



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

**Joint Statement of Chair Lina M. Khan,
Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya
Coulter Motor Company, LLC
Commission File No. 2223033**

August 15, 2024

Today, the Commission and the State of Arizona have charged Coulter, a dealership group, with unlawfully misrepresenting prices to customers, unlawfully charging customers without consent, and unlawfully imposing higher costs on Latino customers than on similarly situated non-Latino White customers.

The complaint charges that Coulter lured people to its dealerships by marketing inaccurately low prices, which buyers would only discover—if at all—once they had expended time visiting the dealership and beginning the purchase process. As alleged in the complaint, Coulter also inflated costs by tacking on charges for add-ons even when customers had not consented to them—and, in some cases, even when customers had expressly declined them. The complaint alleges that 92% of Coulter’s customers were unfairly or deceptively charged for add-ons. Lastly, the complaint describes how Coulter arranged financing with higher interest rate markups and costlier add-ons for Latino customers, who ended up paying nearly \$1,200 more in interest and add-on charges than similarly situated non-Latino White counterparts. These disparities were statistically significant, even when accounting for other factors. The complaint charges Coulter with violating Section 5 of the FTC Act and the Equal Credit Opportunity Act (ECOA), as well as provisions of the Arizona Consumer Fraud Act.

In his concurring statement, Commissioner Ferguson questions whether showing discrimination through disparate impact—rather than through disparate treatment—suffices for liability under ECOA. As he acknowledges, there is “substantial judicial and executive-branch authority in favor of disparate-impact claims under ECOA.”¹ Every district and appellate court to face the issue—and there have been many—has accepted that disparate impact is a cognizable basis for ECOA liability.² And it is the Federal Reserve, not the FTC, which Congress has charged with prescribing regulations implementing ECOA with respect to certain auto dealers,

¹ Concurring and Dissenting Statement of Commission Andrew N. Ferguson in the Matter of Coulter Motor Company, LLC (Aug. 14, 2024).

² See, e.g., *Miller v. Am. Express Co.*, 688 F.2d 1235, 1239-40 (9th Cir. 1982); *Bhandari v. First Nat’l Bank of Com.*, 808 F.2d 1082, 1101 (5th Cir. 1987), *vacated and remanded on other grounds*, 492 U.S. 901 (1989); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 926-28 (N.D. Cal. 2008) (holding that ECOA includes disparate impact, under binding circuit precedent); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008) (same); *Zamudio v. HSBC N. Am. Holdings Inc.*, No. 07 C 4315, 2008 WL 517138, at *2 (N.D. Ill. Feb. 20, 2008) (“[I]t is well established that a disparate-impact claim is available under both the ECOA and FHA.”); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1029-30 (N.D. Ga. 1980); *Williams v. First Fed. Sav. & Loan Ass’n of Rochester*, 554 F. Supp. 447, 448-49 (N.D.N.Y. 1981), *aff’d*, 697 F.2d 302 (2d Cir. 1982); see also *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005); *United States v. Union Auto Sales, Inc.*, 490 Fed. App’x 847, 849 (9th Cir. 2012).

such as Coulter.³ The Federal Reserve has long said that a facially neutral policy that disproportionately excludes or burdens persons on a prohibited basis can violate ECOA. As the Federal Reserve’s official staff commentary notes, ECOA and its implementing regulation (Regulation B) may prohibit a practice that is “discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face.”⁴

Nonetheless, Commissioner Ferguson says that he does not necessarily agree that disparate-impact claims are cognizable under ECOA. He writes that an application of *Inclusive Communities*—where the Supreme Court held that disparate-impact liability exists under the Fair Housing Act—suggests that ECOA may instead require a showing of discriminatory intent or motive. Specifically, the Court stated that anti-discrimination statutes “must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.”⁵ Commissioner Ferguson writes that he does not believe that the text of ECOA meets this criterion, notwithstanding that the statute does refer to the “consequences of actions” and that disparate impact is consistent with ECOA’s “statutory purpose.”⁶

No court agrees with Commissioner Ferguson. Even following *Inclusive Communities*, every court to face the issue has accepted that disparate impact is a viable theory under ECOA.⁷

³ 15 U.S.C. § 1691b(f). In the text of ECOA, Congress vested the Federal Reserve with broad regulatory authority and expressly directed it to promulgate rules to further ECOA’s “purpose” (making credit available on a non-discriminatory basis) and to prevent the “evasion thereof.” 15 U.S.C. § 1691b(a). *See also CFPB v. Townstone Fin., Inc.*, No. 23-1654, 2024 WL 3370023, at *5 (7th Cir. July 11, 2024) (considering *Loper* and holding the Federal Reserve’s prohibition on the discouragement of prospective applicants in Regulation B is consistent with text and purpose of ECOA).

⁴ Board of Governors of the Federal Reserve System, Regulation B Official Staff Commentary, Section 202.6(a)-2, 12 C.F.R. § 202.6(a)-2, Supplement 1.

⁵ *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539 (2015).

⁶ For example, ECOA exempts from liability a consequence—refusing to extend credit—that would otherwise result from facially neutral policy: a nonprofit organization administering a credit assistance program for its members or for an economically disadvantaged class of persons. 15 U.S.C. § 1691(c). Neither of these categories are protected classes; thus, if an actor makes decisions based on these categories, there is no disparate treatment. This exemption makes sense only if facially neutral policies may otherwise violate the statute and if liability can result in the absence of disparate treatment. Commissioner Ferguson ignores the *Inclusive Communities* discussion of exemptions and the plain text of ECOA’s exemptions, which refer to non-profit membership or economically disadvantaged classes (which are not protected classes), not to gender and race (which are protected classes). In *Inclusive Communities*, the Court found that an FHA exemption from liability for certain practices aimed at criminal convictions (which is not a protected category) confirm the availability of disparate-impact liability, given that if an actor “makes a decision based on reasons other than a protected category, there is no disparate-treatment liability.” 576 U.S. at 537–38. The Court noted that the exemption “would be superfluous if Congress had assumed that disparate-impact liability did not exist.” *Inclusive Comtys.*, 576 U.S. at 537–38. This statutory analysis is consistent with ECOA’s central prohibition, which does not reference intent. *See* 15 U.S.C. § 1691(a). And this reading is supported by the statutory purpose and legislative history of ECOA, which approvingly cites Title VII disparate impact cases. *See* ECOA, Pub. L. No. 93-495, § 502 (Findings and Purpose), 88 Stat. 1521, 1521 (1974).

⁷ *See, e.g., Oliver v. Navy Fed. Credit Union*, No. 1:23-CV-1731 (LMB/WEF), 2024 WL 2786905, at *3 (E.D. Va. May 30, 2024) (“Under the FHA and the ECOA, two potential theories of discrimination exist: disparate treatment and disparate impact.”); *Brown v. City Nat’l Bank*, No. 23-cv-03195, 2024 WL 201360, at *5 (N.D. Cal. Jan. 18, 2024) (“ECOA claims may be alleged under either a disparate treatment theory of discrimination or through evidence of disparate impact.”); *Bankhead v. Wintrust Fin. Corp.*, No. 22-cv-02759, 2023 WL 6290548, at *4 (N.D.

Commissioner Ferguson discounts these decisions and suggests that these various courts, spanning districts around the country, have consistently fallen short in their analysis and failed to properly apply *Inclusive Communities* in the near-decade since the Supreme Court issued its decision. As law enforcers, we must be faithful to the law. It is not our role to substitute our own judgment for those of courts, since “[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve.”⁸ Nor should we stray into activism, inviting arguments that would steer the law in a drastically different direction. In advancing the argument that disparate-impact liability is unavailable under ECOA, Commissioner Ferguson lays out a position that no law enforcer charged with enforcing our nation’s antidiscrimination laws has advanced.

Commissioner Holyoak also writes separately, stating that she does not believe that Coulter’s discriminatory practices can constitute an unfair practice under the FTC Act. She writes that she “cannot agree to the Commission’s use of its Section 5 authority for an ‘unfair discrimination’ claim in this case,” but she does not identify any particular deficiency in the Commission’s statutory analysis.⁹

Specifically, it is unclear whether Commissioner Holyoak believes that Coulter’s alleged discrimination against Latino consumers is not unfair because (a) she believes that Latino consumers did not suffer substantial economic injury in the form of higher charges for the same product and services, (b) she believes they could have reasonably avoided this injury, or (c) she

Ill. Sept. 27, 2023) (“[A] disparate impact claim under the ECOA requires a Plaintiff to: ‘(1) identify a specific, facially neutral policy or practice adopted by the defendant; (2) allege a disparate impact on a protected group; and (3) show a causal relationship between the challenged policy or practice and the alleged disparate impact.’”); *Fair Hous. Ctr. of Cent. Ind., Inc. v. Rainbow Realty Grp., Inc.*, No. 17-cv-1782, 2020 WL 1493021, at *3 (S.D. Ind. Mar. 27, 2020) (“[T]o bring a claim of discrimination under the Fair Housing Act or the Equal Credit Opportunity Act, a plaintiff must prove that the defendants’ conduct has a disparate impact on members of a protected class or that the defendants had a discriminatory intent”); *Carroll v. Walden Univ., LLC*, 650 F. Supp. 3d 342, 363 (D. Md. 2022) (rejecting defendant’s motion to dismiss plaintiff’s allegations of disparate impact under ECOA); *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1342 (N.D. Ga. 2018) (holding that plaintiffs sufficiently stated a claim for disparate impact under ECOA); *Saint-Jean v. Emigrant Mortg. Co.*, 337 F. Supp. 3d 186, 200 (E.D.N.Y. 2018) (rejecting challenge to disparate impact ECOA jury instructions); *Pettye v. Santander Consumer, USA, Inc.*, No. 15-cv-7669, 2016 WL 704840, at *5-6 (N.D. Ill. Feb. 23, 2016) (in auto add-on ECOA case, holding disparate impact claim sufficiently pled). Commissioner Ferguson downplays these decisions, quoting from *Camreta v. Greene*, 563 U.S. 692, 703 n. 7 (2011) for the proposition that district court decisions are not necessarily “binding precedent” on other courts. That quote from *Camreta* was actually to *Moore’s Federal Practice*, which goes on to remind readers that “[o]f course, a decision by a federal district judge may be cited to any court for its persuasive effect.” 18 *Moore’s Federal Practice – Civil* § 134.02[d] at 19; see also *Alperin v. Vatican Bank*, 410 F.3d 532, 546 n.8 (9th Cir. 2005). A series of court decisions—with no court decisions on the other side—is clearly persuasive on this point.

⁸ *NLRB v. Hearst Publns, Inc.*, 322 U.S. 111, 130-31 (1944). See also *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (“This Court embraced the Framers’ understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’ 1 Cranch 137,177 (1803). And in the following decades, the Court understood ‘interpret[ing] the laws, in the last resort,’ to be a ‘solemn duty’ of the Judiciary. *United States v. Dickson*, 15 Pet. 141, 162 (1841) (Story, J., for the Court). When the meaning of a statute was at issue, the judicial role was to ‘interpret the act of Congress, in order to ascertain the rights of the parties.’ *Decatur v. Paulding*, 14 Pet. 497, 515 (1840).”); *id.* at 2283 (Gorsuch, J., concurring) (“From the Nation’s founding, they considered ‘[t]he interpretation of the laws’ in cases and controversies ‘the proper and peculiar province of the courts.’ The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton).”).

⁹ Dissenting and Concurring Statement of Commissioner Melissa Holyoak in the Matter of Coulter Motor Company, LLC (Aug. 14, 2024).

believes that charging similarly situated Latino consumers more than their White counterparts has countervailing benefits to consumers or to competition.

This case again makes clear that some conduct may violate both anti-discrimination law (here, ECOA) and Section 5.¹⁰ Under the reading of Section 5 that our colleagues seem to espouse, lawbreakers would enjoy effective immunity under Section 5 if their conduct also violated a separate anti-discrimination law.¹¹ There is no basis for this reading of the law, here or anywhere else in law enforcement. Law violators are charged, every day, for separate statutory violations stemming from a single line of conduct. Rather than assume that discriminatory business practices enjoy a safe harbor under unfairness, we should make our determinations on a case-by-case basis, according to the specific facts and law at hand. We will continue to approach each legal question and fact pattern with an open mind and assess the merits of each claim based on the facts before us.

We are grateful to the Office of the Arizona Attorney General for its partnership on this matter and to the FTC team for its excellent work.

¹⁰ See Complaint, *FTC v. Passport Auto. Grp., Inc.*, No. 8:22-cv-02670-GLS (D. Md. Oct. 18, 2022).

¹¹ Commissioner Ferguson joins in this criticism. Concurring and Dissenting Statement of Commissioner Andrew Ferguson in the Matter of Coulter Motor Company, LLC (Aug. 14, 2024).