



CFPB Announces Plans to Hold Auto Lenders Liable for Discriminatory Loans

The Consumer Financial Protection Bureau issued a [guidance bulletin](#) announcing that it will treat indirect auto lenders as creditors subject to the Equal Credit Opportunity Act (ECOA). The March 21 bulletin follows the CFPB's previous signals that it intended to pursue discrimination in the dealer-assisted auto financing market (read our alert on the CFPB's investigation of auto lenders [here](#)). While automobile dealers are not considered creditors and are specifically exempt from CFPB regulation and oversight, the bulletin targets "dealer markup and compensation" arrangements between dealers and lenders, making clear that lenders may be held responsible for dealer policies that result in discriminatory pricing.

The ECOA prohibits creditors from discriminating in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise in good faith of a right under the Consumer Credit Protection Act. The ECOA's definition of a "creditor" extends to "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." The Federal Reserve's implementing regulation-Regulation B-further clarifies that creditor broadly includes "a person, who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit[.]" The CFPB's bulletin acknowledges that there is a "continuum" of indirect lender participation in credit decisions in the auto loan market and that a lender's practices may fall at "various points along this continuum." The Bureau takes the position, however, that the practices of indirect lenders frequently include sufficient participation

in the credit decision to bring these lenders under the definition of a creditor subject to ECOA compliance.

The bulletin identifies two common scenarios in which an indirect lender may be considered a creditor: first, when the lender evaluates a loan applicant's information, establishes an interest rate, and then communicates that rate to the auto dealer, indicating that it will purchase the obligation at the designated rate if the transaction is consummated, and second, when the lender establishes "buy rates" and provides them to the dealer, allowing the dealer to mark up the interest rates before the lender ultimately purchases the loan contract, with the dealer receiving compensation for the markup. According to the CFPB, these arrangements give dealers both the incentive and the discretion to mark up interest rates, and dealers may exercise their discretion in a discriminatory manner.

CFPB director Richard Cordray observed in recent public remarks that the lack of transparency in the auto loan market makes it difficult for borrowers to assess whether an interest rate accurately depicts the borrower's "actual position in the loan market." The incentive for dealers and loan officers to mark up interest rates has, according to Cordray, "often been shown to result in African-American and Hispanic borrowers paying more for mortgages and auto loans."

The bulletin states that indirect auto lenders may be liable for pricing disparities based on the basis of both disparate treatment (policies that intentionally discriminate) and

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disparate impact (policies that are neutral but nonetheless have a discriminatory result). Although both the CFPB and the Department of Justice have claimed that ECOA claims can be established by evidence of disparate impact, the U.S. Supreme Court's 2005 analysis in *Smith v. City of Jackson* raises significant questions whether this theory applies to actions outside the employment context.

The Bureau's announcement further states that it will look at pricing disparities that occur not only within a lender's transactions with a particular auto dealer but also across the lender's entire portfolio of transactions with different dealers.

The CFPB's bulletin makes clear that it expects indirect auto lenders to take appropriate measures to ensure that their lending practices comply with the ECOA and Regulation B, including revising their policies on dealer markup and compensation where appropriate and instituting strong fair lending compliance programs with data collection and ongoing monitoring practices. In this way, the CFPB is taking the position that indirect lenders will be held responsible for dealer practices to the extent they give rise to discriminatory pricing, exerting pressure on dealers to ensure fair lending practices.

Auto dealer trade groups have criticized the CFPB's approach. In a public statement issued jointly by the National Automobile Dealers Association (NADA) and the National Association of Minority Automobile Dealers (NAMAD), the groups urged the CFPB to engage in a more transparent and formal rule-making process involving public comment and coordination with other federal regulatory bodies.

Coming in the wake of the Bureau's ongoing investigation into auto lending practices, the bulletin portends the likelihood of enforcement activity focused on these issues in the near future. Aside from raising numerous legal issues, including what, if any, limits exist on the CFPB's authority over indirect lenders to address claimed discrimination by dealers, over which the CFPB has no authority, and the viability of the disparate impact theory as a basis for ECOA claims, the bulletin puts auto lenders on notice that they should be gathering and analyzing transaction data so they can assess and respond to potential discrimination claims before they are raised by the CFPB.

For more information about the content of this alert, please contact [Michael Mallow](#) or [Michael Thurman](#).

Loeb & Loeb LLP's Consumer Financial Protection Bureau Task Force

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