



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

Division of Financial Practices

February 4, 2022

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).¹ You request this information for use in preparing the Bureau of Consumer Financial Protection's (CFPB) 2021 Annual Report to Congress. Specifically, you ask for information concerning the FTC's activities with respect to Regulation B during 2021. We are pleased to provide the requested information below.²

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 the ECOA and other consumer laws, such as giving the CFPB rulemaking and enforcement authority for the ECOA. Under the Act, the FTC retained its authority to enforce the 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.³ 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 Commission has been coordinating certain law enforcement, rulemaking, and other

¹ The 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.

² 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.

³ The FTC has authority to enforce the 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).

activities with the CFPB.⁴

II. Regulation B (the ECOA)

In 2021, the FTC engaged in enforcement as well as research and policy development related to the 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.⁵

A. Fair Lending: Enforcement

In 2021, the FTC joined the CFPB, the U.S. Department of Justice (USDOJ), and the Federal Reserve Board in an amicus curiae brief filed with the U.S. Court of Appeals for the Seventh Circuit in *John Fralish v. Bank of America*, an action by a consumer alleging violations of the ECOA, addressing whether the Act’s protections apply to individuals and businesses not only while they are requesting credit but also after they have received credit.⁶ The agencies disagreed with the district court’s dismissal of the consumer’s ECOA action and filed the amicus brief on behalf of the applicant.⁷ The agencies argued that the ECOA’s protections do not end the moment an extension of credit begins, and that the ECOA and Regulation B “establish that ‘applicants’ they protect include both those currently seeking credit and those who previously sought and have since received credit.”⁸ The brief also argues that the ECOA’s implementing Regulation B has, for the 46 years that the ECOA has been in effect, “made explicit through its definition of ‘applicant’ that the law protects those who have applied for and received credit.”⁹

⁴ 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.shtml>, 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.

⁵ 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.

⁶ See Brief of Amici Curiae Consumer Financial Protection Bureau, Department of Justice, Board of Governors of the Federal Reserve System, and Federal Trade Commission in Support of Appellant and Reversal, Nos. 21-2846 (L), 21-2999 (7th Cir. Dec. 16, 2021) (Amicus Brief), *John Fralish v. Bank of America*, Nos. 21-2846 (7th Cir. Oct. 12, 2021) (Appeal Docketed), available at <https://www.ftc.gov/policy/advocacy/amicus-briefs/2021/12/fralish-v-bank-america-na>. See also FTC, Press Release, *FTC Joins Amicus Brief in John Fralish v. Bank of America*, (Dec. 17, 2021) (Amicus Brief Press Release), available at <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-joins-amicus-brief-john-fralish-v-bank-america>.

⁷ See generally *id.*

⁸ See *supra* note 6, Amicus Brief at 10.

⁹ See *supra* note 6, Amicus Brief at 11. The Commission joined the CFPB in addressing the definition of “applicant” in another amicus brief filed jointly with the CFPB a year ago, but that case settled. In the current brief,

This matter is pending in the Court of Appeals for the Seventh Circuit.

B. Fair Lending: Research and Policy Development

1. Serving Communities of Color Staff Report

In 2021, the FTC published new research in a staff report showing a number of key differences in the way that fraud and other consumer problems affect communities of color, from the types of problems reported to the methods used to pay scammers.¹⁰ The report highlighted the FTC’s law enforcement and outreach work addressing consumer protection issues facing these communities in addition to the newly published research. Among other things, the report noted *Bronx Honda*, in which the FTC alleged that the company and its general manager discriminated against Black and Latino car buyers, and violated the ECOA when arranging financing for customers by charging the average Black and Latino borrowers about \$163 and \$211 more in interest, respectively, than similarly-situated non-Latino White borrowers.¹¹ The report also addressed FTC advocacy work to help protect communities of color in credit transactions, including a comment to the CFPB on the disparate impact standard under the ECOA and Regulation B, and the credit needs of small businesses, including those that are minority-owned, and the joint amicus brief filed with the CFPB in *TeWinkle v. Capital One, N.A.*, arguing that the term “applicants” in the ECOA applies to those currently seeking credit as well as those who sought and have received credit.¹² Among the studies addressed in the report was an examination of the differences in reports received by the FTC from consumers who live in majority Black and Latino communities compared to those who live in majority White communities.¹³

2. The ECOA in the Military Area

In 2021, the FTC’s Military Task Force, comprised of a cross-section of agency representatives, continued work on military consumer protection issues.¹⁴ The Task Force is part

the agencies again argue for a federal appellate court to adopt the correct interpretation of “applicant.” *See supra* note 6, Amicus Brief Press Release.

¹⁰ *See* FTC, *Serving Communities of Color: A Staff Report on the FTC’s Efforts to Address Fraud and Consumer Issues Affecting Communities of Color* (Oct. 2021) (Staff Report), available at https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf. *See also* FTC Press Release, *New FTC Staff Report Outlines Impact of Fraud on Communities of Color* (Oct. 15, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/10/new-ftc-staff-report-outlines-impact-fraud-communities-color>.

¹¹ *See id.*, Staff Report at 7-8. *See also* *FTC v. Liberty Chevrolet*, No. 1:20-cv-03945 (S.D.N.Y. filed May 21, 2020).

¹² *See supra* note 10, Staff Report at 39-40.

¹³ *See supra* note 10, Staff Report at 41-46.

¹⁴ *See generally* FTC, *Military Task Force*, available at <https://www.ftc.gov/policy/advocacy/military-task-force>.

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 the ECOA and Regulation B.

3. 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 USDOJ, the Department of Housing and Urban Development (HUD), and the federal banking regulatory agencies. Task Force members meet regularly to share information and discuss policy issues.

In 2021 the FTC also continued its participation in the Interagency Fair Lending Methodologies Working Group. The FTC staff, along with the staff of the CFPB, the Federal Housing Finance Agency, the HUD, the USDOJ, 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 the ECOA, among others.

C. Fair Lending: Consumer and Business Education

In 2021, the Commission engaged in efforts to provide education on significant issues to which Regulation B pertains. The Commission issued a blog post for consumers providing highlights of its Staff Report, discussed above.¹⁵ The blog post noted that the report summarizes the past five years of the FTC's efforts to address, understand, and educate people about consumer issues that have a disproportionately negative impact on communities of color, and its commitment to continue this important work. The blog post also provided examples of FTC research showing that people in communities of color experience fraud and consumer problems in unique ways.

The Commission also released two blog posts for businesses that provided guidance on issues pertaining to discrimination and potential bias affecting legally protected classes. One blog post noted that equal access to credit based on non-discriminatory criteria is an essential

¹⁵ See Rosario Mendez, *New report: Serving Communities of Color*, FTC BUREAU OF CONSUMER PROTECTION BLOG (Oct. 15, 2021), <https://www.consumer.ftc.gov/blog/2021/10/new-report-serving-communities-color>. See also *supra* note 10.

component of economic opportunity and a fair marketplace.¹⁶ The blog post emphasized that the ECOA prohibits creditors from denying credit based on discriminatory criteria, including race, religion, national origin, sex, marital status, and age, among others, and addressed recent FTC enforcement actions. It highlighted the 2021 interpretative rule of the CFPB, which clarified that the ECOA’s prohibition against sex discrimination also prohibits credit discrimination based on a person’s sexual orientation or gender identity. The blog post noted that the FTC has a long-standing commitment to protecting consumers in every community, and that discrimination against members of the LGBTQ+ community violates the law.

Another blog post observed that while advances in AI technology promise to revolutionize the approach to finance and business operations and other areas, research has highlighted how apparently “neutral” technology can produce troubling outcomes, including discrimination by race or other legally protected classes.¹⁷ The blog post noted that the FTC has decades of experience enforcing laws important to developers and users of AI, including the ECOA and FTC Act, and has used that experience to report on big data analytics and machine learning, conduct a hearing on algorithms, AI, and predictive analytics, and provide business guidance on AI and algorithms. The blog post provided key points for businesses to keep in mind, including watching out for discriminatory outcomes, and not exaggerating what algorithms can do or whether they can deliver fair or unbiased results, and it cautioned that businesses should hold themselves accountable – or be ready for the FTC to do it for them.

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

¹⁶ See Lesley Fair, *Fighting discrimination in the credit marketplace*, FTC BUSINESS CENTER BUSINESS BLOG (Mar. 26, 2021), <https://www.ftc.gov/news-events/blogs/business-blog/2021/03/fighting-discrimination-credit-marketplace>.

¹⁷ See Elisa Jillson, *Aiming for truth, fairness, and equity in your company’s use of AI*, FTC BUSINESS CENTER BUSINESS BLOG (Apr. 19, 2021), <https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.