

**AMERICAN BAR ASSOCIATION**

**CIVIL RIGHTS AND SOCIAL JUSTICE SECTION  
STATE AND LOCAL GOVERNMENT LAW SECTION  
COMMISSION ON HOMELESSNESS & POVERTY**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and  
2 tribal governments to adopt and enforce fair lending laws and other federal and state laws  
3 targeting unfair or deceptive acts or practices to address discrimination in vehicle sales  
4 and financing markets;

5  
6 FURTHER RESOLVED, That the American Bar Association urges Congress to amend  
7 the Equal Credit Opportunity Act, 15 U.S.C 1691, to require documentation and collection  
8 of the applicant's race, gender and national origin for vehicle credit transactions, through  
9 applicant voluntary self-identification using disaggregated racial and ethnic categories,  
10 made available through a Demographic Information Addendum, or some equivalent  
11 measurement;

12 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,  
13 territorial, and tribal legislatures and governmental agencies to adopt laws and policies  
14 that promote the adoption of an enhanced nondiscrimination compliance system for a  
15 vehicle loan, or reduce dealer discretion by placing limits on dealer markup, or eliminate  
16 dealer discretion to mark up interest rates by using a different method of dealer  
17 compensation, such as a flat fee for each transaction;

18 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,  
19 territorial and tribal governments to adopt legislation requiring the timely notice and  
20 disclosure of pricing of add-on products by dealers on each vehicle through reasonable  
21 means, such as a pricing sheet and/or website prominently displayed and available at its  
22 location, before a consumer negotiates to purchase a vehicle; and

23 FURTHER RESOLVED, That the American Bar Association encourages state, local,  
24 territorial and tribal bar associations to offer educational programming and materials to  
25 lawyers and consumers to help them understand and navigate purchases and financing  
26 of vehicles, and understand consumers' legal rights with respect to such purchases and  
27 loans.



## REPORT

### OVERVIEW

This resolution addresses some highly discriminatory practices in auto lending and the sale of auto add-on products and their impact on many consumers because of race, gender, national origin, and income that follow. Consumers are burdened with interest-rate markups on loans that have no relation to their credit risk, but rather often relate to prejudice and discrimination. The resolution also addresses the issue of insufficient data available on credit applicants to identify and quantify potential discriminatory impact. Finally, the resolution addresses the lack of transparency in the auto lending market.

### BACKGROUND

More than 90% of American households own or lease a vehicle<sup>1</sup>, with a vehicle being the lifeline to the American consumer in securing employment, accessing healthcare, and pursuing educational opportunities. As noted in a recent Consumer Financial Protection Bureau (CFPB) report, today there are almost 100 million auto loans outstanding, totaling more than one trillion dollars.<sup>2</sup> Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt.<sup>3</sup> For consumers who do not own a home, as is the case for many low-income consumers, auto loan debt can be the largest debt they carry.<sup>4</sup>

The CFPB's Quarterly *Consumer Credit Trends Report*, "Growth in Longer-Term Auto Loans", issued in November 2017,<sup>5</sup> provides that longer-term loans (defined as six or more years) increased from 26 percent of auto loans originated in 2009 to 42 percent of 2017 originations.<sup>6</sup> Longer-term loans also result in higher loan balances, rising from \$20,100 for a five-year loan, compared to \$25,300 for a six-year loan.<sup>7</sup>

The National Consumer Law Center ("NCLC") issued a report in May 2016 on "New Ways to Understand the Impact of Auto Finance on Low-Income Families," that looks at loan origination as the time when abuses occur or unnecessary costs are incurred.<sup>8</sup> The report data for 2014 (the most recent time for student debt data at the time of the report) shows that "there were almost three times as many families originating auto finance as borrowers

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<sup>1</sup> "CFPB Report Finds Sharp Increase In Riskier Longer-Term Auto Loans," Consumer Financial Protection Bureau (CFPB), November 1, 2017, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-sharp-increase-riskier-longer-term-auto-loans/>

<sup>2</sup> *Id.* For consistency, we use the same definition of "auto loans" in this report as is used in the *Consumer Trends* dashboard. This definition includes closed-end loans or leases used by consumers to finance new or used automobile purchases.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CFPB Quarterly *Consumer Credit Trends Report*, "Growth in Longer-Term Auto Loans", issued November 2017.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> "New Ways to Understand the Impact of Auto Finance on Low-Income Families," National Consumer Law Center, May 2016, page 4.

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originating student loans, and more than three times the number of auto finance originations as mortgage originations.<sup>9</sup>

In analyzing the data, there is an indication that individuals with lower credit scores are at greatest risk for abusive loans and sale practices. Data on loan originations is not publicly available for mortgage and auto loans based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation between credit scores and applicant's race, income, educational levels and other characteristics.<sup>10</sup> By extrapolating the originations to the credit risk scores, the NCLC report observes that of "struggling consumers with High-Risk scores, more than 1.5 million (1,551,292) bought and financed a car, while just 100,439 bought a house."<sup>11</sup>

The Washington Post, in a February 7, 2019, article, noted that the Federal Reserve Bank of New York reported that a record seven (7) million Americans are 90 days or more behind on their auto loan payments, which is even more than during the financial crisis.<sup>12</sup> The New York Fed in its report said there were a million more "troubled borrowers, at the end of 2018 than there were in 2010, when unemployment hit 10% and the auto loan delinquency rate peaked."<sup>13</sup>

## ISSUES

### 1. ENFORCEMENT OF DISCRIMINATION LAWS

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. This is evident in the Association's adoption of policies that call upon federal, state and local lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding, and in seeking to eliminate such discrimination in all aspects of the legal profession.<sup>14</sup> The ABA's fundamental position condemning such discrimination is based

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<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> The Washington Post, "A record 7 million Americans are 3 months behind on their car payments, a red flag for the economy," by Heather Long, February 12, 2019, available at: [https://www.washingtonpost.com/business/2019/02/12/record-million-americans-are-months-behind-their-car-payments-red-flag-economy/?utm\\_term=.a72dca7a3795](https://www.washingtonpost.com/business/2019/02/12/record-million-americans-are-months-behind-their-car-payments-red-flag-economy/?utm_term=.a72dca7a3795)

<sup>13</sup> *Id.*

<sup>14</sup> ABA House of Delegates, Resolution and Report, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/78 (race); 8/72, 2/74, 2/78, 8/74, 8/75, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 ("handicap"); 8/87 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation), *archived policies noted at*

on its underlying commitment to the ideal of equal opportunity and advancement of human rights.<sup>15</sup> These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”<sup>16</sup> In furtherance of that right, the Association in August 2017 also urged governments to “enact legislation prohibiting discrimination on the basis of lawful source of income.”<sup>17</sup>

### *History of Discrimination in Auto Lending*

The Equal Credit Opportunity Act (ECOA) makes it illegal for a “creditor” to discriminate 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.<sup>18</sup> As set forth in the Congressional Report, the ECOA is intended to ensure that “...no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.”<sup>19</sup>

Numerous research studies document an extensive history of discrimination in car lending and sale practices, particularly in relation to non-white consumers and low-income consumers. Yale Law Professor Ian Ayres conducted groundbreaking research in his seminal article *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* in the Harvard Law Review.<sup>20</sup> The 1991 study documented that testers, employing a uniform negotiating strategy for buying a new car in Chicago dealerships, would receive different treatment by auto retailers on dealer markups for auto loans when buyers differed solely because of race or gender.<sup>21</sup> The study showed black male testers had to pay more than twice the markup price paid by white male testers. White women testers paid more than 40% over white men, and black women testers paid more than three times the markup paid by white male testers.<sup>22</sup>

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[https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/aba\\_archived\\_policies\\_through\\_2017\\_updated\\_sep\\_2018.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_archived_policies_through_2017_updated_sep_2018.pdf); and addressing gender identity and expression, ABA House of Delegate Resolution and Report, 2015\_at\_112, available at [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/policy-document-library](https://www.americanbar.org/groups/leadership/house_of_delegates/policy-document-library)

<sup>15</sup> American Bar Association, *ABA Mission and Goals*, available at

[https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/)

<sup>16</sup> ABA House of Delegates, Resolution and Report, 2011\_am\_106c.pdf, available at

[https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_106c.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_106c.pdf)

<sup>17</sup> ABA House of Delegates, Resolution and Report, 2017\_AM\_119A,

available at [https://www.americanbar.org/groups/leadership/house\\_of\\_delegates/policy-document-library](https://www.americanbar.org/groups/leadership/house_of_delegates/policy-document-library)

<sup>18</sup> 15 U.S.C. § 1691(a).

<sup>19</sup> S. Rep. No. 94-589, 94<sup>th</sup> Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 403, 405.

<sup>20</sup> 104 Harv. L. Rev. 817 (February, 1991). Also available as Ayres, Ian, “Fair Driving: Gender and Race Discrimination in Retail Car Negotiations” (1991). Faculty Scholarship Series. 1540. Available Online at [http://digitalcommons.law.yale.edu/iss\\_papers/1540](http://digitalcommons.law.yale.edu/iss_papers/1540). See also, Ayres, Ian, “Further Evidence of Discrimination New Car Negotiations and Estimates of its Cause (1995). Faculty Scholarship Series 1523, at [http://digitalcommons.law.yale.edu/fss\\_papers/1523](http://digitalcommons.law.yale.edu/fss_papers/1523).

<sup>21</sup> *Id.* at 818.

<sup>22</sup> *Id.* at 819.

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A 2018 investigative report by the National Fair Housing Alliance (NFHA) describes the early history of discrimination in auto lending and documents continuing current discriminatory practices.<sup>23</sup> The report discusses the 2003 study by Vanderbilt University Business Professor Mark A. Cohen, which investigated more than 1.5 million General Motors Acceptance Corporation (“GMAC”) loans made between 1999 and 2003, noting that “Black customers were three times as likely as equally qualified White customers to be charged an interest rate markup on their loans financed by GMAC.”<sup>24</sup>

A separate 2004 abridged report prepared by Dr. Cohen in the *Matter of Terry Willis, et al. v. American Honda Finance Corporation* (AHFC), found that African-American borrowers paid more than two times the subjective markup that white borrowers paid. Dr. Cohen notes that “My analysis in this case, as well as analysis I have conducted on other auto lenders including GMAC, NMAC and FMCC, provides strong evidence that the industry-wide practice of subjective credit pricing results in a disparate impact on minorities.”<sup>25</sup>

Another recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized a widely accepted testing methodology that has been used in various contexts including enforcement, public policy, and compliance monitoring.<sup>26</sup> The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court.<sup>27</sup> This testing was conducted at new and used car dealerships throughout Eastern Virginia. The findings of the eight tests conducted, in which non-white testers were always more creditworthy than their white counterparts, resulted in five tests where “the Non-White testers received more expensive total overall payment quotes, paying on average \$2,662.56 more than the White testers over the course of the loan, despite being more qualified.”<sup>28</sup>

## 2. AMEND THE EQUAL CREDIT OPPORTUNITY ACT – COLLECTION OF DATA

Under current law, Regulation B, implementing the ECOA, generally prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin.<sup>29</sup> Mandatory data collection by lenders applies only to

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<sup>23</sup> Rice, Lisa, and Schwartz Jr., Erich, *Discrimination When Buying a Car, How the Color of Your Skin Can Affect the Car-Shopping Experience*, (Jan. 2018). Available online at <http://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf>.

<sup>24</sup> *Id.* at 7. See also Mark A. Cohen, *Report on the Racial Impact of GMAC’s Finance Charge Markup Policy*, 2003.

<sup>25</sup> Mark A. Cohen, *Report on the Racial Impact of AHFC’s Finance Charge Markup Policy*, 2004. Abridged summary of report available at [https://consumerfed.org/wp-content/uploads/2004/07/7-30-04-Racial-Impact-Finance-Charge-Markup\\_Report.pdf](https://consumerfed.org/wp-content/uploads/2004/07/7-30-04-Racial-Impact-Finance-Charge-Markup_Report.pdf).

<sup>26</sup> Rice and Schwartz, *id.* at 12.

<sup>27</sup> *Id.* at 12. See e.g. *Havens Realty Corp. v. Coleman*, 455 U.S.363, 373-374 (1982).

<sup>28</sup> *Id.* at 15.

<sup>29</sup> 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b).

mortgage lenders under the Home Mortgage Disclosure Act (HMDA)<sup>30</sup> and certain business lenders under Section 1071 of the 2010 Dodd-Frank Reform Act, which covers applications for women-owned, minority-owned and small businesses.<sup>31</sup>

The National Consumer Law Center (NCLC), in the context of car loans, recently noted the irony that in prohibiting non-mortgage lenders from asking about or documenting characteristics it has made it very difficult to determine if discrimination occurs.<sup>32</sup> And this is a long-standing problem. NCLC, in a 2008 letter to then-Congressman Mel Watt noted that “the problem is that without access to data similar in nature and type to that made available through the HMDA (Home Mortgage Disclosure Act) for mortgage transactions, no one will have an easy time coding an aggregate pool of information sufficient to prove there has been disparate impact discrimination as a matter of law under the ECOA.”<sup>33</sup> A letter to the U.S. Government Accountability Office has also noted that requiring lenders to collect and report such data could actually assist in stopping discrimination.<sup>34</sup>

Professor Winnie Taylor from Brooklyn Law School, in a Review of Banking and Finance Law journal article, addresses the question of whether the ECOA data collection should be expanded to cover nonmortgage lenders, and if so, should it cover all nonmortgage lenders or only a subset?<sup>35</sup> It answers the first question in the affirmative due to the heavy evidentiary burden of establishing a prima facie case of racial discrimination in lawsuits against nonmortgage lenders, as well as the difficulty in getting courts to accept proxies to such data, such as through general population statistics, census tract data, or zip codes.<sup>36</sup>

Taylor’s article answers the second question by suggesting limiting the collection of data on nonmortgage lenders by exempting smaller lenders, as happens in other banking regulations, due to cost considerations. It also proposes to limit collection of data to certain types of loans, based on several factors, “particularly the extent to which there is evidence of potential discrimination in a particular market.”<sup>37</sup> However, Professor Taylor specifically includes automobile loans as needing the collection of data based on the car markets’ important structural aspects, public and private ECOA litigation, legal commentary and expert witnesses in ECOA cases regarding dealer mark-ups.<sup>38</sup> In

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<sup>30</sup> See generally Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (1975) (codified at 12 U.S.C. Sections 2801-2810 (2006)).

<sup>31</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, Section 1071, 124 Stat. 1376, 2056 (2010).

<sup>32</sup> *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017, pgs. 27-28.

<sup>33</sup> National Consumer Law Center letter by Stuart T. Rossman to Congressman Mel Watt, dated July 16, 2008. Available online at [https://www.nclc.org/images/pdf/car\\_sales/Watt\\_Regulation\\_Testimony.pdf](https://www.nclc.org/images/pdf/car_sales/Watt_Regulation_Testimony.pdf)

<sup>34</sup> U.S. Government Accountability Office, *Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending*, GAO-08-698 (June 2008).

<sup>35</sup> See Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 Rev. Banking & Fin. L. 199, 205 (2012)

<sup>36</sup> *Id.* at 244-245.

<sup>37</sup> *Id.* at 262.

<sup>38</sup> *Id.* at 262-263.

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contrast, she does not propose to expand data collection and reporting for race and gender data in the credit card industry.<sup>39</sup>

The article first sets forth the challenges both in litigation for ECOA plaintiffs and in enforcement for ECOA agencies due to the lack of collection of race data. As noted in the Policy Statement on Discrimination in Lending,<sup>40</sup> produced by a group of fair lending regulators, ECOA plaintiffs can prove lending discrimination in three ways: 1) overt discrimination; 2) disparate treatment; and 3) disparate impact.<sup>41</sup>

First, overt discrimination claims require an applicant and borrower to provide overt evidence, such as a written policy instructing loan officers to give minority borrowers lower credit limits than nonminority borrowers.<sup>42</sup> Today, overt evidence of racial discrimination is rare; plaintiffs and enforcement agencies usually rely upon disparate treatment and disparate impact claims.<sup>43</sup> Second, when lenders intentionally treat some applicants or borrowers more favorably than others on an ECOA-prohibited basis, even though all are similarly creditworthy, disparate treatment occurs.<sup>44</sup> Third, “disparate impact occurs when a lender applies a neutral practice equally to all credit applicants, but the practice has a disproportionately adverse effect on applicants or borrowers from ECOA-protected groups.”<sup>45</sup> As distinguished from disparate treatment cases, the plaintiff does not have to prove the discriminatory practices are intentional or result from prohibited criteria; rather the focus is on the harm the victim experiences.<sup>46</sup>

On May 4, 2017, the National Consumer Law Center (on behalf of its low-income clients), the NAACP, the Leadership Conference on Civil and Human Rights, the Center for Responsible Lending, and a dozen other leading consumer advocacy groups, sent a comment letter in response to CFPB 2017-0009. The comment letter was in regard to proposed amendments to ECOA Regulation B on ethnicity and race information collection. It urged the Bureau to 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, to “further the ECOA’s goal of promoting the availability of credit to all creditworthy applicants on a non-discriminatory basis.”<sup>47</sup>

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<sup>39</sup> *Id.* at 263.

<sup>40</sup> Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18, 266, 18,268 (Apr. 15, 1994)

<sup>41</sup> Taylor, *supra* note 35, at 213.

<sup>42</sup> Taylor, *supra*, note 35 at 208.

<sup>43</sup> Taylor, *supra*, note 35 at 209, and *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1030 (N.D. Ga. 1980).

<sup>44</sup> Taylor, *supra*, note 35, at 210-211.

<sup>45</sup> Taylor, *supra*, note 35 at 212-213. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Ablemarle Paper Co. Moody*, 422 U.S. 405, 425 (1975).

<sup>46</sup> Taylor, *supra*, note 35 at 212.

<sup>47</sup> Letter to Ms. Jackson, Consumer Financial Protection Bureau, May 4, 2017, Re: Docket No. CFPB 2017-0009, 82 Fed. Reg. 16307 (Apr. 4, 2017), signed by (in alphabetical order) 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, available at [https://www.nclc.org/images/pdf/credit\\_discrimination/cfpb-2017-ecoa-fnl3-cmmnts.pdf](https://www.nclc.org/images/pdf/credit_discrimination/cfpb-2017-ecoa-fnl3-cmmnts.pdf)

The comment letter stresses the need to collect such information for a number of reasons, in part based on the size of the auto loan market as the third largest consumer debt, and the fact that there are almost three times as many auto borrowers as there are borrowers taking out student loans, and more than three times the number of auto finance originations as mortgage originations.<sup>48</sup> In addition, presently the data is basically unavailable, much of it is proprietary, and if available, it is prohibitively expensive or requires extensive analysis.<sup>49</sup> Further, the direct collection of data would answer the critics who question the use of proxy analysis in enforcement actions.<sup>50</sup>

In the Fall, 2018, CFPB Rulemaking Agenda, the CFPB indicated, consistent with comments made earlier in May, 2018, that it was reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent Supreme Court cases, presumably the 2015 *Texas Department of Housing and Human Affairs v. the Inclusive Communities Project*<sup>51</sup> as well as the passage of Public Law 115-172, wherein Congress invoked the Congressional Review Act to disapprove the CFPB Bulletin 2013-02 (March 21, 2013), relating to “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act.”<sup>52</sup> The response from U.S. Senators and State Attorneys General has been swift.

On September 5, 2018, fourteen (14) State Attorneys General, in jurisdictions representing a total of 125 million Americans,<sup>53</sup> wrote to Acting Director Mick Mulvaney, Consumer Financial Protection Bureau, in response to his statement that the CFPB “will be reexamining the requirements” of the ECOA.<sup>54</sup> They noted particular concern due to the State Attorneys General sharing authority with CFPB under 12 U.S.C. Section 5552, enacted under the Dodd-Frank Reform Act, and because many of their antidiscrimination statutes, such as the Maryland Equal Credit Opportunity Act,<sup>55</sup> are modeled on ECOA. The letter emphasizes the critical importance of disparate impact liability in antidiscrimination law and the reliance of State Attorneys General upon such theories to “combat lending discrimination and ensure greater equality of opportunity.”<sup>56</sup>

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<sup>48</sup> Americans for Financial Reform, *et al.*, *supra*, note 47 and note 8 at 5.

<sup>49</sup> Americans for Financial Reform, *et al.*, *supra*, note 47 at 4.

<sup>50</sup> Americans for Financial Reform, *et al.*, *supra*, note 47 at 4. See also note 60, below. An example of proxy analysis is Bayesian Improved Surname Geocoding (BISG), which is appropriate, as noted below, yet objected to as it represents an indirect method.

<sup>51</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>52</sup> 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b), and Public Law 115-172, May 21, 2018.

<sup>53</sup> Census Bureau, Annual Estimates of the Resident Populations for the United States, July 1, 2018, available at: <https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html>

<sup>54</sup> Letter dated September 5, 2018 to Acting Director Mick Mulvaney, Consumer Financial Protection Bureau, signed by Josh Stein, NC AG, Xavier Becerra, CA AG, Karl A. Racine, DC AG, Lisa Madigan, IL AG, Janet Mills, Maine AG, Brian E. Frosh, Maryland AG, Maura Healey, MA AG, Lori Swanson, MN AG, Gurbir Grewal, NJ AG, Barbara D. Underwood, NY AG, Ellen F. Rosenblum, OR AG, Peter F. Kilmartin, RI AG, Thomas J. Donovan, Jr., VT AG, and Mark R. Herring, VA AG., available at <https://www.ncdoj.gov/getattachment/36142f21-0b34-4955-8f8a-c5d92051662b/EOA-disparate-impact-letter-to-CFPB-final.pdf.aspx>

<sup>55</sup> Md. Code Ann. Com. Law Section 12-701 *et seq.*

<sup>56</sup> Stein, *et al.*, *supra*, note 54 at 2, See Brief of Massachusetts *et al.* as Amici Curiae in Support of Respondent, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015)

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Finally, the State Attorneys General express their trust that the CFPB reexamination will determine that ECOA provides for disparate impact liability, but in any event, they note in closing that the “Attorneys General will not hesitate to uphold the law if CFPB acts in a manner contrary to law with respect to interpreting ECOA or to fulfilling its Congressional charge to ensure nondiscriminatory lending to the residents of our states.” Auto lending is one of the primary concerns of the State Attorneys General.

The critical importance of loan data reporting to combat discrimination and predatory lending is highlighted by the recent introduction in February 2019, of proposed legislation in the U.S. Senate and the House of Representatives. The Home Loan Quality Transparency Act, introduced in the Senate by Sen. Catherine Cortez Masto (NV), and its companion bill (H.R. 963) in the U.S. House of Representatives, introduced by Congresswoman Nydia M. Velazquez (NY), Chairwoman of the House Small Business Committee, reinstate Dodd-Frank reporting requirements that were repealed last year. At that time, Congress voted to roll back reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness, and relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. In addition to Senator Cortez Masto (NV), thirteen other U.S. Senators joined in introducing the legislation.<sup>57</sup>

Absent timely action at the federal level for mortgage lending discrimination documentation, at least one state, Connecticut, has passed recent legislation to collect data from sales finance companies pertaining to the ethnicity, race and sex of applicants, effective October 1, 2018.<sup>58</sup>

This resolution follows the notice published by the Consumer Financial Protection Bureau, pursuant to the ECOA, concerning the new Uniform Residential Loan Application and the collection of expanded HMDA Act Information about ethnicity and race in 2017.<sup>59</sup> It seeks to gather similar information in the vehicle sales market through voluntary self-

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(No. 13-1371), at 24-26, available at [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/131371\\_amicus\\_resp\\_states.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/131371_amicus_resp_states.authcheckdam.pdf).

<sup>57</sup> Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (Md), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala D. Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination->. H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at <https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle+cell%22%5D%7D>

<sup>58</sup> Section 36a-547 of the 2018 Supplement to the General Statutes, as Amended by Section 97 of Public Act 18-173, available at <https://www.cga.ct.gov/2018/act/pa/pdf/2018PA-00173-R00HB-05490-PA.pdf>

<sup>59</sup> Bureau of Consumer Financial Protection Plan, Status of New Uniform Residential Loan Application and Collection of Expanded Home Mortgage Disclosure Act Information About Ethnicity and Race in 2017, Federal Register, Vol 81, No. 189/ Thursday, September 29, 2016, Notice.

identification, using disaggregated racial and ethnic categories, made available through a Demographic Information Addendum. The resolution further acknowledges that some other equivalent measurement of discrimination can also be adopted, such as the Bayesian Improved Surname Geocoding (BISG) methodology,<sup>60</sup> or other generally agreed upon research-focused methodology pertaining to vehicle transactions.

### 3. ADDRESSING DISCRIMINATION IN DEALER MARKUPS

A common practice in the auto lending market that lacks a great deal of transparency and that has a long history of discriminatory impact is a “dealer markup”, which compensates auto dealers for originating automobile loans by allowing interest rate markups. As noted in CFPB Bulletin 2013-02, “[i]f the dealer charges the consumer a higher interest rate than the lender’s buy rate, the lender may pay the dealer what is typically referred to as “reserve’ (or ‘participation’) compensation, based upon the difference in interest rate revenues between the buy rate and the actual note rate charged to the consumer in the installment sale contract executed with the dealer.”<sup>61</sup> Many studies have documented the discriminatory impact, and large public settlements initiated by the CFPB and the Department of Justice in recent years have resulted in restitution and fines to lenders in excess of \$150 million to settle claims of discrimination.<sup>62</sup>

The allegations of discrimination noted in the public settlements indicate a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691(f), whereby dealers charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the CFPB Bulletin on the basis of whether the discrimination that may result from dealer markup is intentional by dealers, or have challenged the bulletin on the basis that the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office concluded in December 2017 that CFPB Bulletin 2013-02 did qualify as a rule, and thus was subject to the little-used Congressional Review Act because it served as a general statement of policy.<sup>63</sup> As noted earlier, Congress disapproved CFPB Bulletin 2013-02 (March 21, 2013), through passage of Public Law 115-17 (May 21, 2018).

On August 23, 2018, the New York State Department of Financial Services provided guidance to Indirect Automobile Lenders to ensure compliance with New York State’s Fair Lending Law, Section 296-a of the Executive Law (“Fair Lending Law”), by supervised

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<sup>60</sup> Consumer Financial Protection Bureau. (Summer 2014). “Using Publicly Available Information to Proxy for Unidentified Race and National Origin: A Methodology and Assessment.” [Hppt://files.consumerfinance.gov/f/201409\\_cfpb\\_report\\_proxy-methodology.pdf](http://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf).

<sup>61</sup> CFPB Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, 15, dated March 21, 2013.

<sup>62</sup> See Ayres and Cohen above. See also Ally Financial Inc. and Ally Bank (\$98 Million) U.S. Dept. of Justice Release 13-1349, dated Dec. 20, 2013; American Honda Corp (\$24 Million), U.S. Dept. of Justice Release 15-882, dated July 14, 2015; Fifth Third Bank (\$18 Million), U.S. Dept. of Justice Release 15-1185, dated Sept. 28, 2015; and Toyota (\$21 Million) U.S. Dept. of Justice Release 16-127, dated Feb. 2, 2016.

<sup>63</sup> U.S. Government Accountability Office, Letter B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey.

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institutions that engage in indirect automobile lending.<sup>64</sup> The guidance reiterates that New York’s Fair Lending Law prohibits discrimination in, among other things, the granting, withholding, extending, or renewing, or in the fixing of the rates, terms, or conditions of any form of credit on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status. N.Y. Exec. Law Section 296-a(1)(b). The guidance sets forth a list of actions that lenders should take to develop a fair lending compliance program for indirect automobile lending.

Moreover, the guidance specifically addresses the liability of lenders for discrimination resulting from dealer markup and compensation policies. Since dealer markup is part of the credit transaction, it must be charged non-discriminatorily to comply with the Fair Lending Law. The guidance states that lenders that permit dealers to markup the buy rate are potentially liable for prohibited pricing disparities.<sup>65</sup> The guidance identifies specific compliance actions. Item 4 states “the lender should consider reducing dealer discretion by placing limits on dealer markup or eliminating dealer discretion to markup interest rates by using a different method for dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination. Limits on markup do not, however, guarantee protection from fair lending liability.”<sup>66</sup>

U.S. Senator Kirsten Gillibrand (NY), and six other Senators, in a December 6, 2018 letter to Chairman Joseph Simons, Federal Trade Commission (“FTC”), expressed grave concerns about how minority car purchasers are harmed by discriminatory and predatory practices through dealer markups.<sup>67</sup> The letter acknowledged the FTC’s authority over the business practices of automobile dealers, and requested a detailed explanation of how the FTC plans to uphold its responsibility and enforce ECOA in indirect automobile lending.<sup>68</sup> The letter specifically identified the issues of documented discrimination in studies alluded to elsewhere in this resolution<sup>69</sup> relating to dealer markups and the pricing and disparity of add-on products, as well as the prices of cars.

The fundamental issue this resolution addresses is the significant risk that currently exists in today’s auto lending market: that pricing disparities may exist between auto lending customers with equal lending risk, on the basis of race, national origin, and potentially other prohibited bases. One remedy to this problem that was offered in CFPB 2013-02, now repealed, and in the September 2018 New York Guidance on Fair Lending Law, and supported by other commentators, is that of eliminating the discretion of dealers in dealer

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<sup>64</sup> New York Department of Financial Services, Indirect Automobile Lending and Compliance with New York’s Fair Lending Statute, Maria T. Vullo, Superintendent of Financial Services, August 23, 2018, available at <https://www.dfs.ny.gov/legal/industry/il180823.pdf>

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> Letter to Honorable Joseph Simons, Chairman, Federal Trade Commission, December 6, 2018, signed by: U.S. Senators: Kirsten Gillibrand (NY), Cory A. Booker (NJ), Elizabeth Warren (MA), Dianne Feinstein (CA), Richard Blumenthal (CT), Kamala Harris (CA), and Ron Wyden (OR), available at: <https://www.gillibrand.senate.gov/imo/media/doc/12.6.18%20Letter%20to%20FTC%20re%20auto%20lending%20guidance.pdf>

<sup>68</sup> *Id.*

<sup>69</sup> Ayres, *supra*, note 20; Rice, *et al.*, *supra*, note 23; and Cohen, *supra*, note 24.

markup buy rates. Compensating dealers fairly with another mechanism, such as a flat percentage fee of the auto loan amount, will not lead to discrimination and will promote economic justice and civil rights for all consumers.

The promotion of an enhanced nondiscrimination compliance system, as voluntarily promoted in the Fair Credit Compliance Policy & Program through the National Association of Minority Automobile Dealers (NAMAD), the National Automobile Dealers Association (NADA), and the American International Automobile Dealers,<sup>70</sup> can be an effective way to ensure a rigorous review of exceptions to a flat-percentage fee in order to provide robust processes for fair pricing of dealer markups to all consumers in a nondiscriminatory manner. The program is predicated on and incorporates the ECOA compliance framework spelled out by the Justice Department in a series of consent orders to resolve claims of disparate impact discrimination. One of the consent orders is publicly available.<sup>71</sup> It is important to note that this consent order to a specific dealer was issued in 2007 and was effective for a limited five-year period.

#### 4. TRANSPARENCY OF PRICING ADD-ON PRODUCTS

Add-on products, like service contracts, guaranteed asset protection, and window etching, significantly increase the price of the overall auto purchase and have vastly inconsistent pricing between consumers purchasing the same product with the same dealer. The pricing disparities, exacerbated by the lack of transparency, result in excessive pricing for consumers and discriminatory markups of auto add-ons.

In October 2017, the NCLC issued a report, “Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing.”<sup>72</sup> This report is based on an analysis of almost 3 million add-on products from September 2009 through June 2015 based on a nationwide data set of 1.8 million car sale transactions involving over 3,000 car dealers.<sup>73</sup>

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty for a longer duration. Guaranteed asset protection (GAP) contracts, are designed to cover the “gap” between the debt on the car and what the car is worth, also referred to as “negative-equity” or “under-water.” Finally, window etching (Etch) products are where dealers will etch in the vehicle identification number (VIN) on one or multiple windows to deter theft or aid in finding a stolen car.<sup>74</sup>

The insidious effects of the wide disparities in car loan pricing are evident when compared to insurance products, which have similar characteristics and are also not tangible in

<sup>70</sup> Fair Credit Compliance and Policy Program, <https://www.nada.org/faircreditprogram/>

<sup>71</sup> [www.justice.gov/crt/about/hce/documents/pacifico\\_order.pdf](http://www.justice.gov/crt/about/hce/documents/pacifico_order.pdf) (see, in particular, paragraph 7 entitled “Guidelines for Setting Dealer Reserves” and Appendix B).

<sup>72</sup> *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017

<sup>73</sup> *Id.* at 9.

<sup>74</sup> *Auto Add-Ons Add Up*, at 7-8.

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nature. However, while insurance pricing is often reviewed by state regulators, pricing discretion is not given to the selling agent, and the insurance agent's commission is not based on charging different consumers a different price for the same product, as is the case with dealers selling add-ons.<sup>75</sup>

It is very significant to note that the finding of the NCLC data set was that "looking collectively at service contracts, GAP products and etch products, the combined average rate of markup was 170%."<sup>76</sup> To put it in perspective, car dealer markups on autos for new cars in a 2015 National Association of Automobile Dealers Association Report reflect 3.4% markup for new cars and 8.6% markup for used cars.<sup>77</sup>

It is also important to look at add-on pricing markups in comparison to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.<sup>78</sup> In 2012, the average dealer markup for Etch sales in the data set was 325%, the average for GAP was 151%, and the average dealer markup for service contracts was 83%.<sup>79</sup>

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price because the cost to the dealer for Etch products generally does not vary by the price of the car, whether a car is new or used, or other characteristics that vary from car to car.<sup>80</sup>

The NCLC Report identified a subset in 2012 that sold Etch products that had just one dealer cost for every Etch product they sold and thus represented an excellent review of pricing disparity. The report noted that "only 19 of those 105 dealers sold the Etch product to each of their customers for the same price. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods."<sup>81</sup>

The NCLC data set reflected wide variations on pricing unrelated to the cost of the service contracts and different pricing methodologies, such as a set fixed add-on price to cost (markup), a set fixed sales price unrelated to cost of the service contract, and at widely varying pricing based on the dealers' whim.<sup>82</sup>

New York City in 2015 successfully implemented a new rule that requires the price of both the car and any add-on products offered with the car to be posted on each car offered for

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<sup>75</sup> *Id.* at 11.

<sup>76</sup> *Auto Add-Ons*, NCLC report, *id.* at 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *Id.* at 12.

<sup>79</sup> *Id.* at 12-13.

<sup>80</sup> *Id.* at 19-20.

<sup>81</sup> *Id.* at 19-20.

<sup>82</sup> *Id.* at 22-26.

sale by a used car dealer in the city.<sup>83</sup> Additionally, New York City proposed in early 2018 new rules under Local Laws 197 and 198 in 2017 on second-hand car dealers that would benefit consumers by, among other provisions, providing for a Consumer Bill of Rights.<sup>84</sup> The Bill informs the consumer he or she has the right to receive an itemized price for each add-on product, has the right to refuse any add-on product by the dealer, and further that they have the right to be free from discrimination when applying for credit.<sup>85</sup>

In December 2018, the National Consumer Law Center published the Model “Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act.”<sup>86</sup> The Model looks to many current statutes or ordinances currently being used to achieve consistent and transparent pricing, such as Conn. Gen. Stat. Ann. Section 14-99h, ME. Rev. Stat. Ann. Tit. 10 Section 1174(3)(E) N.Y.C Admin Code Section 20-271, and others cited within the commentary to the Model Law.<sup>87</sup>

The legislative intent of the statute is to make the pricing of add-on products transparent and consistent to protect consumers from paying arbitrary and discriminatory prices for add-on products.<sup>88</sup> The definition used in the Model Act, “seeks to cover any service or product sold either before or after the vehicle is sold, provided the product is sold in conjunction with the auto sale, which is similar to New York City’s requirement under N.Y.C. Admin. Code Section 20-264 that the product be “offered with” the vehicle.<sup>89</sup>

Requirements for posted pricing for many retail items already exist in many states.<sup>90</sup> For new cars, federal law requires that cars have a manufacturer suggested retail price (MSRP) sticker on each car. 15 U.S.C. Section 1232. It is not a posted price, “but it does give consumers some idea of where a reasonable price might start. New York City has extended this idea to pricing add-ons. N.Y.C. Admin. Code Section 20-271.”<sup>91</sup>

The Model Law Section 104(2), which prohibits charging different prices for different customers, is an extension of Maine’s protection to consumers. In Maine, a prohibition on charging some car buyers different prices from others exists for the protection of dealers

<sup>83</sup> NYC Admin. Code Section 20-271 (Local Laws of the City of New York for the Year 2015, No. 44).

<sup>84</sup> Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.

<sup>85</sup> After completing the required public hearing, notice of adoption of the new rules to implement Local Laws 197 and 198 of 2017, was effective on June 24, 2018, and notice of adoption to amend the fixed penalties was effective on July 30, 2018. New York City Rules, Recently Adopted Rules, available at <http://rules.cityofnewyork.us/adopted-rules>

<sup>86</sup> National Consumer Law Center, Model Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act, December 2018, available at: [https://www.nclc.org/images/pdf/legislation/model\\_laws/model-law-transparent-and-consistent-pricing.pdf](https://www.nclc.org/images/pdf/legislation/model_laws/model-law-transparent-and-consistent-pricing.pdf)

<sup>87</sup> *Id.* at 2-7.

<sup>88</sup> *Id.* at Section 101, Short Title and Declaration of Purpose, 2.

<sup>89</sup> *Id.* at Section 102 Definitions, Comment.

<sup>90</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment, and see, U.S Department of Commerce, National Institute of Standards and Technology, U.S. Pricing Laws and Regulations by listing state, available at <https://www.nist.gov/pml/weights-and-measures/laws-and-regulations/retail-and-unit-pricing-laws>

<sup>91</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

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buying cars from manufacturers, but not for consumers buying cars from dealers. ME Rev. Stat. Ann. Tit. 10 Section 1174(3)(E).<sup>92</sup>

The mandate to provide a pricing schedule to the Attorney General in Model Law Section 104(1) and (2) is based in part on Connecticut's pricing requirements for vehicle identification number etching.<sup>93</sup> Connecticut Gen. Stat. Ann. Section 14-99h, requires dealers to submit prices for the add-on of etching and to submit an amended rate schedule for price changes. Further, the comment notes that regulators, researchers and consumer advocates will be able to see the prices from dealer to dealer for add-ons and will provide for healthy competition.<sup>94</sup>

The Model Act requirement under Section 104(5) that vehicle add-ons be optional, and that that fact is disclosed, will aid in deterring discriminatory practices. Citing earlier research, the Comment notes that "African American and Latino consumers, for example, are about three times more likely to be told that add-ons are mandatory compared with white consumers."<sup>95</sup> Under the Model Law, Section 106(2), a violation of the Act is a violation of the state unfair and deceptive practices statute (UDAP).<sup>96</sup>

Recent enforcement actions in add-on products further highlight the need for greater consumer protections. A recent important study by law professors Prentiss Cox, Amy Widman and Mark Totten, on UPAD enforcement, "Strategies of Public UDAP Enforcement," is helpful in understanding the varied operation of UDAP rules, which exist in every state<sup>97</sup> and at the federal level with the FTC and the CFPB.<sup>98</sup> The implications of the study by support the observation that robust enforcement of UDAP laws is lacking or insufficient in many jurisdictions, either due to lack of prioritization, funding, or effective enforcement strategy, among other reasons. Even in jurisdictions where large dollar amount settlements have been achieved, the authors question: "Should state enforcers focus on larger targets? If so, what happens to the fraud and deception furthered by individuals and small entities that states characterized as "street cops" target?"<sup>99</sup>

## 5. EDUCATION OF LAWYERS AND CONSUMERS

Consumer protections would be strengthened by enhancing educational opportunities for consumers, guided by members of the Bar<sup>100</sup>, so they can identify and effectively address

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<sup>92</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

<sup>93</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

<sup>94</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

<sup>95</sup> *Id.* at Section 104, Transparent and Consistent Pricing, Comment.

<sup>96</sup> *Id.* at Section 106(2), Enforcement.

<sup>97</sup> Harvard Journal on Legislation, "Strategies of UDAP Enforcement," Posted March 29, 2017, last revised 4 Mar 2018, Prentiss Cox, Amy Widman, and Mark Totten, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2942406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942406).

<sup>98</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, 124 Stat. 1376 (2010).

<sup>99</sup> Cox, et al., *supra* note 97 at 103.

<sup>100</sup>E.g., March 2019 webinar "Abusive Car Loan and Sale Practices: Scope and Potential Remedies to Strengthen Consumer Protections," sponsored by ABA Civil Rights and Social Justice Section, Economic Justice Comm., and State and Local Government Law Section, State Attorneys General and Department of Justice Attorneys Comm.

the issues they face in auto lending and sale practices. The magnitude of over 100 million transactions and the substantial economic harm inflicted upon millions of low- and moderate-income consumers, many of whom count the automobile as their single largest debt, makes it imperative that the Association vigorously address the need to facilitate consumer protection.

Finally, bar associations should help all citizens to understand their legal rights and address situations where those rights are violated. A starting point is communicating a model “Consumer Bill of Rights” so that all consumers are aware of their rights to receive an auto loan free of discrimination, based solely on their credit risk, and full pricing transparency prior to entering into negotiations for an auto purchase.

## **Conclusion**

This resolution will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the ECOA, will strengthen consumer protections for all, and will promote economic justice. Adoption of this resolution will advance the work of consumer advocates, legislators, and attorneys who seek justice and fairness for consumers, particularly low-income consumers and consumers who suffer discrimination on the basis of race, gender, national origin, or income.

Respectfully submitted,

Wilson A. Schooley  
Chair, Civil Rights and Social Justice Section  
August 2019

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## GENERAL INFORMATION FORM

Submitting Entity: Civil Rights and Social Justice Section

Submitted By: Wilson A. Schooley, Chair, Civil Rights and Social Justice Section

1. Summary of Resolution(s). The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant's race, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers' legal rights in such purchases and loans.
2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of the amended resolution during its Spring Meeting on Friday, April 12, 2019.

The Council of the Section of State and Local Government Law approved sponsorship of the amended resolution during its Spring Business Meeting on Sunday, April 14, 2019.

The Commission on Homelessness and Poverty approved co-sponsorship of the resolution on May 6, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes. A version was submitted for the 2018 Annual Meeting and but withdrawn to collaborate with other entities.
4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA's fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights, which would be bolstered by this resolution.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. In February 2019, fourteen U.S. Senators joined in introducing the Home Loan Quality Transparency Act, which calls for the reinstatement of reforms mandated by the Dodd-Frank Act for reporting of data collection requirements in the home mortgage market, which were relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (MD), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala D. Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-> H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at <https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle+cell%22%5D%7D>. The reinstatement was introduced because Congress voted to roll back the Dodd-Frank reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness. A companion Bill, H.R. 963, February 2019, was introduced in the U.S. House of Representatives, by Congresswoman Nydia M. Velazquez, Chairwoman of the House Small Business Committee Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (MD), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala D. Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-> H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at <https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle+cell%22%5D%7D>
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.
8. Cost to the Association. (direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

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9. Disclosure of Interest. There are no known conflicts of interest.

10. Referrals. By copy of this form, the Resolution and Report with Recommendation will be referred to the following entities:

Section of Business Law  
Section of Infrastructure and Regulated Industries Section  
Section of Public Contract Law  
Section of Taxation  
Section of State and Local Government Law  
Section of Tort Trial and Insurance Practice Section  
Section of Litigation  
Section of Administrative Law and Regulatory Practice  
Government and Public-Sector Lawyers Division  
Commission of Racial and Ethnic Diversity in the Profession  
Commission of Hispanic Legal Rights and Responsibilities  
Coalition on Racial and Ethnic Justice  
Commission on Disability Rights  
Standing Committee on Public Education  
Law Student Division  
Young Lawyers Division  
Senior Lawyers Division  
Commission on Sexual Orientation and Gender Identity  
Solo, Small Firm and General Practice Division  
Center for Public Interest entities.

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant's race, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers' legal rights to such purchases and loans.

### 2. Summary of the Issue that the Resolution Addresses

The resolution addresses the highly discriminatory practices and impacts to many consumers of color, gender, national origin, and low-income, that arise in auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often relate to prejudices and discriminatory actions. The resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of timely notice and transparency in the auto lending market, particularly in the pricing of add-on products, which is unacceptable when it represents the third largest consumer debt in America.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This policy will reaffirm the ABA's commitment to ensuring the enforcement of fair lending laws to protect against discrimination, strengthen consumer protections in the auto lending and sale market, and promote economic justice. It will assist the work of consumer advocates, lawmakers, and public and private attorneys who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, gender, national origin, or economic position.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

At the federal level, various legislators have taken opposing viewpoints on the powers of the Consumer Protection Financial Bureau and whether expressions of policy articulated by the CFPB should be subject to congressional rule making

authority. As noted in the report, Congress approved Public Law 115-172, May 21, 2018, which invoked the Congressional Review Act to disapprove CFPB Bulletin 2013 -02 (March 21, 2013), which provided guidance on the use of discretion in dealer interest markup rates. The CFPB Rulemaking Agenda, Fall 2018, indicates that the CFPB is reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent supreme court cases.

Internal to the ABA, the Business Law Section has indicated it does not support the resolution.