2020 Fair Lending Interagency Webinar

Outlook Live Webinar – December 8, 2020

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Overview

- Age Discrimination & Age-Related Considerations
- FHFA Credit Score Fair Lending Requirements
- OCC's Project REACh
- CFPB's ECOA Request for Information
- Assessing Fair Lending Risk: Policies and Procedures
- Managing Fair Lending Risks in Underwriting and Pricing Exceptions
- HUD's Disparate Impact Rule
- Testing for Lending Discrimination: *United States v. Guaranteed Auto*

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Age Discrimination & Age-Related Considerations

Matthew Nixon, Program Officer
Office of Consumer Financial Protection
National Credit Union Administration

General Rule Prohibiting Lending Discrimination

- A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction – Regulation B § 1002.4(a)
  - Covers all dealings between an applicant and a creditor whether or not addressed by other provisions of Regulation B
  - Covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts

Prohibited Bases

With limited exceptions, under ECOA and Regulation B, creditors cannot consider the following factors in any aspect of a credit transaction:

ECOA (Regulation B)
Race or Color
Religion
National Origin
Sex
Marital Status
Age
Receipt of Public Assistance Income
Use of Consumer Credit Protection Act

Age

Age May Be Considered

- To determine if an applicant has the capacity to enter into a binding contract
- In any system of evaluating creditworthiness when it favors applicants age 62 and older
- In an empirically derived, demonstrably and statistically sound, credit scoring system (provided elderly applicants are not assigned a negative value)
- In a judgmental system of evaluating creditworthiness only for the purpose of determining a pertinent element of creditworthiness

Empirically Derived Credit Scoring System

To qualify as an empirically derived, demonstrably and statistically sound, credit scoring system, the system must be:

- Based on empirical data comparing sample groups of creditworthy and non-creditworthy applicants
- Developed for the purpose of evaluating creditworthiness
- Developed and validated using statistical methods
- Periodically revalidated and adjusted as necessary to maintain predictive ability

Judgmental System of Evaluating Creditworthiness

- Any system for evaluating creditworthiness that is not empirically derived, demonstrably and statistically sound
- Age-related information may be considered only in evaluating other pertinent elements of creditworthiness. For example:
  - A creditor may not deny an application based on an applicant's age but may consider the adequacy of any security offered when the term of the credit extension exceeds the life expectancy of the applicant

NCUA Observations

- Recently, NCUA examiners have identified credit unions including "age" as a variable in judgmental automatic loan approval systems
- Applicants are being subjected to stricter underwriting guidelines because they do not meet the systems' age requirements
- In some instances, applicants who meet all system requirements for approval except for age are denied credit

FHFA Credit Score Fair Lending Requirements

James Wylie, Manager
Office of Fair Lending Oversight
Federal Housing Finance Agency

Who Are We?

- The Federal Housing Finance Agency (FHFA) is the regulator for Fannie Mae, Freddie Mac, and the Federal Home Loan Banks
  - FHFA is also currently conservator for Fannie Mae and Freddie Mac
- FHFA's Office of Fair Lending Oversight (OFLO) was established in 2018
- FHFA does not regulate primary mortgage market lenders or credit score model developers
- All information referenced in this presentation that is not otherwise cited is available at the FHFA Credit Scores Webpage
- Project contact: Kevin.Sheehan@fhfa.gov

Credit Score Validation and Approval

- Fannie Mae and Freddie Mac currently use FICO Classic
- New requirements for credit score validation/approval were passed by Congress in 2018
- FHFA implemented these requirements in a [credit scores final rule]
- The process for validating and approving scores is underway (Classic FICO was validated and approved 11/10/20)
- **"One of my priorities is to ensure that the American people have a safe and sound path to sustainable homeownership, which requires tools to accurately measure risk."** *- FHFA Director Mark Calabria*

Credit Score Validation and Approval
(continued)

- FHFA's rule established minimum fair lending requirements but allowed the Enterprises to establish additional requirements
- The Enterprises added additional detail on fair lending requirements in the public solicitation
- Fair Lending Requirements
  – Compliance Description 12 CFR 1254.6(a)(2)
  – Certification 12 CFR 1254.6(a)(2)
  – Fair Lending Assessment 12 CFR 1254.8(b)(2)

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Fair Lending Certification

- Fair Lending Certification As part of its application in response to the GSE Credit Score Solicitation dated ____________________, [Date] ____ ("Applicant") hereby certifies that: [Company Name]

i. The Model does not include any variable or characteristic that would be considered a protected class or prohibited basis under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1601-1691f and its implementing regulation, Regulation B, 12 C.F.R. part 1002, the Fair Housing Act, 42 U.S.C. §§ 3601-3631, and its implementing regulations, including 24 C.F.R. Subtitle B, Subchapter A, the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, including 12 U.S.C. § 4545, and its implementing regulations, including 24 C.F.R. § 81.42 (the "Fair Lending Laws").

ii. <u>No variable or characteristic that is based directly on or is highly correlated solely with a classification prohibited under the Fair Lending Laws is used as a factor in the Model to produce credit scores, including any variables that (a) would be considered proxies for a classification prohibited under the Fair Lending Laws or (b) are predictive solely due to their correlation with a classification prohibited under the Fair Lending Laws.</u>

iii. No variable or characteristic in (i) or (ii) above was used in the development of the Model.

iv. <u>A reasonable, causal, and understandable relationship exists between variables used in the Model and credit risk</u>.

v. <u>The Model has been evaluated to support compliance with Fair Lending Laws.</u> A description of this testing is attached to and incorporated into this certification.

vi. <u>The Applicant has policies and processes to support compliance with Fair Lending Laws</u>. A description of these policies and processes is attached to and incorporated into this certification.

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Proxy Testing

- Identify variables that may be proxies
- Provide support that remaining variables are *not* proxies
- Can only be performed by opening up the model
- One method described in a Federal Reserve report to Congress

Enterprise Assessment

- "The fair lending assessment for each Model submitted will evaluate the impact of that Model's Credit Score on various borrower demographic groups, including assessment of:
- **Credit Score value**
  - Do some borrower demographic groups receive less accurate and lower/higher Credit Scores than other borrower demographic groups?
  - Does the answer to the previous question differ for borrowers overall versus at relevant points in the distribution, such as near eligibility cutoffs?
- **Performance** – What is the impact on outcomes for different borrower demographic groups for the following Enterprise business uses:
  - Underwriting models
  - Credit Policies
  - Pricing
- **Access to credit** – What is the impact on access to credit for different borrower demographic groups in Enterprise business uses?
- The fair lending assessment may be conducted on each Enterprise's historical loan applications and loan purchases, during differing economic conditions."

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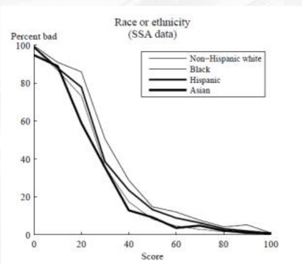
Credit Score Value

Accuracy of risk by demographic group:

- Over/under-prediction?

Accuracy near:

- Eligibility and cutoff points?
- Risk-based pricing or other tiers?



Source: 2007 Federal Reserve Study

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Other Fair Lending Assessment Factors

Performance

- Impact on outcomes in underwriting, credit policies, pricing?

Access to credit

- Impact on access to credit?

Differing economic conditions

- Stress vs. non-stress environments?

PROJECT REACh

Bobbie Kennedy, CRA & Fair Lending Technical Expert, Bank Supervision Policy Department

Office of the Comptroller of the Currency

PROJECT REACh

Project REACh Website

REACh stands for **R**oundtable for **E**conomic **A**ccess and **Ch**ange

Initiative to promote financial inclusion through greater access to credit and capital

Our Approach

- REACh brings together leaders from the banking industry, civil rights organizations, business, and technology to eliminate specific barriers that prevent full, equal, and fair participation in the nation's economy
- These leaders identify and work to remove barriers that exist at the national or local levels to expand access to credit and capital

Barriers

- Nearly 50 million people in the U.S. have no or incomplete credit scores
- Affordable homeownership remains a problem
- Minority-owned banks play critical roles in their communities but face challenges accessing capital, growing technology, and modernizing infrastructure

Alternative Credit Score Initiative

The goal is to promote entry to financial services, and include credit counseling and education

- Phase 1: Identify population who are banked individuals (such as a checking account), but who do not have robust credit files (thin file/no credit history)
- Phase 2: Establish entry points to financial services
- Phase 3: Expand opportunities for target population to access capital and credit

Minority Depository Institution Revitalization

- Goals
  - Create an MDI Investment Fund
  - Provide targeted technical assistance
  - Develop Executive Exchange
  - Enable and improve access to cost effective, shared loan origination platforms
  - Establish an ongoing advisory group and provide revenue generating partnerships

Homeownership

- Initiative to address challenges with closing costs, down payments and underwriting
- Identifying bank-owned properties for purchase
- Housing counseling and financial education

ECOA Request for Information

Christopher Davis, Attorney-Advisor
Office of Fair Lending & Equal Opportunity
Consumer Financial Protection Bureau

Summary

- RFI issued on July 28 seeks comments and information to identify opportunities under the Equal Credit Opportunity Act (ECOA) and Regulation B to:
  - prevent credit discrimination,
  - encourage responsible innovation,
  - promote fair, equitable, and nondiscriminatory access to credit,
  - address potential regulatory uncertainty, and
  - develop viable solutions to regulatory compliance challenges
- Extended comments deadline from October 2 to **December 1**.

RFI Topics

1. Disparate Impact
2. Serving Limited English Proficient (LEP) Consumers
3. Special Purpose Credit Programs (SPCPs)
4. Affirmative Advertising to Disadvantaged Groups
5. Small Business Lending
6. Sexual Orientation and Gender Identity Discrimination
7. Scope of Federal Preemption of State Law
8. Public Assistance Income
9. Artificial Intelligence and Machine Learning
10. ECOA Adverse Action Notices

Serving LEP Consumers

- Should the Bureau provide additional clarity under ECOA and/or Regulation B to further encourage creditors to provide assistance, products, and services in languages other than English to consumers with limited English proficiency?
- If so, in what way(s)?

Special Purpose Credit Programs

- Should the Bureau address any potential regulatory uncertainty and facilitate the use of SPCPs?
- If so, in what way(s)?
- For example, should the Bureau clarify any of the SPCP provisions in Regulation B?

Small Business Lending

- In light of the Bureau's authority under ECOA/Regulation B, in what way(s) might it support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned?

Artificial Intelligence (AI) and Machine Learning (ML)

- Should the Bureau provide more regulatory clarity under ECOA and/or Regulation B to help facilitate innovation in a way that increases access to credit for consumers and communities in the context of AI/ML without unlawful discrimination?
- If so, in what way(s)?
- Should the Bureau modify requirements or guidance concerning notifications of action taken, including adverse action notices, under ECOA and/or Regulation B to better empower consumers to make more informed financial decisions and/or to provide additional clarity when credit underwriting decisions are based in part on models that use AI/ML?
- If so, in what way(s)?

ECOA Adverse Action Notices

- Should the Bureau provide any additional guidance under ECOA and/or Regulation B related to when adverse action has been taken by a creditor, requiring a notification that includes a statement of specific reasons for the adverse action?
- If so, in what way(s)?

Conclusion

- The Bureau's Electronic Disclosure of Adverse Action Virtual Tech Sprint took place between October 5-9, 2020

Assessing Fair Lending Risk: Policies and Procedures

David Evans, Senior Fair Lending Specialist
Federal Deposit Insurance Corporation

Managing Fair Lending Risk

Written Policies and Procedures

- A strong compliance management system helps ensure financial institutions treat consumers fairly
- Written policies and procedures are an important component of an effective fair lending program
- As part of the consumer compliance examination, FDIC examiners review written credit policies and procedures

Fair Lending Laws and Regulations

Prohibited Basis Groups Covered by the Equal Credit Opportunity Act and the Fair Housing Act

ECOA	ECOA and FHA	FHA
❑ Marital Status ❑ Age ❑ Public Assistance Income ❑ Good Faith Exercise of Rights • Truth in Lending • Fair Credit Reporting • Fair Debt Collection Practices	❑ Race ❑ Color ❑ Religion ❑ National Origin ❑ Sex	❑ Familial Status ❑ Disability Also Prohibits Retaliation

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Assessing Fair Lending Risk

Underwriting Policies and Procedures

- Discrimination resulted from screening out commercial loan applicants on the prohibited basis of religion

Ensure that prohibited basis terms are not used to identify and treat applicants differently

With only limited exceptions, commercial loans are also covered by ECOA

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Assessing Fair Lending Risk
(continued)

Pricing Policies and Procedures

- Discrimination on the prohibited basis of marital status:
  - For **married** joint applicants the bank priced credit using the highest credit score of the two applicants
  - For **unmarried** joint applicants the bank priced credit using the credit score of the first applicant listed on the credit application

Ensure pricing policies do not treat applicants differently on a prohibited basis

Assessing Fair Lending Risk
(continued)

Policies and Procedures Used by Third Parties

- Discrimination on the prohibited bases of age and receipt of public assistance income
  - Applicant must be over 30
  - Income must be from "employment"

Monitor the actions of the third party as if the activity were handled within the bank itself

Assessing Fair Lending Risk
(continued)

Takeaways

- Review policies for overt issues
  - Includes both underwriting and pricing policies
  - Consumer loans and commercial credit
- Monitor and oversee third party activities
  - Bank is responsible for the actions of the third party
- Pay careful attention to language in online applications
  - Includes filter criteria to screen out applicants

Fair Lending Reference Material

- Fair Lending Resources
- Fair Lending Technical Assistance Video Program
- FDIC Fair Lending Scope and Conclusions Memo
- FIL-44-2008: Guidance for Managing Third-Party Risk

Managing Fair Lending Risks in Underwriting and Pricing Exceptions

Katrina Blodgett, Senior Counsel
Division of Consumer and Community Affairs
Federal Reserve Board

Overview

- The Federal Reserve's Fair Lending Authority
- Overview of Risks
- Identifying Exceptions
  - Pricing Exceptions
  - Underwriting Exceptions
- Managing Fair Lending Risk Related to Exceptions
- Resources

The Federal Reserve's Fair Lending Authority

- The Federal Reserve Board supervises:
  - Approximately 800 state member banks (SMBs)
  - All SMBs for compliance with the Fair Housing Act
  - SMBs of $10B or less for compliance with the Equal Credit Opportunity Act (ECOA) and Regulation B
- Pursuant to the ECOA, if the Board has reason to believe there is a pattern or practice of discrimination, the Board must refer the matter to the Department of Justice

Overview of Risks

- What is an Exception?
- Risks May Differ Based on Loan Product
  - Secondary Market Mortgage Loans
    - Sold to investor
    - Investor sets underwriting and pricing standards
    - Lender can add pricing or underwriting overlays
  - Portfolio Mortgage Loans
    - In-house product
    - Lender determines underwriting and pricing criteria and sets the level of discretion in both decisions

Pricing: Rate Exceptions

- Deviation from the rate sheet or par price in loan origination software ("LOS")
  - Institution might permit a range above and below par without authorization
  - Deviations within this range would still be considered exceptions

Pricing Exceptions: Rate Exception Policies

- Reduction or increase in note rate in relation to par price
- Common reasons for rate exceptions
  - Portfolio loan may have discounts for banking relationship (e.g., commercial relationship, deposit balance)
  - Secondary market loans may have rate exceptions for customer service (e.g., departing from par to extend the lock) or competition
- Mitigating risks of discretion: Written, clear policy setting forth reasons for pricing exception and retention of documentation
  - Example: Applicant provides a written quote from competitor with a lower rate. Written quote included in loan file.
- Not an exception: auto debit reduction available to all borrowers

Pricing: Fee Exceptions

- Reduction or waiver of institution's fees (e.g., origination fee)
- Common reasons for fee exceptions
  - Banking relationship
  - Competition
- Mitigating risks of discretion: Written, clear policy specifying which factors permit fee exceptions
  - Example: Origination fee reduced by 25% for applicant with 3 year history of account at institution

Underwriting: Exceptions in the Secondary Market

- If the institution adds an overlay to investor standards, the institution can make exceptions to the overlay and still have a saleable loan
- Automated Underwriting System ("AUS") decision of "Refer/Eligible" leading to manually underwriting the loan
  - AUS recommendation is now a HMDA field

Underwriting: Low-Side Overrides

- Applicant doesn't meet underwriting criteria (e.g., credit score too low)
- Common reasons for low-side overrides
  - Existing banking relationship
  - Positive past payment history
- Mitigating risks of discretion: Written, clear policy setting forth factors permitting manual override of underwriting criteria
  - Example: Applicant has maintained a personal checking account with bank for 5 years
    - Policy specifies length of banking relationship that would allow manual override of credit score criteria

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Underwriting: High-Side Overrides

- Applicant meets underwriting criteria but is ultimately denied
- Common reason for high-side overrides
  - History of late payments with the bank
- Mitigating risks of discretion: Written, clear policy setting forth factors permitting override of underwriting approval
  - Example: Applicant has had 2 or more 60 day derogs on a past credit product with the bank within 3 years
    - Policy specifies the type of negative history that would allow denial of otherwise eligible applicant

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Managing Fair Lending Risk Related to Exceptions

- Establish clear policies
  - Note that an institution's definition of an exception may be different than exceptions that could impact a fair lending analysis
- Track exceptions
  - On paper or in LOS
  - Type of exception, e.g., exception code
  - Amount of exception
- Monitor for fair lending risk
  - Incidence of exceptions
  - Magnitude of exceptions (pricing)

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Federal Reserve Resources

- Exception Tracking
  - Federal Reserve's 2017 Interagency Fair Lending Hot Topics "Compliance Management for Consumer Loans"
- General Compliance Resources
  - Consumer Compliance Outlook – Federal Reserve publication dedicated to consumer compliance
  - Outlook Live – Federal Reserve webinars on consumer compliance topics
  - Consumer Compliance Supervision Bulletin – Federal Reserve publication providing high-level summaries of consumer compliance issues
  - Interagency Fair Lending Examination Procedures and Appendix

2020 Disparate Impact Rule

Rosanne Avilés, Trial Attorney
Office of General Counsel
Fair Housing Enforcement Division
U.S. Department of Housing & Urban Development

2020 Disparate Impact Rule

- The U.S. Department of Housing & Urban Development's 2020 Disparate Impact Rule
  - 85 Fed. Reg. 60288
  - Published September 24, 2020

General Liability Statement
24 C.F.R. 100.500(a)

- Liability may be established under the Fair Housing Act based on a specific policy or practice's discriminatory effect on members of a protected class, even if the specific practice was not motivated by a discriminatory intent.
  - Perpetuation of Segregation claims still cognizable

Pleading Stage
24 C.F.R. 100.500(b)

1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;
2) That the challenged policy or practice has a disproportionately adverse effect on members of a protected class;
3) That there is a robust causal link between the challenged policy or practice and the adverse effect on members of a protected class, meaning that the specific policy or practice is the direct cause of the discriminatory effect;
4) That the alleged disparity caused by the policy or practice is significant; and
5) That there is a direct relation between the injury asserted and the injurious conduct alleged.

Burden-Shifting Framework
24 C.F.R. 100.500(c)

Plaintiff/Charging Party's Burden

(1) A plaintiff must prove by the preponderance of the evidence each of the elements in paragraphs (b)(2) through (5).

(3) If a defendant rebuts a plaintiff's allegation, the plaintiff must prove by the preponderance of the evidence either that the interests advanced by the defendant are not valid or that a less discriminatory policy or practice exists that would serve the defendant's identified interests in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.

Defendant/Respondent's Burden

(2) A defendant may rebut a plaintiff's allegation that the challenged policy or practice is arbitrary, artificial, and unnecessary by producing evidence showing that the challenged policy or practice advances a valid interest and is therefore not arbitrary, artificial, and unnecessary.

Defenses – Pleading Stage

24 C.F.R. 100.500(d)

- The defendant may establish that a plaintiff has failed to sufficiently plead facts to support an element of a prima facie case under paragraph (b) of this section, including by showing that the defendant's policy or practice was reasonably necessary to comply with a third-party requirement, such as a:
  - (A) Federal, state, or local law;
  - (B) Binding or controlling court, arbitral, administrative order or opinion; or
  - (C) Binding or controlling regulatory, administrative or government guidance or requirement.

Defenses – After Pleading Stage

24 C.F.R. 100.500(d)

(1) *Outcome Prediction Defense*: The policy or practice is intended to predict an occurrence of an outcome, the prediction represents a valid interest, and the outcome predicted by the policy or practice does not or would not have a disparate impact on protected classes compared to similarly situated individuals not part of the protected class, with respect to the allegations under paragraph (b). This is not an adequate defense, however, if the plaintiff demonstrates that an alternative, less discriminatory policy or practice would result in the same outcome of the policy or practice, without imposing materially greater costs on, or creating other material burdens for the defendant.

(2) The plaintiff has failed to establish that a policy or practice has a discriminatory effect under paragraph (c) of this section.

(3) The defendant's policy or practice is reasonably necessary to comply with a third party requirement, such as a:
- (A) Federal, state, or local law;
- (B) Binding or controlling court, arbitral, administrative order or opinion; or
- (C) Binding or controlling regulatory, administrative or government guidance or requirement.

Business of Insurance Laws

24 C.F.R. 100.500(e)

- Nothing in this section is intended to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.

Remedies in Discriminatory Effect Cases

24 C.F.R 100.500(f)

- Remedies should be concentrated on eliminating or reforming the discriminatory practice so as to eliminate disparities between persons in a particular protected class and other persons.

Severability

24 C.F.R. 100.500(g)

- The framework of the burdens and defenses provisions are considered to be severable. If any provision is stayed or determined to be invalid or their applicability to any person or circumstances invalid, the remaining provisions shall be construed as to be given the maximum effect permitted by law.

Data Collection

24 C.F.R. 100.5

- Neither the Disparate Impact Standard nor anything in HUD Fair Housing Regulations in Part 100 requires or encourages the collection of data with respect to protected classes.

Pending Litigation

- *Open Communities Alliance and Southcoast Fair Housing v. HUD* (D. Conn.)
- *National Fair Housing Alliance; Fair Housing Advocates of Northern California; and BLDS, LTD v. HUD* (N.D. Cal.)
- *Massachusetts Fair Housing Center and Housing Works v. HUD* (D. Mass)

Massachusetts Fair Housing Center and Housing Works, Inc. v. HUD

- Order stayed implementation of HUD's 2020 disparate impact rule, in its entirety, pending entry of a final judgment on Plaintiff's APA claims in that case.
- The judge also preliminarily enjoined HUD from implementing or enforcing the Final Rule in any manner or in any respect, and ordered HUD to preserve the status quo pursuant to the regulations in effect as of Sunday October 25, 2020 (which are the regulations that implemented HUD's 2013 disparate impact rule).

Testing for Lending Discrimination: *United States v. Guaranteed Auto Sales*

Carrie Pagnucco, Trial Attorney
Civil Rights Division
U.S. Department of Justice

United States v. Guaranteed Auto Sales

Source: Google, Aug. 2019

- "Buy Here, Pay Here" financing
- Third-party financing via Credit Acceptance Corporation

Testing Evidence

- Testing conducted by the United States
- Testing revealed experiences of black and white males seeking financing for used cars

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Testing Background

- Tests between September 2017 and April 2018
- Black testers had $1,200 down payment available
- White testers had $1,100 down payment available

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Testing Differences Alleged in Complaint

1. Defendants offered white testers down payment installments
2. Defendants offered white testers lower down payments
3. Defendants offered white testers lower bi-weekly payments
4. Defendants took other actions to discourage black testers

Settlement Provisions

- Fair credit policies
- Nondiscrimination notices
- ECOA training
- Recordkeeping
- Reporting to the United States for three-year compliance period

Key Outcomes

- Defendants committed to take the steps necessary to ensure equal treatment for all borrowers
- Clear message that lenders must never make credit decisions based on race

Where to Find Us

www.usdoj.gov/fairhousing

For speeches, complaints, settlements, press releases, and ECOA reports to Congress visit:

https://www.justice.gov/crt/fair-lending-program-0

Questions?