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September 24, 2013

Mr. Richard Cordray
Director
Consumer Financial Protection Bureau
1801 L Street Northwest
Washington, DC 20036-3811

Dear Mr. Cordray,

This letter is a follow-up to an exchange that we had during your appearance in front of the House Financial Services Committee on September 12 regarding the Consumer Financial Protection Bureau (CFPB) Bulletin 2013-02 on indirect auto lending and compliance with the Equal Credit Opportunity Act. On a bipartisan basis, Congress has expressed concern about the guidance and asked for specific information supporting the CFPB's determination, including detailed information on the data methodology and analysis used as part of the agency's evaluation. It would appear that many important questions raised by Members have not been answered adequately and, in some cases, not addressed at all. As stated during the hearing, I found the answers given by the CFPB in its response letter dated August 2, 2013, to be very general and I am now seeking a more detailed response.

The Bureau has stated that its goal is to be an open and transparent organization. Yet, the decision to make a far reaching change in the auto-finance industry through informal guidance instead of a formal rule-making with a public notice and comment period seems lacking in transparency at best. This particular guidance seeks to eliminate potential discrimination in a way that will have a significant impact on automobile lenders, and it could impact consumers' access to credit as well.

The presence of unlawful discrimination in any market is unacceptable. Increased transparency from the Bureau will advance the shared goal of eliminating potential discrimination while ensuring that consumers have access to needed credit. In an effort to increase transparency around the Bureau's Bulletin 2013-02, below are several questions that I would like the CFPB to address in detail.

The use of a reliable statistical methodology to determine whether disparate impact in lending is present in an auto creditor's portfolio is critical for a number of reasons, including to effectively protect consumers from discrimination; to ensure that an efficient flow of government resources is directed to eliminating discrimination where it actually exists; and to prevent businesses from being unfairly impacted by the application of flawed methodology.

The following issue areas are particularly relevant for the Bureau to consider when determining whether it has been operating within an appropriate framework of evaluation with regard to a determination of potential disparate impact discrimination in the indirect auto lending sector and potential associated remedies.

1. The data and assumptions the CFPB relied upon to substantiate the determination that there is a problem with fair lending in the indirect auto financing market;
2. The detailed methodology that measures whether discrimination is present in an auto creditor's portfolio. This includes ensuring that accurate proxies are used to identify different groups of consumers, ensuring that appropriate controls are used to isolate a consumer's background as the sole reason for any apparent pricing disparity , and identifying the threshold at which the Bureau determines that statistically significant disparate impact is present;
3. An explanation of how the Bureau's use of a guidance document to issue the directives contained in its March 21, 2013 issuance to auto lenders is consistent with federal law; and
4. The Bureau's analysis of how an industry move to compensate dealers for arranging financing through a "flat fee per transaction" would affect the marketplace and the consumers it serves.

Specific responses are requested for each question below:

1) The data and assumptions the CFPB relied upon to substantiate the determination that there is a problem with fair lending in the indirect auto financing market. The March 21, 2013 fair lending guidance apparently stems from the Bureau's assumption that disparate impact discrimination is both widespread in the market and harmful to certain groups of consumers. However, the Bureau has not made clear how this determination was made and what process was used to support its validity. As a result, please provide the following:

Request 1 – Identify all research supporting the CFPB press release from March 21, 2013, stating that "discriminatory markups in auto lending may result in tens of millions of dollars in consumer harm each year" and "research indicates that markup practices may lead to African Americans and Hispanics being charged higher markups."

Request 2 – State whether that research is uncontroverted or whether contrary research exists.

Request 3 – If contrary research exists, state what led the Bureau to determine that the supporting research possesses greater validity than the contrary research.

2) The detailed methodology that measures whether discrimination is present in an auto credit's portfolio. This includes the use of accurate proxies to identify different groups of consumers, ensuring that appropriate controls are used to isolate a consumer's background as the sole reason for any perceived pricing disparity, and identifying the threshold at which the Bureau determines that statistically significant disparate impact is present. Pursuant to this, please provide the following:

Request 4 - In letters to Members of the House Financial Services Committee, you said that the Bureau uses surnames and geographic location to determine the background of consumer credit applicants. Please provide a full list of proxies used, and state the quantitative degree of accuracy (expressed as a percentage) that applies to this proxy methodology for each category of consumers to which the Bureau has applied the methodology (including, but not limited to, the two categories identified in the March 21 press release referenced above).

Request 5 - Identify the research and findings that support your answers to the previous question.

Request 6 - Explain the Bureau's rationale that the auto industry's use of proxies "for marketing purposes" is relevant to a determination of an auto creditor's potential liability for alleged disparate impact discrimination under ECOA.

Request 7 - Consistent with your statement that "there are a variety of proxy methods" and that lenders may "select a reasonable proxy method," provide a complete list of proxy methods other than the use of surnames and geographic location that the Bureau recognizes as reasonable for auto creditors to use.

Request 8 - With regard to each proxy method identified in the response to the previous question,

a) Provide the quantitative degree of accuracy (expressed as a percentage) that applies to the proxy methodology for each category of consumers identified in your response to Question 4 above; and

b) Explain the Bureau's rationale for using surnames and geographic location in lieu of that particular method.

Request 9 - Identify each control the Bureau applies to its analysis of the amount of dealer participation paid by different groups of consumers to ensure that the consumers who are being compared are "similarly situated."

Request 10 - The Bureau has stated: "In evaluating whether pricing disparities exist in dealer markup, we typically look to whether there is a statistically significant basis point disparity in the dealer markups received by the prohibited basis group as compared to the control group." Please describe in quantitative terms (i.e., a number) what the Bureau has determined is the statistically significant basis point disparity applicable to each prohibited basis group that it has examined using its disparate impact methodology (including, but not limited to, the two prohibited basis groups identified in the March 21 press release referenced above).

3) An explanation of how the Bureau's use of a guidance document to issue the directives contained in its March 21, 2013 issuance to auto lenders is consistent with federal law. The Bureau's fair lending guidance sets forth standards intended to change market behavior for creditors involved in the indirect financing process, including both initial auto dealer creditors over which the Bureau lacks jurisdiction and assignee finance source creditors over which the Bureau may exercise jurisdiction. Such an exercise must comport with the process Congress created for this purpose. Accordingly, please respond to the following:

Request 11 - Identify all coordination that occurred prior to March 21, 2013 between the CFPB and the Board of Governors of the Federal Reserve ("Federal Reserve") concerning the Bureau's development and issuance of CFPB Bulletin 2013-02.

Request 12 - Identify all coordination that occurred prior to March 21, 2013 between the CFPB and the Federal Trade Commission (FTC) concerning the Bureau's development and issuance of CFPB Bulletin 2013-02.

Request 13 - With regard to CFPB Bulletin 2013-02 -

a) Explain whether the Bureau conducted an analysis of the extent to which its issuance comports with controlling federal case law that addresses the circumstances under which an agency may use a guidance document in lieu of the Administrative Procedures Act rulemaking process for this purpose;

b) If the Bureau conducted such an analysis, provide the complete written analysis;

c) Explain in detail why the Bureau did not seek public input on the matters addressed in the bulletin before it was issued; and

d) Explain whether its application is prospective only or also applies to market conduct that occurred prior to its issuance.

4) The Bureau's measurement of how an industry move to compensate dealers for arranging financing through a "flat fee per transaction" would affect the marketplace and the consumers it serves. The Bureau has identified "steps" that "lenders should take… to ensure they are operating in compliance with the ECOA and Regulation B…" and that its actions are likely to force major changes throughout an industry. These actions should not be viewed in a vacuum. This is particularly true when the Bureau attempts to change the behavior of market participants for whom there is no public finding or evidence of a legal violation. It is critically important that the Bureau consider the effects of its actions on the marketplace and the consumers that it serves. Accordingly, please provide the following:

Request 14 – State whether the Bureau has considered how an industry move to a flat fee compensation system will affect the cost of credit to consumers, including (but not limited to) those who are only marginally creditworthy.

Request 15 - If the Bureau has considered this effect, identify and summarize all research, reports, or other information the Bureau considered and state the Bureau's specific findings on the matter; and.

Request 16 - Please provide an estimate, based on current market conditions, of the number of consumers who will be priced out of the conventional vehicle financing market as a result of a decrease in competition resulting from an industry move to a flat fee compensation system.

Thank you for your statements in support of openness and transparency on the part of the Bureau. It is my request that the CFPB provide full and meaningful answers to these questions within 30 days of your receipt of this letter.

Sincerely,

Spencer Bachus

Spencer Bachus
Member of Congress