



Office of Commissioner
Melissa Holyoak

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Commissioner Melissa Holyoak

Asbury Automotive Group – McDavid Group; Matter No. 2223135

August 16, 2024

I vote to bring this case because I have reason to believe respondents are violating the law.¹ In addition, I write with brief observations concerning the Commission’s approach to enforcing the Equal Credit Opportunity Act (ECOA) more generally, without commenting on staff’s work or the evidence in this matter specifically. *First*: To the extent we deploy methods we have not yet tested in court, we must tread carefully. For example, we should use the most relevant and reliable data sets for the evaluation of the conduct in question, and control for all relevant factors that could affect the conclusions of any statistical analysis. When that’s not possible, we should explore other ways to establish our claims. *Second*: In guidance to the public—and, when it would not compromise our enforcement, during pre-litigation discussions with potential defendants—the Commission and Commission staff should be clear about the methodology the Commission uses to assess liability under ECOA. Lack of awareness of agency enforcement methodology can lead to significant backlash.² *Third*: The Commission should carefully consider the propriety of bringing an ECOA claim based on a disparate impact theory,³ as well as use of such theory against an individual defendant.⁴ *Fourth*: operating with these principles in mind will benefit the Commission and consumers. The cases we choose to bring will be stronger. Settlement negotiations will be more productive and will result in faster relief for consumers. Companies will better understand our approach and their potential legal obligations. Ultimately, consumers will benefit.⁵ We should embrace transparency, not shrink from it.

I look forward to hearing additional information and arguments in this matter and will consider the case with an open mind.

¹ With respect to the Equal Credit Opportunity Act claim in this case, I incorporate the relevant part of my statement in the *Coulter* matter. See Dissenting and Concurring Statement of Commissioner Melissa Holyoak, *Coulter Motor Company, LLC*, FTC No. 2223033, at 2 n.12 (August 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf. It is also telling that the complaint in the *Asbury* matter today hazards no so-called Section 5 “unfair discrimination” claim. See *id.* at 3 n.17.

² See, e.g., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING, COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES, 24-26 (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf.

³ See Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, *Coulter Motor Company, LLC*, FTC No. 2223033 (August 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-ferguson-concurring-statement-coulter.pdf.

⁴ See Concurring and Dissenting Statement of Commissioner Christine S. Wilson, *FTC v. Passport Automotive Group, Inc., et al.*, File No. 2023199, at 4 (Oct. 18, 2022) (ECOA claims “may require extensive analysis and data not available to” individual defendants), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-passport-statement.pdf.

⁵ See J. Howard Beales III & Timothy J. Muris, *Achieving Change at the Federal Trade Commission*, COMPETITIVE ENTERPRISE INSTITUTE, at 8-9 (May 2024), <https://cei.org/wp-content/uploads/2024/05/Achieving-Change-at-the-Federal-Trade-Commission.pdf>.