The Commission then stayed the administrative proceeding pending the resolution of the federal litigation.[6] Before the Commission now is complaint counsel's motion partially to lift that stay "for the sole purpose of permitting issuance of an amended Complaint that [removes the ECOA claim in] Count IV and its supporting allegations from the action … in light of Executive Order No. 14281."[7] The Commission has granted complaint counsel's motion to file an amended complaint without the ECOA claim. We grant that motion and write separately to reiterate this Commission's commitment to enforcing ECOA as enacted by Congress, while also complying with Executive Order 14281.

Congress initially enacted ECOA to ensure that lenders involved in extending credit did so without regard to an applicant's sex or marital status. Over time, Congress has broadened ECOA's protections to what they are today: prohibitions on "discriminat[ing] against any applicant, with respect to any aspect of a credit transaction … on the basis of race, color, religion, national origin,

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[1] Concurring Statement of Commissioner Andrew N. Ferguson, *In re Asbury Automotive Group, Inc., et al.*, No. 2223135 (Aug. 16, 2024) (Ferguson Statement); Statement of Commissioner Melissa Holyoak, *Asbury Automotive Group – McDavid Group*, No. 2223135 (Aug. 16, 2024).
[2] Compl., *In the Matter of Asbury Automotive Group, Inc.*, No. 2223135, ¶¶ 32–35, 51–52 (Aug. 16, 2024).
[3] *Id.* ¶¶ 51–52.
[4] *Id.*¶¶ 32–34.
[5] Dkt. No. 1, Compl., *Asbury Automotive Grp. v. Federal Trade Comm'n*, No. 4:2024cv00950 (N.D. Tex. Oct. 4, 2024).
[6] Order, *In the Matter of Asbury Automotive Group Inc., et al.*, No. Dkt. No. 9436 (June 3, 2025).
[7] Complaint Counsel's Motion to Partially Lift Stay of Administrative Proceedings to Amend Administrative Complaint, *In re Asbury Automotive Group, Inc., et al.*, No. 2223135 at 1–2 (May 6, 2025).

sex or marital status, or age."[8] ECOA is an important safeguard for consumers from lenders' intentional discrimination on the basis of these protected characteristics—in other words, "disparate treatment." As one of the federal agencies with authority to enforce ECOA, the Commission remains unreservedly committed to rooting out intentional discrimination in the extension of credit.

But Count IV in this matter goes beyond disparate treatment. It "pleads a disparate-impact theory of liability under" ECOA.[9] As I expressed when the Commission issued the complaint, I have grave reservations about whether Congress authorized disparate-impact theories under ECOA at all.[10] I have argued that ECOA does not satisfy the Supreme Court's test[11] for determining whether a statute imposes disparate-impact liability because that test requires *textual* evidence of Congress's intention to impose disparate-impact liability, and the text of ECOA contains no such evidence.[12] Those courts that have imposed such liability have relied only on regulations and legislative history rather than ECOA's text.[13] I nevertheless withheld judgment on whether ECOA imposes disparate-impact liability until the question was presented to me as part of the merits of Asbury's defense against the Commission's claim.[14]

Since then, however, President Donald J. Trump issued Executive Order 14281, entitled "Restoring Equality of Opportunity and Meritocracy," which directed agency heads to "evaluate all pending proceedings that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the [order's] policy."[15]

The United States of America is the land of equal opportunity in no small part because all of its citizens are equal before the law. Our Constitution specifically enshrined this ideal after a long and bloody civil war,[16] and it remains a bedrock principle underlying our multiethnic and multiracial society. This principle requires the law to treat all citizens as individuals rather than as members of their race or group. Merit, rather than immutable characteristics, should govern outcomes in America.[17] As Justice Thomas so eloquently put it, the Fourteen Amendment promises

> that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique

[8] 15 U.S.C. § 1691(a)(1).
[9] Ferguson Statement at 1.
[10] *Id.*
[11] *Tex. Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533 (2015).
[12] Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, *Coulter Motor Company, LLC*, No. 2223033, 1–4 (Aug. 15, 2024).
[13] *Id.* at 5–6.
[14] Ferguson Statement at 1.
[15] Exec. Order 14821, 90 Fed. Reg. 17537, 17538 (Apr. 23, 2025).
[16] See U.S. Const. amend. XIV; Declaration of Independence (July 4, 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights ….").
[17] U.S. Const. amend. XIV; Exec. Order 14821, 90 Fed. Reg. at 17537 ("Adherence to this principle is essential to creating opportunity, encouraging achievement, and sustaining the American Dream.").

thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.[18]

Executive Order 14281 recognizes that a "pernicious movement" threatens this colorblind meritocracy.[19] That movement promotes the theory of "disparate-impact liability" which imposes "a near insurmountable presumption of unlawful discrimination" "where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed."[20]

This theory of liability promotes, rather than prevents, discrimination. Instructing employers, schools, and other institutions to make decisions based on "outcomes … among different races" where no facially discriminatory policy or intent exists, for example, teaches decisionmakers that consideration of race *is* permissible, laudable, and even *required* so long as that discrimination is done in the name of "racial balancing."[21] If schools, employers, and businesses face disparate-impact liability even when fastidiously refusing to consider race or sex in their hiring, admissions, or business decisions, they will have little choice but to make decisions on the basis of race or sex in order to avoid such liability.

Thus, in at least some instances, this theory of liability forces decisionmakers considering candidates for employment, education, and other opportunities to overlook "bona fide" credentials in favor of race, sex, and other like characteristics—thereby replacing meritocracy with discrimination.[22] Disparate-impact liability perverts the ideals and promises of American society into the pursuit of equal outcomes and "race- or sex-based favoritism," ultimately dividing our society and pitting us against each other on the basis of race, sex, and other immutable characteristics.[23]

But our Constitution promises more: "[E]qual protection of the laws"[24] guarantees equality before the law, and promotes outcomes based on merit; it cannot abide discrimination designed to pursue "equity" in outcomes to the detriment of equality before the law. Unless we vigorously guard against theories that require race- and sex-conscious decisionmaking, "the Fourteenth Amendment w[ill] become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in … discrimination."[25] President Trump's Executive Order returns the government to common-sense prevention of unlawful discrimination, directing the federal government to "treat[] [people] as individuals, not components of a particular

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[18] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 277 (2023) (Thomas, J., concurring).
[19] Exec. Order 14821, 90 Fed. Reg. at 17537.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*; see also *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 759 (2007) (Thomas, J., concurring) (explaining that race-based decisionmaking to achieve racial balance "pits the races against one another, exacerbates racial tension, and 'provoke[s] resentment among those who believe that they have been wronged by the … use of race'" (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (opinion of Thomas, J.))).
[24] U.S. Const. amend. XIV.
[25] *Students for Fair Admissions*, 600 U.S. at 260 (Thomas, J., concurring).

race or group," in order to "encourage[] meritocracy and a colorblind society, not race- or sex-based favoritism."[26] The Executive Order correctly recognizes that only through upholding this "bedrock principle of the United States" can the American Dream flourish.[27]

We embrace the President's Executive Order wholeheartedly and will take the necessary steps to implement this policy, including by voting in favor of granting complaint counsel's motion seeking dismissal of the ECOA claim in this matter.

The Commission is steadfastly committed to enforcing ECOA to prevent and punish lenders who would treat consumers differently on the basis of their race, color, religion, national origin, sex or marital status, or age. Granting complaint counsel's motion does not depart from this commitment. Complaint counsel moves the Commission to dismiss Count IV as necessary to comply with Executive Order 14821. Under the regulations governing the Commission's adjudications, complaint counsel operates as the plaintiff in administrative proceedings and is master of its case.[28] The Commission therefore correctly defers to counsel's conclusion that it lacks evidence to support a disparate-treatment claim under ECOA. Without such evidence, the Commission could proceed only on a disparate-impact theory in violation of Executive Order 14821. We therefore grant complaint counsel leave to amend its complaint. But the Commission will not hesitate to bring disparate-treatment claims under ECOA where the facts support such claims.

[26] Exec. Order 14821, 90 Fed. Reg. at 17537.
[27] *Id.*
[28] E.g., 16 C.F.R. §§ 3.1–3.40, 3.41(c).