

WITHDRAWN

AMERICAN BAR ASSOCIATION

**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW**

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 stronger fair lending laws targeted to
3 discrimination in the vehicle sales market;

4 FURTHER RESOLVED, That the American Bar Association urges Congress to amend
5 the Equal Credit Opportunity Act to require documentation and collection of the
6 applicant's race or national origin for non-mortgage credit transactions pertaining to
7 vehicle transactions;

8 FURTHER RESOLVED, That the American Bar Association urges Congress and all state,
9 local, territorial, and tribal legislative bodies and governmental agencies to adopt laws
10 and policies that require a flat percentage fee for dealer compensation, and disclosure of
11 dealer compensation for a vehicle loan;

12 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
13 territorial and tribal governments to adopt legislation requiring the separate posting of
14 pricing of add-on products by dealers on each vehicle before a consumer negotiates to
15 purchase a vehicle; and

16 FURTHER RESOLVED, That the American Bar Association encourages state, local,
17 territorial and tribal bar associations to offer programming to educate lawyers and
18 consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing
19 and sales practices.

REPORT

OVERVIEW

The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the 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 transparency in the auto lending market, which is unacceptable when it represents the third largest consumer debt in America.

BACKGROUND

More than 90% of American households have a vehicle¹, the auto is the lifeline to the American consumer to 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.² Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt.³ For consumers who do not own a home, true for many low-income consumers, it can constitute the largest debt they may have to pay back.⁴

The Bureau's Quarterly *Consumer Credit Trends Report*, "Growth in Longer-Term Auto Loans", issued in November 2017,⁵ provides that while the rapid increase in automobile loans in the decade is slowly subsiding, an increase in longer-term loans is occurring. These 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.⁶ Also noteworthy is that the credit scores of borrowers taking out longer-term loans is significantly lower than borrowers who take out five-year loans, with six-year loans at 674, which is 39 points lower than five-year loans.⁷ 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.⁸ This has resulted in higher cumulative default rates for six-year loans as compared to five-year loans, as noted in trend data for loans originated from 2009 to 2015.⁹

¹ "CFPB Report Finds Sharp 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/>

² *Id.*

³ *Id.*

⁴ *Id.*

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

⁶ *Id.*, page 4.

⁷ *Id.*, page 4.

⁸ *Id.*, page 5.

⁹ *Id.*, page 8.

104B

When you look into the further composition of auto finance lending, the magnitude of touchpoints that impact on low-and moderate-income families is pervasive. 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.¹⁰ The report reflects that data for 2014 (the most recent time for student debt data at the time of the report), “there were almost three times as many families originating auto finance as borrowers originating student loans, and more than three times the number of auto finance originations as mortgage originations.”¹¹ In 2014, there were almost 28.2 million auto finance originations.¹²

In analyzing the data, there is a presumption 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 originations based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation with credit scores and applicant’s race, income, educational levels and other characteristics.¹³

Experian, one of the three major credit reporting agencies, classifies consumer credit scores as prime (best score, includes super prime and prime). Consumers with a prime credit make up the largest contingent of auto loan originations. However, nonprime, subprime and deep subprime, collectively represented 30% of open finance in Q4 2015.¹⁴ Thus, the lower credit scores which represent 30% of the open finance market for vehicles and has the greatest risk for vehicle sale and financing transactions is falling disproportionately on persons of color and lower-income consumers.

In comparing total originations of mortgage and autos with Equifax risk score data, another of the three major credit reporting agencies, “those with High-Risk Equifax scores in Q4 2015 originated nearly 25% of auto finance transactions, but just 5% of mortgage transactions.”¹⁵ In absolute numbers, there were about 2 million mortgage originations and nearly 6.5 million auto originations during that period.¹⁶ Extrapolating the originations to the 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.”¹⁷ In short, struggling consumers are 15 times more likely to be engaged in a vehicle sale and financing transaction than a home mortgage transaction, and

¹⁰“New Ways to Understand the Impact of Auto Finance on Low-Income Families,” National Consumer Law Center, May 2016, page 4.

¹¹ *Id.*, page 5.

¹² *Id.*, page 5.

¹³ *Id.*, page 6.

¹⁴ *Id.*, pages 6-7. Credit score categories are based on the Experian Vantage Score 3.0 ranges: Super prime =781-850; Prime = 661-780; Nonprime = 601-660; Subprime = 501-600; Deep Subprime = 301-500.

¹⁵ *Id.*, page 8. Equifax credit score categories are based on Low-Risk Equifax Risk Score (> or equal to 700); Average-Risk Score (620 < or equal to and < 700); and High-Risk Score (< 620).

¹⁶ *Id.*, page 8.

¹⁷ *Id.*, page 8.

highlights the critical need for protection of low-income consumers from deceptive sale and financing practices.

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.¹⁸ 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.¹⁹ 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."²⁰ 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."²¹

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.²² 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."²³

Notwithstanding the explicit language of the ECOA, the compelling need for the Association's full support of enforcement of laws prohibiting discrimination in auto

¹⁸ See, 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); 8/06 (addressing gender identity and expression).

¹⁹ Am. Bar Ass'n, *ABA Mission and Goals*, available at http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html (last visited April 10, 2017).

²⁰ Resolution adopted 8/2013.

²¹ Resolution adopted 8/2017.

²² 15 U.S.C. § 1691(a).

²³ S. Rep. No. 94-589, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Admin. News 403, 405.

104B

lending and sale practices is based on the repeated research studies documenting 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.²⁴ The 1991 study documented whether 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 on race or gender.²⁵ The result was black male testers had to pay more than twice the price of white male testers. Compared to white men, White women testers paid more than 40% than white men, and black women testers paid more than three times the markup of white male testers.²⁶

The 1991 study by Professor Ayres, although compelling, was not statistically significant and he therefore followed up the study in 1994. The expanded and retested results were similar in that white male testers were offered lower prices. The one distinction was that, unlike the original study, black male testers were charged higher prices than black female testers.²⁷

A recent investigative report by the National Fair Housing Alliance (NFHA) highlights the early history of discrimination in auto lending and further documents current discriminatory practices.²⁸ It highlights 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. It was noted 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.”²⁹

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 mark-up than white borrowers. 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

²⁴ 104 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.

²⁵ *Id.* at 818.

²⁶ *Id.* at 819.

²⁷ 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.

²⁸ 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>.

²⁹ *Id.* At 7. See also Mark A. Cohen, *Report on the Racial Impact of GMAC’s Finance Charge Markup Policy*, 2003.

industry-wide practice of subjective credit pricing results in a disparate impact on minorities.”³⁰

The recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized testing, a widely accepted methodology that has been accepted for use in various purposes, to include enforcement, public policy, and compliance monitoring purposes, among others.³¹ The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court.³² The testing was conducted at new and used car dealers throughout Eastern Virginia. The findings over 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.”³³

Continued discriminatory treatment in the auto lending and sale practices imperils economic justice and frustrates the human and civil rights of many of our most vulnerable citizens. To root out such practices, the Resolution proposes to enforce the fair lending laws and the auto sale market practices should fully support the active enforcement at the federal level by the Federal Trade Commission (FTC), The Consumer Financial Protection Bureau (CFPB), and the Department of Justice. At the state and local level, vigorous enforcement by state Attorneys General of local lending and consumer protection laws prohibiting discrimination, either individually, or collectively, should be vigorously supported. Enforcement efforts should be addressed to direct and indirect lenders, as well as extended to car dealers, to advance protection to all consumers.

2. AMEND THE EQUAL OPPORTUNITY CREDIT ACT - COLLECTION OF DATA

Under current law, Regulation B, implementing the ECOA, prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin.³⁴ The National Consumer Law Center (NCLC), has 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.³⁵ NCLC, in a 2008 letter to U.S. 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

³⁰ 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.

³¹ Rice and Schwartz, *Id.* At 12.

³² *Id.* At 12. See e.g. *Havens Realty Corp. v. Coleman*, 455 U.S.363, 373-374 (1982).

³³ *Id.* At 15.

³⁴ 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b).

³⁵ *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017, pgs. 27-28.

104B

matter of law under the ECOA.”³⁶ 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.³⁷

This Regulation B provision frustrates the purpose of the ECOA, which is to “require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to [sex, marital status, race, age, religion, national origin, and age].³⁸ The NCLC and other commentators have argued that “if discrimination remains hidden, it, it will not be possible to end it.”³⁹ Congress should amend ECOA directly to ensure the collection of data necessary to prevent discrimination. Although some commentators have argued Agency action by the Consumer Financial Protection Bureau (CFPB) to amend Regulation B to require documentation of the customer’s race or national origin for non-mortgage credit transactions is not prohibited by the ECOA and thus can be accomplished by Agency action, Congress should ensure by legislative action that proper collection of data is effectuated that would be consistent with home mortgage credit products today.⁴⁰

The actions proposed by this Resolution would be consistent with and facilitate furtherance of the Strategic Plan for the CFPB for FY2018-2022.⁴¹ Goal 2 of the CFPB is to implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive.⁴² It seeks to obtain this goal by achieving the following objectives, of which is Objective 2.1: Protect consumers from unfair, deceptive, or abusive acts and practices and from discrimination.⁴³ The strategy to achieve this objective and goal is to “enhance compliance with federal laws intended to ensure the fair, equitable and nondiscriminatory access to credit for both individuals and companies and promote fair lending compliance and education.”⁴⁴

Collection of data to identify areas of discrimination will further the strategy, objective and goal of the CFPB in ensuring consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination. The collection of data will provide full transparency and fair lending compliance activities to all consumers.

³⁶ 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

³⁷ U.S. Government Accountability Office, Fair Lending: Race and Gender Data Are Limited for Nonmortgage Lending, GAO-08-698 (June 2008).

³⁸ Equal Credit Opportunity Act, Pub. L. No. 93-495, S 502, 88 Stat. 1521, 1521 (1974).

³⁹ *Auto Add-Ons*, at 43.

⁴⁰ *Id.* at 43. In the late 1990s The Federal Reserve Board, partly in response to comments by the Department of Justice and the federal financial enforcement agencies, proposed removing the prohibition on seeking information about an applicant’s race, color, religion, national origin, and sex for non-mortgage credit products. 64 Fed. Reg. 44,582, 44, 586 (Aug. 16, 1999).

⁴¹ Bureau of Consumer Financial Protection Plan, FY2018-2022. Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf

⁴² *Id.* At 10.

⁴³ *Id.* At 10.

⁴⁴ *Id.* At 10.

3. DISCLOSURE OF DEALER MARK-UP ON LOANS

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, “If 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.”⁴⁵ Many studies noted above 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.⁴⁶

The allegations of discrimination noted in the public settlements related to a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691(f), by permitting dealers to charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the Bulletin on the basis of whether or not the discrimination that may result from dealer markup is intentional by dealers, or have challenged the bulletin on the basis of whether the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office recently 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.⁴⁷

Without addressing the reasonable legal merits of congressional and agency power matters from different viewpoints, the fundamental issue this resolution desires to address is the significant risk that currently exists in today’s auto lending market that pricing disparities may arise between auto lending customers with equal lending risk on the basis of race, national origin, and potentially other prohibited bases. One remedy to such matter offered in CFPB 2013-02 and supported by other commentators is that of eliminating the discretion of dealers in dealer 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 to all consumers.

Further, consumers today do not have any visibility into the amount of their loan interest rate that is solely a discretionary dealer markup based on the perception of their willingness to pay by the dealer. This portion of the dealer markup is not related at all to their credit risk as a consumer. As noted in a policy brief by the Center for Responsible

⁴⁵ CFPB Bulletin 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act, 15, dated March 21, 2013.

⁴⁶ 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.

⁴⁷ U.S. Government Accountability Office, Letter B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey.

104B

Lending (CRL), “the add-on interest is hidden from the consumer, who assumes, inaccurately, the rate is based on their risk profile.”⁴⁸ Surveys cited by the policy brief show that two-thirds of Americans have no idea that the dealer is adding to the interest rate for compensation.⁴⁹

The major thrust of this CRL study, however, was to evaluate whether the system of dealer interest-rate markups actually serve consumers better under a cost-benefit analysis approach, or whether consumers would benefit from a flat compensation system that would increase transparency and provide greater competition that would more benefit the consumer. The data from the Charles River Associates Report showed that consumers with higher credit scores would have access to multiple lending sources and thus have greater ability to obtain lower rates for credit. They would not therefore be likely subject to a higher cost under a flat rate compensation system. Whereas, consumers with lower credit scores, would be more likely to pay a markup due to having fewer lending options and thus would benefit from switching from a dealer markup system to a flat rate compensation system.⁵⁰ It is important to further note that the Report showed that “borrowers of color were more likely to save money than white borrowers if the industry shifted to flat fees instead of discretionary interest rate markups.”⁵¹

4. TRANSPARENCY OF PRICING OF 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, aided immensely by the lack of transparency of pricing, results in excessive pricing to consumers and discriminatory mark-ups 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.”⁵² 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 card dealers.⁵³ Major items sold included: Service contracts (representing 33% of the products sold), Guaranteed Asset Protection (GAP) products (26%), various warranty-type products (15%), and vehicle identification number (also referred to as “window”) Etching (Etch) (9%).⁵⁴ Excluding warranty costs, which were not included in further NCLC analysis as these costs are typically not shown as a separate fee, but are rolled into the

⁴⁸ Delvin Davis and Chris Kukla, Road to Nowhere: Car Dealer Interest Rate Markups Lead to Higher Interest Rates, Not Discounts, Policy Brief, dated Nov. 2015.

⁴⁹ *Id.*, at 2.

⁵⁰ *Id.* At 4.

⁵¹ *Id.* at. 4.

⁵² *Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing*, National Consumer Law Center, October 2017

⁵³ *Id.*, page 9.

⁵⁴ *Id.*, page 9.

price of the car⁵⁵, these categories are consistent with the CFPB Examination Procedures document for ancillary products and services.⁵⁶

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty by having 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, is where dealers will etch in typically the vehicle identification number (VIN) on one or multiple windows to deter theft or aid in finding a stolen car.⁵⁷

The wide disparities in pricing can be evidenced when comparing to insurance products, which have similar characteristics and are also not tangible in nature. However, 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 in dealers selling add-ons.⁵⁸

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 markup was 170%⁵⁹ To put in perspective, The NCLC report compared the markups for other retail products, which varies greatly by industry. Brick and mortar retailers such as big box office supply or sporting goods stores may mark up their goods by 40% to 50%,⁶⁰ clothing retailers may mark up at 50% to 100%, subject to lower markups for sales,⁶¹ jewelry stores have markups between 25% to 125%,⁶² and most relevant, 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.⁶³

Another important comparison to look at add-on pricing markups is to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.⁶⁴ In 2012, the average dealer markup for Etch sales in the data set was 325% (an average markup of \$189 over the dealer’s average cost of \$58), the average for GAP was 151% (an average markup of \$378 over the dealer’s average cost of \$251), and the average dealer markup for service

⁵⁵ *Id.*, page 9.

⁵⁶ CFPB “*Automobile Finance Examination Procedures*”, dated June 2015, pages 4-5.

⁵⁷ *Auto Add-Ons Add Up*, at pgs. 7 to 8.

⁵⁸ *Id.* at 11.

⁵⁹ *Auto Add-Ons*, NCLC report, *Id.* Page 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.

⁶⁰ *Id.* Page 10.

⁶¹ *Id.* Page 10.

⁶² *Id.* Page 10.

⁶³ *Id.* Page 11.

⁶⁴ *Id.* Page 12.

104B

contracts was 83% (an average markup of \$859 over the dealer's average cost of \$1,032).⁶⁵

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price as the price as 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.⁶⁶

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. 82% of dealers did not have a single fixed price for their Etch products, but established a different price depending on the customer. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods."⁶⁷

Very large variations with no rationale could also be seen in service contracts, where there is disparity in the dealer cost due to factors such as the value of car, new or used, cost of repair and length of coverage.⁶⁸ 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.⁶⁹

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 sale by a used car dealer in the city.⁷⁰ 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 1) requiring dealers to provide financing disclosures to consumers, 2) clarify the automobile contract cancellation options that dealers offer to consumers, 3) create a consumer bill of rights that dealers must display, and 4) clarified requirements related to record-keeping by dealers.⁷¹ The Consumer Bill of Rights, among other provisions, would inform the consumer he or she has the right to receive an itemized price for each add-on product, the consumer would have the right refuse any add-on product by the dealer, and further advises the consumer they have the right to be free from discrimination when applying for credit.

To strengthen consumer protection and promote economic justice, this resolution urges legislators to adopt legislation that requires the posting of nonnegotiable pricing of add-on products by dealers on each vehicle to promote full transparency of available add-ons and prevent discriminatory practices.

⁶⁵*Id.* Pages 12 and 13.

⁶⁶ *Id.* Pages 19 and 20.

⁶⁷ *Id.*, Pages 19 and 20.

⁶⁸*Id.*, Page 22.

⁶⁹ *Id.*, Pages 22-26.

⁷⁰ NYC Admin. Code Section 20-271 (Local Laws of the City of New York for the Year 2015, No. 44).

⁷¹ Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.

5. EDUCATION OF LAWYERS AND CONSUMERS

Consumer protections would be strengthened by enhancing educational opportunities for members of the Bar so they can identify and effectively address the issues facing consumers in the auto lending and sale practices customarily faced today. The magnitude of over 100 million transactions and the substantial economic harm inflicted upon millions of low-income to moderate-income consumers, for whom many the auto is the single-largest debt, makes it imperative that the Association vigorously address the legal and consumer needs of lawyers and consumers.

Lawyer education, such as the recent webinar in March 2018, “Abusive Car Loan and Sale Practices: Scope and Potential Remedies to Strengthen Consumer Protections,” sponsored jointly by the economic justice committee of the Civil Rights and Social Justice Section and the State Attorneys General and Department of Justice Issues Committee of the State and Local Government Law Section is an excellent example of expanding timely and relevant information to lawyers. Additional educational materials include further training, seminars, and various publications on relevant topics to arm the lawyer with the skills that provide a level playing field for all consumers in making such a large financial purchase.

Finally, the Association needs to enhance its efforts to help all citizens in understanding their legal rights and addressing situations where those rights are violated. A starting point is communicating a model “Consumer Bill of Rights” so that all taxpayers are aware of their rights to receive an auto loan free of discrimination, based solely on their financial credit-risk, and full transparency prior to entering negotiations for an auto purchase as to all relevant terms of the loan being offered, including discretionary dealer markup above the risk-based price of the loan, as well as the price each available add-on product

Conclusion

This policy will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the EOCA, will strengthen consumer protections for all, and will promote economic justice. By adopting this resolution, this policy will advance the work of consumer advocates, legislators, public attorneys and litigators who seek to advance justice and fairness for all consumers, particularly low-income consumers and consumers who suffer discrimination based on color, national origin, or some other protected class.

Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018

104B

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Robert N. Weiner, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). The resolution urges Congress to amend the Equal Credit Opportunity Act to require credit documentation and collection of the applicant's race or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.
2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of the Resolution during its Spring Meeting on Friday, April 20, 2018.

The Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting in Detroit, Michigan, on Sunday, April 22, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No.
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. 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."
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. Currently, New York City requires both the price of the car and the price of any add-on products to be posted on each car offered by a used car dealer in the city, and has proposed a rule requiring dealers to provide financing disclosure

to dealers. This Resolution will allow the ABA to encourage other jurisdictions to adopt similar laws.

Additionally, on May 21, 2018, President Trump signed into law S.J. Res. 57 – a measure passed by Congress to reject a Washington bureaucracy’s rule which could have eliminated the ability of car dealerships to discount loans for their customers.

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. Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.
9. Disclosure of Interest. There are no known conflicts of interest.
10. Referrals. By copy of this form, the 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
- Government and Public Sector Lawyers Division
- Commission of Racial and Ethnic Diversity in the Profession
- Commission of Hispanic Legal Rights and Responsibilities
- Standing Committee on Public Education
- Law Student Division
- Young Lawyers Division
- Commission on Sexual Orientation and Gender Identity
- Solo, Small Firm and General Practice Division

11. Contact Name and Address Information.

Antonia Kivelle Fasanelli
Homeless Persons Representation Project, Inc.
201 North Charles Street, Suite 1104
Baltimore, MD 21201
410-685-6589 x17
Email: afasanelli@hprplaw.org

104B

Marilyn Harbur
Tax & Finance Section | General Counsel Division
Oregon Department of Justice
1162 Court Street NE, Salem, OR 97301
503.947.4485
Email: marilyn.harbur@doj.state.or.us

Paula Shapiro
Associate Director, Section of Civil Rights and Social Justice
American Bar Association
1050 Avenue NW, Suite 400
Washington, D.C. 20036
202.662.1029
Email: paula.shapiro@americanbar.org

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave NW
Washington, DC 20001
Tel.: 202-942-5855
E-mail: robertweiner@aol.com
robert.weiner@apks.com

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.)

Marilyn J. Harbur
Senior Assistant Attorney General | Tax & Finance Section | General Counsel
Division
Oregon Department of Justice
1162 Court Street NE, Salem, OR 97301
503.947.4485

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 or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the 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 transparency in the auto lending market, 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 litigators who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, national origin, or economic position.

104B

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, see the General Accountability Office Letter, B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey, with respect to CFPB Bulletin 2013-02, which provided guidance on the use of discretion in dealer interest mark-up rates.