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PROVING RACIAL DISCRIMINATION AND MONITORING FAIR LENDING COMPLIANCE: THE MISSING DATA PROBLEM IN NONMORTGAGE CREDIT

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Introduction

Lending discrimination litigation has proliferated as a result of the recent subprime mortgage crisis.[1] The plaintiffs in most of these lawsuits claim racial discrimination in violation of the Equal Credit Opportunity Act (ECOA), a federal law prohibiting credit discrimination on the basis of race, gender, age or other personal attributes.[2] This accelerating ECOA litigation has helped to focus national attention on public and private efforts to eliminate racial inequality in the credit industry.[3] Yet, a central controversy

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1 During the crisis, some subprime lenders aggressively targeted minority neighborhoods for the purpose of making unaffordable home loans that were destined for delinquency, default or foreclosure. *See generally* Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform,* 18 J.L. & POL'Y 263 (2009).

2 *See generally* 15 U.S.C. § 1691-1691f (2006). The ECOA also prohibits discrimination on the basis of national origin, religion, color, marital status, receipt of public assistance income, and good faith exercise of rights under the Consumer Credit Protection Act.

3 *See generally* THE ATTORNEY GENERAL'S 2010 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 (April 5, 2011); *see also* Consent Judgment and Order at 7-8, 10, FTC v. Countrywide Financial Corp., No. CV10-4193 (C.D. Cal. 2010) (enjoining Countrywide Financial Corp. from servicing loans); Mayor of Baltimore v. Wells Fargo Bank, 631 F.Supp. 2d 702, 704 (D. Md. 2009) (denying banking institution's motion to dismiss for lack of standing in claims that predatory residential mortgage loans targeting black neighborhoods caused city damages); Consent Order at 4, United States v. AIG Federal Savings Bank, No. 10CV178-JJF (D. Del. 2010) (consent order enjoining AIG Federal Savings Bank from engaging in any wholesale home mortgage lending that discriminates on the basis of race or color); *NAACP alleges Wells Fargo, HSBC mortgage bias,*

concerning litigation of such claims involves the uncertainty of whether ECOA plaintiffs may legally use employment law evidentiary standards, like disparate impact analysis, to prove lending discrimination in court.[4]

This article does not focus upon the continuing debate over the suitability of employment law analysis for credit cases.[5] Instead,

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REUTERS, http://www.reuters.com/article/2009/03/13/naacp-banks-lawsuit-idUSN1344141220090313 (last visited Nov. 8, 2011) (describing lawsuits brought in Federal court accusing Wells Fargo and HSBC of subjecting African American borrowers to onerous loan terms in comparison to those offered to white borrowers).

[4] In 2005, the United States Supreme Court decided that the disparate impact analytical framework that originated in employment law jurisprudence is appropriate to use in proving age discrimination. Smith v. City of Jackson, Miss. 544 U.S. 228, 239-240 (2005). However, the Court has yet to decide whether such analysis can be used in lending discrimination claims. Although most federal courts allow ECOA plaintiffs to use statistical impact proof methods, whether the Supreme Court would or should reverse these decisions if given the opportunity remains a hotly debated topic. *See, e.g.,* Osborne v. Bank of America, Nat'l. Ass'n., 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002) ("[T]he Court rejects the argument that [plaintiffs are barred] from proceeding under the ECOA on a disparate impact claim."); Smith v. Chrysler Fin. Co., No. Civ.A. 00-6003, 2003 WL 328719, at *6 (D.N.J. Jan. 15, 2003) ("It is clear . . . that disparate impact theory is present in the ECOA . . ."); Faulker v. Glickman, 172 F. Supp. 2d 732, 737 (D.Md. 2001) ("The credit applicant may prove discrimination in violation of the ECOA by relying on . . . disparate impact analysis . . . ."); Gross v. U.S. Small Bus. Admin., 669 F. Supp. 50, 52 (N.D.N.Y. 1987) ("The plaintiff may ground her case on . . . a disparate treatment analysis . . ."); Thomas v. First Fed. Sav. Bank of Indiana, 653 F. Supp. 1330, 1340 (N.D. Ind. 1987) (concluding that disparate impact analysis is an "avenue of recovery . . . available in the context of the Fair Housing Act . . . ."); Peter N. Cubita & Michelle Hartmann, *The ECOA Discrimination Proscription and Disparate Impact—Interpreting the Meaning of the Words That Actually Are There,* 61 BUS. LAW. 829, 830-33 (2006) (arguing that Congress did not intend for the disparate impact method of proving discrimination claims to apply in ECOA litigation because neither the ECOA's statutory discrimination proscription nor its legislative history supports a finding that the Act prohibits facially neutral practices that disparately affect protected class members).

[5] *See* Thomas P. Vartanian et al., *Disparate Impact Discrimination: Fair Lending At The Crossroads,* 49 CONSUMER FIN. L. Q. REP. 76, 77 (1995) (discussing the non-uniform manner in which various federal courts have applied disparate impact theory in lending discrimination cases).

it assumes that employment law analogies are appropriate in the credit context and addresses whether race data limitations in non-mortgage credit create barriers to monitoring fair lending compliance and proving prohibited discrimination. As explained below, ECOA plaintiffs need race data to prove racial discrimination claims, whether the claim alleges a difference in treatment on the basis of race or lender conduct that has discriminatory racial effects.[6] However, race data sources are largely unavailable in nonmortgage credit markets. The absence of this data hinders effective litigation of race-based ECOA claims and impedes federal regulatory efforts to identify discriminatory lending patterns in nonmortgage credit transactions.

Pursuant to the Home Mortgage Disclosure Act (HMDA),[7] mortgage lenders have collected and reported information on applicants for decades.[8] In order to implement the HMDA, the

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Admittedly, the suitability issue is an unresolved question that needs to be addressed. Until that issue is resolved, however, the current evidentiary standards will continue to be used to accomplish ECOA antidiscrimination policy objectives.

6 *See infra* notes 31-40 and accompanying text (arguing that ECOA plaintiffs need race data to prove a *prima facie* case for disparate treatment discrimination).

7 *See generally* Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (1975) (codified at 12 U.S.C. §§ 2801-2810 (2006)). Congress enacted the HMDA in 1975 to address the issue of whether minority borrowers were denied mortgage loans more frequently than white borrowers and whether those disparities, if any, reflected discrimination in financial institutions' lending practices. Taylor, *supra* note 1, at 281. At first, mortgage lenders only had to collect and report geographic information on loan originations and purchases to federal regulatory agencies and the general public. Home Mortgage Disclosure Act of 1975 § 304(a). Congress later amended the HMDA in 1989 to require lenders to collect and report further information about the race, sex and income of applicants for home mortgage loans. *See* Home Mortgage Disclosure, 54 Fed. Reg. 51,356, 51,359-60 (1989) (codified at Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 203.4(a)(10) (2011)) (stating that the HMDA had been amended to require "reporting of data on the race, sex, and income of applicants and borrowers, in addition to the geographic itemization of loans that is currently required").

8 *See* 12 C.F.R. § 203.4(a)(10). Since 1992, HMDA data has been collected for a consistent set of census tracts on virtually all home-loan applications. These data constitute a unique record of the flows of credit in geographic areas of the United States from which the possible presence of

Federal Reserve Board (FRB) drafted Regulation C, which included a race data collection requirement.[9] Federal Reserve analysts study the collected race data to determine whether it indicates unlawful practices that violate the ECOA.[10] Although HMDA data, standing alone, do not prove racial discrimination,[11] ECOA plaintiffs have

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discriminatory patterns can be discerned. Importantly, the HMDA does not require all financial institutions to collect and report data for all loan applications, but provides certain exemptions based on size, location, volume, and loan characteristic considerations. *See, e.g.*, 12 U.S.C. § 2803(g)(1) (2006) (exempting mortgage banking subsidiaries of bank holding companies or savings and loans holding companies or any savings and loan service corporation that originates or purchases mortgage loans). Banks, credit unions and savings associations with total assets of $30 million or less as of the most recent full fiscal year are also exempt from providing census tract, income level, racial or gender data, though they are still required to report the number and dollar amount of mortgage loans. *Id.* § 2803(j). Depository institutions which originate, purchase or receiver fewer than five applications for a mortgage loan in any given metropolitan statistical area where such institutions do not maintain an office are also exempt from reporting those applications and related data as required by the Act. *Id.* § 2803(a)(2); *see generally* Jason Dietrich, *Missing Race Data in HMDA and the Implications for the Monitoring of Fair Lending Compliance* (Office of the Comptroller of the Currency, OCC Econ. Working Paper No. 2001-1) (arguing that missing race data from many institutions is systemically lost and introduces bias and efficiency problems into fair lending exams).

[9] *See generally* 12 C.F.R. §§ 203.4(a)(10)-(b)(1).

[10] Taylor, *supra* note 1, at 282. It is a matter of debate as to whether racial disparities in home mortgage application denial rates indicate illegal discrimination or whether they reflect economic conditions or other factors; nonetheless, disparities cannot be ignored. *See* Glenn B. Canner & Delores Smith, *Home Mortgage Act: Expanded Data On Residential Lending,* 77 FED. RES. BULL. 859, 976-78 (1991) (discussing how new racial data will assist bank regulators in determining whether racial discrimination exists in home mortgage lending); Anne P. Fortney, *Fair Lending Developments,* 54 BUS. LAW. 1329, 1330 (1999) (suggesting that racial data indicates continued racial disparity).

[11] The extent to which HMDA data actually proves or disproves racial discrimination is an issue that has made mortgage credit a controversial fair lending topic. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis,* 79 VA. L. REV. 291 (1993) (investigating alternatives to the CRA and advocating its repeal); George J. Benston, *Discrimination in Mortgage Lending: Why HMDA and CRA Should Be Repealed,* 19 J. RETAIL BANKING SERVICES 47 (1997)

used this data in regulatory enforcement actions and private litigation to support race-based claims against mortgage lenders.[12] Additionally, banking regulators have used HMDA data to assist in identifying institutions, loan products or geographic areas that show racial disparities significant enough to require investigation under antidiscrimination statutes.[13] Some commentators agree that HMDA data have improved compliance with and enforcement of fair lending laws that prohibit racial discrimination in the housing market, even though the data do not conclusively prove illegal lending practices.[14]

(arguing that HMDA data are both useless and often misleading and advocating the repeal of the HMDA). Most commentators agree, however, that without more, the data provide insufficient information about borrowers to definitely prove the presence or absence of racial discrimination in the sense of arbitrary denials based on an applicant's race. This is because HMDA data do not consider credit reports or debt-to-income ratios, factors that many lenders consider when evaluating mortgage loan applications. *See* Robert B. Avery et al., *New Information Reported Under HMDA and Its Application in Fair Lending Enforcement,* 91 FED. RESERVE BULL. 344, 385-87 (2005) (discussing "many relevant facts to underwriting and pricing [that] are not included in the HMDA data . . .").

[12] *See generally* Settlement Agreement, United States v. Long Beach Mortgage Co., No. 96-CV-6159 (C.D. Cal. 1996) (settlement agreement between government and mortgage lender reached upon claim of statistically-demonstrated discrimination against African Americans, Hispanics, women and the elderly); Settlement Agreement, United States v. Fleet Mortgage Corp., No. 96-CV-2279 (E.D.N.Y. 1996) (settlement agreement reached upon claim of discriminatory pricing by mortgage lender against African Americans and Hispanics); Settlement Agreement, United States v. Huntington Mortgage Co., No. 95-CV-2211 (N.D. Ohio 1995) (settlement agreement reached upon claim of discriminatory pricing against African Americans).

[13] *See, e.g.*, THE ATTORNEY GENERAL'S 2007 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 1-4, 6 (2008) (describing how regulatory agencies, such as the Federal Deposit Insurance Corporation (FDIC) have used racial data to refer potential ECOA claims to the Department of Justice); THE ATTORNEY GENERAL'S 2008 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 2-4, 6 (2009) (updating Congress as to the number of referrals for potential ECOA claims from numerous regulatory agencies).

[14] *See Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearings Before the Subcomm. On Oversight and Investigations of the H. Comm. On Financial Services.,* 110th Cong. 37, 42 (2007) (statements of Sandra L. Thompson, Director of

Unlike mortgage lenders, nonmortgage lenders are not required to collect and report data on the racial background of their borrowers. In fact, Regulation B, the FRB's interpretive regulation implementing the ECOA, expressly prohibits them from doing so.[15]

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the Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation & Calvin R. Hagins, Director of Compliance Policy, Office of the Comptroller of Currency) (suggesting that HMDA data provide helpful information for lending exams, indicate the possibility of discrimination in lending practices, and help to target supervisory activities); Patricia McCoy, Professor of Law, Univ. of Conn. Sch. of Law, Written Testimony of Patricia McCoy: Hearing on the Home Mortgage Disclosure Act Before the Board of Governors of the Federal Reserve System 1-2 (Sept. 24, 2010) (transcript available at http://www.federalreserve.gov/communitydev/files/mccoy_remarks.pdf) (noting the importance of public access to HMDA data and its benefit to individuals, local groups, community institutions, and state and federal agencies); Allen Fishbein & Ren Essene, *The Home Mortgage Disclosure Act at Thirty-Five: Past History, Current Issues* 1 (Joint Ctr. for Hous. Studies, Harvard Univ., Paper No. MF10-7, 2010), *available at* http://www.jchs.harvard.edu/publications/MF10-7.pdf (arguing that HMDA has become an accepted part of the mortgage industry and regulatory landscape).

[15] *See* Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202.5(b) (2011) ("A creditor shall not inquire about the race, color, religion, national origin, or sex of an application . . ."). There are two exceptions to this prohibition. First, a creditor may request an applicant to designate a sex-related title, *viz.*, Ms., Miss, Mr. or Mrs., so long as such a request is optional. *Id.* § 202.5(b)(2). The second, a limited self-testing exception, allows lenders to collect the race of nonmortgage applicants to monitor their own compliance with the ECOA's antidiscrimination mandate. *Id.* § 202.5(b)(1). A "self-test" is defined as a program, practice or study that is designed and used specifically to determine compliance with the ECOA and Regulation B, and creates data or factual information that is not available and cannot be derived from loan application files or other records related to credit transactions. *Id.* § 202.15(b)(1). If a self-test meets this definition, the results are privileged and cannot be obtained by a government agency in any examination or investigation, or by an agency or an applicant in any proceeding or civil action alleging a violation of Regulation B. *Id.* § 202.15(d)(1). The privilege may be lost or waived, however, under certain circumstances. *Id.* § 202.15(d)(2). Few, if any, lenders collect race data for self-monitoring purposes. *See GAO Report on Regulation B: Should Lenders Be Required to Collect Race and Gender Data of Borrowers for All Loans?: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. of Fin. Services*, 110th Cong. 12 (2008) [hereinafter *Hearing on GAO Report on Regulation B*] (statement of Sandra F. Braunstein, Director,

Consequently, ECOA regulators cannot systematically identify and scrutinize nonmortgage lenders who may discriminate on the basis of race. Also, although race data are essential to proving most racial discrimination claims, this crucial information is often unavailable in cases involving nonmortgage credit transactions.

Federal efforts to address the missing data problem have been slow and ineffective. The FRB twice considered removing the data collection ban—first in 1995 and again in 1998—yet chose to retain it both times.[16] Removal of the ban would have permitted nonmortgage lenders to collect racial data voluntarily. Congress only recently began to respond to the problem of limited race data sources in nonmortgage credit.[17] In July 2010, Congress enacted financial reform legislation that requires small business lenders to collect and report race data to federal regulators.[18] Before then, home mortgage lenders were the only type of lenders required, or even permitted, to gather information about the race of their applicants or borrowers.[19]

This article examines two questions: Is the expansion of mandatory data collection to cover nonmortgage lenders appropriate? If so, should all nonmortgage lenders be subject to a data collection requirement or only a subset? The answers to these questions will ultimately impact ECOA plaintiffs who may find themselves without race data to help prove a prima facie case of racial discrimination, as well as banking regulators who are likely to encounter race data

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Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve System) ("I will add that our understanding in talking to lenders is that hardly [any lender] is [collecting race data for self-monitoring purposes].").

[16] *See infra* notes 60-76 and accompanying text.

[17] *See Hearing on GAO Report on Regulation B*, *supra* note 15, at 2 (statement of Congressman Melvin Watt (D-NC)) ("It is hard to believe, as we convene his hearing today, that no one in the Federal Government has access to reliable data about important lending patterns and the real prospect of disparities and discrimination in the provision of credit other than mortgage credit.").

[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1071, 124 Stat. 1376, 2056 (2010) (extending data collection to minority-owned, women-owned and small businesses).

[19] *See* Assan Jallow, *What to Expect from Recent Changes in the Home Mortgage Disclosure Act*, FED. RESERVE BANK OF ATLANTA, http://www.frbatlanta.org/pubs/partners/partners-vol_15_no_3-what_to_expect_from_recent_changes_inhome_mortgage_disclosure_act_.cfm (last visited Nov. 18, 2011) (describing historical changes in the HMDA).

limitations when monitoring nonmortgage creditors for compliance with antidiscrimination statutes.

For members of minority groups, this lack of collected race data makes it extremely difficult to make a case of racial discrimination under the ECOA. Consequently, while minority group members have a statutory right under the ECOA to challenge a nonmortgage lender's racially discriminatory practices, they are arguably left with no effective means to pursue a remedy when harmed, unless the lender overtly discriminates. Unsurprisingly, overt "smoking gun" evidence of lending discrimination is rare since lending discrimination is likely to be subtle, sophisticated and difficult to prove, especially given the use of computerized credit scoring systems to evaluate applicants.[20]

In this modern lending environment, ECOA plaintiffs must have alternatives to "smoking gun" evidence to prove their claims if litigation is going to be a viable method of combating racial discrimination in credit transactions. Comparative race data provide circumstantial and statistical evidence that can facilitate proof of these claims.[21] In addition, race data could facilitate more effective monitoring of nonmortgage lenders for ECOA compliance.

Part I of this article considers how the lack of race data can create litigation difficulties for ECOA plaintiffs. It begins by describing the three basic methods of proof of lending discrimination under the ECOA: 1) direct evidence of overt discrimination; 2) disparate treatment; and 3) disparate impact.[22] It then traces the history

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[20] *See* Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (discussing the significance of utilization of the disparate impact theory to prove lending discrimination claims in light of the likelihood of unintentional discrimination by lenders).

[21] *See id.* at 1031 (discussing the usefulness of such data, in the context of other facts and circumstances, for identifying the disparate impact of discriminatory lending practices). This evidence is particularly valuable at the initial stages of litigation because it can help establish a prima facie case and defeat summary judgment motions. As a result, more full-fledged hearings of race-based lending discrimination claims could be decided on their merits.

[22] Policy Statement On Discrimination in Lending, 59 Fed. Reg. 18,266, 18,268 (Apr. 15, 1994) (describing the three types of lending discrimination). A group of fair lending regulators jointly produced this Policy Statement to inform and advise lenders about fair lending compliance and to provide examples of conduct that constitutes such discriminatory lending practices. *See id.* at 18,266.

of these evidentiary standards from employment law jurisprudence and legislation to credit markets. Next, it provides background information on Regulation B's data collection ban and examines the FRB's proposals for lifting it. After summarizing the data collection controversy, Part I critiques the FRB's arguments for retaining the ban and presents ECOA case law that highlights the deleterious effect the missing data problem has on litigating racial discrimination claims.

Part II examines why ECOA enforcement agencies are likely to fall short of optimal scrutiny of lending practices in the nonmortgage credit industry due to lack of collected race data. Canvassing the need for greater transparency in this market, Part II focuses on Government Accountability Office (GAO) reports[23] that survey the extent to which race data limitations impede the ability of ECOA supervisory officials to identify racial discrimination in nonmortgage credit transactions.

Part III explores the proper scope of mandatory data collection by examining whether a mandate, if warranted, should apply to the myriad of lenders comprising the nonmortgage credit market, including credit card issuers and automobile financiers, among others. Attention is paid to whether this diversity justifies lifting the ban for some, but not all, lenders.

Part IV contends that policymakers should use regulatory mandates to address the missing data problem in nonmortgage credit. Although several branches of government can issue such mandates, i.e., the FRB, Congress and the Consumer Financial Protection Bureau (CFPB),[24] I conclude that the recently established CFPB is better positioned institutionally than the FRB or Congress to promulgate expanded data collection regulations. As an expert administrative body with consumer protection as its core function, I argue that the CFPB is more likely than either Congress or the FRB

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[23]The Government Accountability Office (GAO) is the audit, evaluation and investigative arm of Congress charged with examining matters relating to the receipt and payment of public funds and with helping to improve the performance and accountability of the federal government. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-343SP, FISCAL YEAR 2012 PERFORMANCE PLAN 1 (2011) (describing the GAO's mission and responsibilities).

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (establishing the Bureau of Consumer Financial Protection).

to rigorously investigate data limitation problems in nonmortgage credit and create appropriate data collection mandates to address them.

I. Employment Law Analogies in ECOA Litigation: Proving Lending Discrimination

The ECOA prohibits discrimination in any aspect of a credit transaction.[25]ECOA plaintiffs can prove lending discrimination in three ways: 1) overt discrimination; 2) disparate treatment; and 3) disparate impact.[26] This section describes various types of lending discrimination and the methods courts have recognized to prove them.

A. Overt Discrimination

When applicants and borrowers claim under the ECOA that a lender blatantly discriminated against them on a prohibited basis, they must provide overt evidence of such discrimination to support their claims.[27] Plaintiffs can establish such a prima facie case by showing explicit and unambiguous statements of the lender's hostility toward persons protected by the ECOA.[28] For example, a written policy instructing loan officers to give minority borrowers lower credit limits than nonminority borrowers would provide sufficient evidence of overt racial discrimination.[29] In modern

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[25] *See* 15 U.S.C. §§ 1691-1691f (2006) (extending the Equal Credit Opportunity Act's protections to both consumer and commercial extensions of credit).

[26] *See supra* note 22 and accompanying text (enumerating the three types of lending discrimination).

[27] *See* Policy Statement On Discrimination in Lending, 59 Fed. Reg. at 18,268 (providing examples of practices that would evidence over discrimination).

[28] *See* Charlotte E. Thomas, *Defending A Free Standing Equal Credit Opportunity Act Claim,* 114 BANKING L.J. 108, 109 (1997) (suggesting that "[d]irect evidence of discrimination may be established through explicit and unambiguous statements of hostility toward persons protected by ECOA . . . .").

[29] This example is based on one provided in an interagency policy statement. Policy Statement On Discrimination in Lending, 59 Fed. Reg. at 18,268 (providing an example where an ECOA plaintiff claims that a lender

American society, however, overt evidence of lender hostility toward racial minorities is rare.[30]

B. Disparate Treatment Discrimination

In credit transactions, disparate treatment discrimination occurs when lenders intentionally treat some applicants or borrowers more favorably than others on an ECOA prohibited basis even though all are similarly creditworthy.[31] The disparities in treatment must be intentional, but the prima facie case does not require any showing that the lender's treatment of the applicant was motivated by prejudice. The following example illustrates disparate treatment based on race in the amount of assistance and information the lender provided:

> A nonminority couple applied for an automobile loan. The lender found adverse information in the couple's credit report, discussed this report with them, and determined that the adverse information, a judgment against the couple, was incorrect since the judgment had been vacated. The nonminority couple was granted their loan. A minority couple then applied for a similar loan with the same lender. Upon discovering adverse information in the minority couple's credit report, the lender denied the loan application on the basis of the adverse information without giving the couple an opportunity to discuss the report.[32]

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is offering a credit card with a limit of up to $750 for African American applicants and $1500 for Caucasian applicants).

30 *See Cherry*, 490 F. Supp. at 1030 (recognizing that ECOA plaintiffs must rely on disparate treatment and disparate impact proof methods because blatant evidence of racial discrimination in the credit context is rare).

31 *See supra* note 22 and accompanying text (enumerating the three types of lending discrimination). *But see* Latimore v. Citibank Fed. Savings Bank, 151 F.3d 712, 714 (7th Cir. 1998) (finding that a disparate discrimination claim absent an invidious motivation may not be advanced in the context of credit discrimination).

32 *See* Policy Statement On Discrimination in Lending, 59 Fed. Reg. at 18,268 (providing a similar example of overt treatment discrimination).

If a lender has treated similar applicants differently on the basis of race and direct evidence is unavailable to prove overt discrimination, an ECOA plaintiff can still establish a prima facie case of discrimination by presenting circumstantial evidence of racial bias.[33] To be sufficient, the circumstantial evidence must satisfy the standard set forth in the employment law case of *McDonnell Douglas v. Green.*[34]

In *McDonnell Douglas,* the United States Supreme Court provided an analytical framework for establishing a prima facie case of racial discrimination that allows the presentation of circumstantial evidence from which an inference of discrimination could be reasonably drawn.[35] Under this standard, a prima facie ECOA case requires proof that a lender rejected, or otherwise treated unfavorably, a creditworthy applicant who belonged to an ECOA protected class. If the plaintiff establishes such a prima facie case by presenting evidence showing that the lender treated more favorably persons outside the protected class, an inference of discriminatory conduct is created and the burden of producing evidence shifts to the defendant.[36] Thus, in disparate treatment racial discrimination cases, ECOA plaintiffs must present comparative racial evidence showing that one race has been treated better than another.

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[33] *See supra* note 22 and accompanying text.

[34] McDonnell Douglas v. Green, 411 U.S. 792 (1973).

[35] To establish a prima facie case of employment discrimination, the plaintiff must demonstrate that: (1) she is a member of a Title VII protected group; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open and the employer continued to see applications from persons with the plaintiff's qualifications. *Id.* at 802.

[36] Whether it is fair to say that an inference of discrimination is created when lenders reject qualified credit applicants is the subject of considerable debate. *See Latimore*, 151 F.3d at 715 (rejecting the use of the *McDonnell Douglas* standard in consumer credit discrimination cases); Richard Hill, *Credit Opportunities, Race, and Presumptions: Does the McDonnell Douglas Framework Apply in Fair Lending Cases? Latimore v. Citibank Federal Savings Bank,* 64 MO. L. REV. 479, 499-500 (1999) (advocating use of the *McDonnell Douglas* framework in credit discrimination cases); Mane Hajdin, *The McDonnell Douglas Standard in Lending Discrimination Cases: A Circuit Split?*, 33 MCGEORGE L. REV. 1, 14-16 (2001) (criticizing the *Latimore* decision in not extending the *McDonnell Douglas* standard to credit discrimination cases).

A defendant can successfully rebut the presumption of discrimination[37] by presenting a legitimate reason for his adverse actions. If the lender is unable to provide a credible and legitimate nondiscriminatory explanation for the difference in treatment, a court will likely infer that the lender discriminated in violation of the ECOA. If the rebuttal is successful, the burden of producing evidence shifts back to the plaintiff.

The crux of the *McDonnell Douglas* proof method is the idea that if a creditworthy minority applicant is treated worse than a creditworthy white applicant in a situation where there is no obvious reason for the difference in treatment, the lender must present a non-invidious explanation for treating the white applicant better after the plaintiff establishes a prima facie case.[38] By not requiring the presentation of overt evidence, the disparate treatment theory eases the plaintiff's initial proof burden in discrimination cases.[39]

C. Disparate Impact Discrimination

Disparate impact discrimination occurs when a lender applies a neutral practice equally to all credit applicants but the practice has a disproportionately adverse effect on applicants or

[37] *But see Latimore*, 151 F.3d at 714-15 (arguing that the burden shifting approach that is appropriate for employment discrimination cases is unworkable in lending discrimination cases because borrowers do not directly compete against each other for loans in the way that applicants compete for employment positions, which are usually finite). Theoretically, credit will be extended to all qualified applicants. Consequently, the burden-shifting approach of *McDonnell Douglas* is unworkable in the credit context, which means that there is no "presumption of discrimination" to rebut. *See id.*

[38] *See id.* at 715 ("At the heart of *McDonnell Douglas* is the idea that if the black is treated worse than the white in a situation in which there is no *obvious* reason for the difference in treatment . . . there is *something* for the employer to explain; and although the competitive situation which invites and facilitates comparison is usually missing from credit discrimination cases, sometimes there will be another basis for comparison.").

[39] *See* Mercado Garcia v. Ponce Fed. Bank, 779 F. Supp. 620, 628 (D.P.R. 1991) (clarifying that ECOA plaintiffs need only show prime facie evidence to meet their initial burden of production), *aff'd*, 979 F.2d 890 (1st Cir. 1992).

borrowers from ECOA protected groups.[40] In contrast to disparate treatment claims, a plaintiff who brings a disparate impact lawsuit is not required to prove that the lender's discriminatory practices are intentional or result from animus on a prohibited basis; rather, plaintiffs in disparate impact cases focus primarily on the harm that the victim experiences.[41]

Regulation B and its Official Staff Commentary provide guidance on proving disparate impact claims in the credit context.[42] According to Regulation B, employment law jurisprudence is the root of the ECOA's impact analysis framework. Section 202.6, note two, of Regulation B states that "[t]he legislative history of the act indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody*, to

[40] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (discussing the disparate impact approach in the context of employment discrimination); Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (April 15, 1994) ("When a lender applies a policy or practice equally to credit applicants, but the policy or practice has a disproportionate adverse impact on applicants from a group protected against discrimination, the policy or practice is described as having a 'disparate impact.' Policies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit.").

[41] *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 422-23 (1998) (identifying the requirements in a disparate impact case under *Griggs* as excluding any finding of discriminatory intent); Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,269 ("The existence of a disparate impact must be established by facts. Frequently this is done through a quantitative or statistical analysis. Sometimes the operation of the practice is reviewed by analyzing its effect on an applicant pool; sometimes it consists of an analysis of the practice's effect on possible applicants, or on the population in general. Not every member of the group must be adversely affected for the practice to have a disparate impact. Evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender that has a disparate impact is in violation of the FH Act or ECOA.").

[42] *See generally* Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 202 (2011).

be applicable to a creditor's determination of creditworthiness."[43] The Staff Commentary provides the following guidance on application of the "effects test" doctrine in the credit context:

> The act and regulation may prohibit a creditor 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, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. For example, requiring that applicants have income in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and nonminority applicants. If there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved, however, use of the income standard would likely be permissible.[44]

Further guidance on using the impact theory to prove ECOA claims comes from a 1994 Interagency Policy Statement on Lending Discrimination, which articulates how disparate impact is established:

> The existence of disparate impact is not established by a mere assertion or general perception that a policy or practice disproportionately excludes or injures people on a prohibited basis. The existence of a disparate impact must be established by the facts. Frequently, this is done through a quantitative or statistical analysis. Sometimes the operation of the

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[43] *Id.* § 202.6(a) n.2 (citations omitted).

[44] DIV. OF CONSUMER & CMTY. AFFAIRS, FED. RESERVE BD., SUPPLEMENT I TO PART 202—OFFICIAL STAFF INTERPRETATIONS 55 (2011), *available at* http://www.gpo.gov/fdsys/ pkg/CFR-2011-title12-vol2/pdf/CFR-2011-title12-vol2-part202-appI.pdf.

> practice is reviewed by analyzing its effect[s] . . . on possible applicants, or on the population in general.[45]

Thus, there are notable differences between how plaintiffs prove ECOA violations via disparate impact and how one might prove discrimination through disparate treatment.[46] Rather than using a burden-shifting analysis where circumstantial evidence creates a presumption of intentional discrimination, plaintiffs traditionally establish a prima facie disparate impact case by comparing the statistical representation of the protected class in the applicant pool with the number of protected class members actually accepted from the pool.[47]

D. The Regulation B Data Collection Ban and ECOA Litigation

When racial discrimination claims are asserted by ECOA plaintiffs, they tend to take the form of disparate treatment or disparate impact because overt lending discrimination is rare. With respect to the more usual claims, it is axiomatic that proving either a

[45] Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,269.

[46] *See Merrill v. Feldstein, Watson v. Forth Worth Bank & Trust: Reallocating The Burdens Of Proof In Employment Discrimination Litigation*, 38 AM. U. L. REV. 919, 947-50 (1989) (distinguishing between disparate treatment and disparate impact proof methods in employment discrimination cases); Thomas, *supra* note 28, at 110-11 (delineating the different evidentiary standards in ECOA cases). The ECOA proof methods are based on employment law models. S. REP. NO. 94-589, at 4-5 (2d Sess. 1976), *reprinted in* 1976 U.S.C.C.A.N. 403, 406 ("judicial constructions of anti-discrimination legislation are intended to serve as guides in the application of [ECOA], especially with respect to the allocations of burdens of proof.").

[47] If ECOA plaintiffs establish a prima facie disparate impact case, the burden then shifts to the lender to show that the challenged practice is justified by business necessity. Mahoney, *supra* note 41, at 244 (explaining that the defendant inherits the burden of showing business necessity after the plaintiff makes a prima facie case). If the lender provides this justification, the plaintiff has one last chance to succeed in the case by showing that another practice would serve the lender's legitimate interest that should have less of a discriminatory impact on persons in the ECOA protected classes. *Id.* The lender's failure to use the "lesser restrictive alternative" signifies that the challenged practice is a pretext for illegal discrimination. *Id.* at 496-97.

difference in treatment based on race or a disparity between races requires a comparison between minority and nonminority groups. Accordingly, to prove racial discrimination claims, ECOA plaintiffs must either compare a lender's treatment of minority and non-minority applicants and borrowers or show that a lender's practices have a significant, disproportionate effect on various racial groups. But these comparisons are difficult to make in cases involving nonmortgage credit transactions because reliable race data sources are virtually nonexistent and racial proxies are inadequate to solve the missing data problem.

Because the ECOA makes it unlawful for lenders to consider the race or ethnicity of applicants, Regulation B generally prohibits lenders from inquiring about or noting such information in a credit transaction.[48] This general prohibition, however, does not apply to home mortgage lending.[49] Due to frequent allegations and concerns about racial discrimination in this industry, Regulation B has required lenders since 1977 to ask for or otherwise note the applicant's national origin or race in applications for home purchase loans.[50] Although lenders who make residentially secured loans are

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[48] Equal Credit Opportunity, 64 Fed. Reg. 44,582, 44,585-86 (proposed Aug. 16, 1999); *see also* 12 C.F.R. § 202.5(b) ("A creditor shall not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, except as provided in paragraphs (b)(1) and (b)(2) of this section").

[49] *See* 12 C.F.R. § 202.13(a)(1)(i) ("A creditor that receives an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling, shall request as part of the application the following information regarding the applicant(s) . . . Ethnicity, using the categories Hispanic or Latino, and not Hispanic or Latino; and race, using the categories.").

[50] *See* Equal Credit Opportunity, 64 Fed. Reg. at 44,585 ("For home mortgage lending (given frequent allegations and concerns about unlawful discrimination) the regulation has required creditors, since 1977, to note the applicant's national origin or race, marital status, sex, and age in applications for home purchase loans, so that enforcement agencies can better monitor home mortgage lenders' compliance with the ECOA"). Of particular concern was 'redlining,' that is, geographic discrimination whereby lenders refuse to make loans in certain neighborhoods or communities because of the racial composition of its residents. Taylor, *supra* note 1, at 269-70 (citing Gene A. Marsh, *Lender Liability for Consumer Fraud Practices of Retail Dealers and Home Improvement Contractors*, 45 ALA. L. REV. 1, 15 (1993)).

required to collect race data so that enforcement agencies can better monitor their compliance with the ECOA, Regulation B precludes them from making credit decisions on this basis.[51]

In 1989, Congress amended the HMDA and imposed a similar race data collection requirement on certain mortgage lenders.[52] This requirement applies to home improvement loans in addition to home purchase loans. Also, in contrast to the ECOA and Regulation B, lenders are required to report the collected HMDA data to federal regulators and the general public.[53]

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[51] *See* 12 C.F.R. § 202.6(b)(9) ("Except as otherwise permitted or required by law, a creditor shall not consider race, color, religion, national origin, or sex (or an applicant's or other person's decision not to provide the information) in any aspect of a credit transaction").

[52] *See* 12 U.S.C. §§ 2801-2810 (2006) ("Each depository institution . . . shall compile and make available, in accordance with regulations of the Board, to the public for inspection and copying . . . the number and total amount of mortgage loans which were (A) originated (or for which the institution received completed applications), or (B) purchased by that institution during each fiscal year . . . ."). Notably, a report by the Government Accountability Office stated:

> "HMDA requires lending institutions to collect and publicly disclose information about housing loans and applications for such loans, including the loan type and amount, property type, income level and borrower characteristics (such as race, ethnicity and sex). All federally insured or regulated banks, credit unions, and savings associations with total assets exceeding $39 million, as of December 31, 2008, with a home or branch office in a metropolitan statistical area (MSA) that originated any secured home purchase loans or refinancing are required to file HMDA data."

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-704, FAIR LENDING: DATA LIMITATIONS AND THE FRAGMENTED U.S. FINANCIAL REGULATORY STRUCTURE CHALLENGE FEDERAL OVERSIGHT AND ENFORCEMENT EFFORTS 3 n.5 (2009) (citations omitted).

[53] *See* 12 U.S.C. §§ 2801-2803 ("Each depository institution . . . shall compile and make available, in accordance with regulations of the Board, to the public for inspection and copying . . . the number and total amount of mortgage loans which were (A) originated (or for which the institution received completed applications), or (B) purchased by that institution during each fiscal year . . . .").

Regulation B's general data collection ban[54] prohibits credit card issuers, finance companies and other nonmortgage lenders from gathering information on the racial background of credit applicants.[55] When the FRB drafted the ban in 1977 to implement the 1976 ECOA amendments,[56] it considered whether permitting all lenders to collect applicant personal data would advance or impede the ECOA's antidiscrimination goals.[57] Concluding the latter, the FRB decided on a general prohibition against data collection "on the theory that if creditors did not have this information, they could not use it to discriminate against applicants."[58]

Despite the FRB's noble intention of instituting the ban to discourage discrimination, the ban contributes substantially to a dearth of race data in the nonmortgage credit industry. Perhaps the FRB recognized this infirmity when it drafted proposals to lift the ban in 1995 and 1998. The 1995 proposal would have amended Regulation B to allow, but not require, creditors to collect

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[54] There is a limited self-testing exception to the general rule that nonmortgage lenders cannot gather racial data from applicants. There is also another exception under Regulation B where lenders may request information on the racial background of applicants if they are required to do so by a federal regulation. 12 C.F.R. § 202.5(a)(2). Consequently, lenders do not violate Regulation B when they comply with Regulation C, which requires the collection of race data for home improvement loans and home purchase loans on property not intended as the borrower's principal residence. 12 C.F.R. § 203.4(b)(1).

[55] Fortney, *supra* note 10, at 1336. *But see supra* note 15 and accompanying text (explaining the self-testing exception to the general data collection ban).

[56] Originally, when Congress enacted the ECOA in 1974, it prohibited credit discrimination on the basis of sex and marital status. The 1976 amendments to the ECOA expanded the prohibited bases to include race, color, national origin, age, receipt of public assistance income and good faith exercise of rights under the Consumer Credit Protection Act. Equal Credit Opportunity Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat 251, 257 (codified at 15 U.S.C. § 1691(a) (2006)) (amending the ECOA to prohibit "discrimination against any applicant, with respect to any transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age").

[57] *Equal Credit Opportunity Act Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 44 (2008) (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.).

[58] Fortney, *supra* note 10, at 1329.

information about an applicant's race, sex, national origin and other personal characteristics for nonmortgage loans.[59] In December 1996, after receiving and considering more than 250 comment letters,[60] the FRB withdrew this proposal, concluding, without elaboration, that given the political sensitivity of the issues involved, it might be more appropriate for Congress to decide whether the data collection ban should be lifted.[61]

Three years after announcing that it would defer to Congress on whether the data collection ban should be lifted, the FRB again proposed removal of the restriction. Like the previous proposal, the 1998 proposal did not have a mandatory data collection requirement; it merely proposed lifting the ban to allow nonmortgage creditors to collect race data voluntarily.[62] The public comments the FRB received in response to this proposal expressed diverse views on whether the ban should be lifted.[63] Proponents of lifting the ban

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[59] *See* Equal Credit Opportunity, 63 Fed. Reg. 12,326, 12,328 (prelim. notice of proposal Mar. 12, 1998) ("In April 1995, the Board published for comment a proposed amendment to Regulation B that would have allowed, but not required, creditors to collect information about an applicant's sex, marital status, race, color, and national origin for nonmortgage credit products.").

[60] See Equal Credit Opportunity, 61 Fed. Reg. 68,688, 68,689 (withdrawn Dec. 30, 1996) ("Approximately 250 comment letters were received. Nearly 70 percent of them opposed the Board's proposal; the majority of these comments were from creditors and their trade associations.").

[61] *Id.*

[62] Equal Credit Opportunity, 64 Fed. Reg. 44,582, 44,586 (proposed Aug. 16, 1999).

[63] In 1998, the FRB solicited public comments on its proposed rule to lift the Regulation B data collection ban. Pursuant to a Freedom of Information Act (FOIA) request, I obtained most of these comments to better understand the diverse views on whether the ban should be removed. Of the approximately 730 comments the FRB received, those from consumer protection advocates indicated that the collection of race data would facilitate more effective monitoring of ECOA compliance. Additionally, some creditors themselves supported the data collection proposal, believing that it would facilitate their own self-monitoring, either for compliance purposes or for evaluating the success of outreach marketing programs that target under-resourced prospects. However, the majority of the comments opposed the removal of the prohibition on data collection in nonmortgage credit transactions. These comments came primarily from creditors, and the principal concern was that removal of the prohibition was a step down the slippery slope toward compulsory data collection, which, it was feared,

argued that it is overly protective of consumers. These critics of the ban pointed out that while it may have been justifiable for the FRB to prohibit the collection of race data in 1977, the subtle and sophisticated discriminatory practices of contemporary lenders necessitate a policy change.[64] Additionally, critics of the restriction emphasized that data collection had a positive impact in detecting

would ultimately impose great costs and burdens on the entire nonmortgage credit industry. A second category of concern was almost opposite that of the first one, that is, some comments objected to the fact that the proposed rule envisioned only voluntary collection and that, as such, whatever data was collected would be confounded. *See generally* Equal Credit Opportunity, 64 Fed. Reg. at 44,582-01.

[64] The Office of Thrift Supervision vividly expressed these concerns as follows:

> "The original fear that race or national origin and other monitoring information collected on mortgage loan applicants would be used for discriminatory purposes has not been realized. Instead, the requirement for recording and reporting applicant monitoring data has benefited minority loan applicants by significantly expanding their access to home mortgage loans, assisted creditors in complying with the law and aided federal enforcement efforts. Based on this experience, we conclude that the existing prohibition in Regulation B on the collection of monitoring information on loan applicants for nonmortgage credit is an unnecessary restriction on how creditors conduct their business, that may encourage—and certainly does not reduce—discrimination in lending. As such, the restriction should be eliminated. The restriction also has the unintended consequence of inhibiting the ability of creditors to meet the needs of underserved markets with innovative financial products by making it difficult for them to know whether their products expand access to credit for minorities . . . Permitting creditors to collect monitoring information from applicants for nonmortgage credit may also enhance access to credit by enabling lenders to identify gaps in their efforts to serve customers."

Letter from Ellen Seidman, Dir., Office of Thrift Supervision, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 8, 1999) (on file with the author).

and curbing racial discrimination in the home mortgage industry.[65] Given this success in the home mortgage industry, they found the regulatory distinction between mortgage and nonmortgage lenders deeply troubling. Moreover, the FRB's concern that nonmortgage lenders would use collected race data in a discriminatory manner perplexed critics of the ban because there was no evidence that mortgage lenders had used this data unlawfully in more than twenty years of collecting it. These critics also noted that data collection alone would not necessarily create a risk for discrimination because lenders may already be aware of applicants' personal characteristics in cases involving face-to-face contact.[66]

Supporters of the restriction strongly urged the FRB to retain the ban on collecting racial data. Some predicted that the ban's

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[65] Two such critics noted that "[d]ata disclosure has resulted in significant increases in lending to traditionally underserved populations [because] HMDA data reporting has bolstered access to credit for minority and working class populations by holding financial institutions publicly accountable for their lending practices and by helping financial institutions identify missed market opportunities in underserved communities." Letter from Sharon Lee, Exec. Dir., Low Income Hous. Inst., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 8, 1999) (on file with the author); Letter from John Moon, Senior Fin. Dev. Specialist, City of Seattle, to Jennifer J. Johnson, Sec'y, Bd. of Governors of Fed. Reserve Sys. (Nov. 1, 1999) (on file with the author). *See also* Letter from Peter Skillern, Exec. Dir., Cmty. Reinvestment Ass'n of N.C., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Oct. 27, 1999) (on file with the author) ("When doing HMDA analysis before the reforms of 1988 became effective, we were in a similar position of not being able to estimate demand and or how individual applicants were treated. Did we not learn the tremendous value of understanding the discriminatory nature of the credit markets once individual application data was gathered? Why would we not apply this same standard to other types of credit such as business and agricultural lending?").

[66] *See, e.g.*, Letter from Ellen Seidman to Jennifer J. Johnson, *supra* note 64 ("Regulation B's existing prohibition on collecting data for nonmortgage credit appears to be unnecessary to further its well-intentioned objective of preventing the discriminatory use of such data."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-698, FAIR LENDING: RACE AND GENDER DATA ARE LIMITED FOR NONMORTGAGE LENDING 6 (2008) ("[S]everal researchers said that voluntary data collection would not necessarily increase the risk of discrimination because, in certain cases—such as small business lending, which is often done on a face-to-face basis—lenders could already observe an applicant's race and gender.").

removal would lead to the imposition of a mandatory data collection requirement on nonmortgage lenders.[67] Others feared that subjecting minority borrowers to requests for racial information on every application for credit may alienate those borrowers.[68] Supporters of the ban also argued that lenders are less likely to engage in discrimination when they do not know the race of credit applicants, and for this reason, lenders should not be allowed to gather race data.[69] Still others predicted that consumers would inevitably share

[67] *See, e.g.*, Letter from Pat L. Camerier, Vice President, The N. Trust Co., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 3, 1999) (on file with the author) ("We believe that if this change were made, it would eventually result in banks being required as a practical matter to collect and maintain this data due to the dynamics of the regulatory examination process."). Similarly, Marilyn Foss, General Counsel to the North Dakota Bankers Association, expressed this view: "We are also sincerely concerned that the 'optional' data collection will eventually become *de facto* mandatory as a result of regulatory recommendations to collect the data once it is permissible to do so." Letter from Marilyn Foss, Gen. Counsel, N.D. Bankers Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 2, 1999) (on file with the author).

[68] *See, e.g.*, Letter from Jack McGrath, Chairman of the Legislative/ Regulatory Comm., Chartway Fed. Credit Union, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Oct. 27, 1999) (on file with the author) ("We believe that consumers will be hesitant to provide [race data] because they will perceive that it may be used in the credit decision despite our disclosure."); Letter from Gregg Elberg, President, First Fed. Sav. & Loan Ass'n of San Rafael, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 2, 1999) (on file with the author) ("We more strenuously oppose the proposal to lift the prohibition against collecting information on race . . . At a time when privacy is such a major consumer concern, we believe that our customers would object merely to being asked for some of the information you propose that financial institutions request."); Letter from Lorraine Garcia, Internal Audit & Compliance Officer of Borrego Springs Bank, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Oct. 26, 1999) (on file with the author) ("Most consumers feel that the government does not need access to this [personal] information, and may actually be more concerned about possible discrimination if the prohibited information is gathered.").

[69] *See e.g.*, Letter from Max Cook, President, Mo. Bankers Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 10, 1999) (on file with the author) (arguing that the absence of race and gender information during the credit evaluation process reduces discrimination).; Letter from William J. Donovan, Senior Vice President & Deputy Gen. Counsel, Nat'l Ass'n of Fed. Credit Unions, to Jennifer J.

some of the cost that nonmortgage lenders would incur in complying with a data collection mandate.[70] They argued that the ban should be retained if the cost to consumers of lifting it would be too burdensome.[71]

After considering the arguments on both sides of the controversy, the FRB elected to retain the ban in 2003. The FRB justified its decision on two primary grounds. First, the FRB said that retaining the ban was justified because the proposed voluntary data collection approach would not produce useful market-wide data.[72] The FRB worried that many creditors would elect not to collect the data while those that did collect it would use inconsistent standards, criteria and methods.[73] Consequently, the data would be of questionable utility because there would be no assurance of its accuracy nor would there be any way to compare it from creditor to creditor.[74] The FRB's second justification for retaining the ban was

Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 5, 1999) (on file with the author) ("[W]e would suggest that the proposed revision adds nothing to the existing regulation that would ensure that the decision to grant credit is made on purely race-neutral criteria. It is not that the Board's proposal is unconstitutional on its face, but rather that it creates an opportunity for creditors to utilize illegal standards when determining whether to provide credit.").

70 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 14 ("[Banking] officials . . . said that they were concerned . . . that the additional expenses associated with data collection and reporting would, in part, be passed on to borrowers.").

71 *Id.*

72 *See Equal Credit Opportunity Act Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 44 (2008) (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.) (pointing out that inconsistencies in collection would undermine the data's reliability).

73 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 6.

74 *Equal Credit Opportunity Act Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 44 (2008) (statement of Sandra F. Braunstein, Dir., Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.). At the same time the FRB retained the Regulation B data collection ban, it revised the prohibition on data collection to permit creditors to collect information about nonmortgage credit applicants' personal characteristics for the purpose of conducting a self-test. *Id.* at 47-48. A self-test is a program, practice or study designed and used by the creditor specifically to determine

that allowing data collection would create opportunities for nonmortgage lenders to use the data in a discriminatory manner. The FRB thus reiterated its belief that personal information should be kept from lenders because in the past some lenders had used such data to discriminate against members of minority groups.[75]

E. Critique of the FRB's Decision to Retain the Data Collection Ban

After considering the arguments on both sides of the debate about whether the data collection ban should be removed, the FRB twice decided to retain the ban. The FRB's decision to disallow voluntary collection is arguably justified. As the FRB pointed out, removing the ban would permit nonmortgage lenders to voluntarily collect personal information from applicants but not require them to do so. Predictably, some lenders would collect the data while others would not. This piecemeal approach to data collection would not lead

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compliance with the ECOA. *See supra* note 15 and accompanying text (explaining the self-testing exception and its statutory source). A report or result of the self-test is privileged and may not be obtained or used in an examination or investigation, or in any proceeding or lawsuit alleging a violation of ECOA or Regulation B. *Equal Credit Opportunity Act Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 48 n.1 (2008) (statement of Sandra F. Braunstein, Dir., Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.). Predictably, lenders have not rushed to voluntarily collect racial data as they are permitted to do under the FRB's self-testing exception. Generally, lenders appear uninterested in "seeing for themselves" if they are engaging in racial discrimination, especially since this would cost time and money. Additionally, lenders probably fear risk of damage to their reputations if internal findings of racial discrimination are somehow leaked to the public.

[75] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 18 (stating that the Fed opted not to remove the voluntary data collection ban in 2003"); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 26 (explaining the reasoning behind the Fed's decision); *Equal Credit Opportunity Act: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 44 (2008) (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.) (providing further clarification of the Fed's rationale).

to the availability of reliable race data that could be used in ECOA litigation or regulatory actions to combat lending discrimination.

But a major shortcoming of the FRB's reasoning is its failure to frame the data collection issue more broadly. The FRB focused on the narrow question of whether the ban should be removed without considering the possibility of mandatory data collection.[76] The FRB's failure to consider a mandate is a central weakness of the proposals. As many commentators noted, the issue of lifting the data collection ban is inextricably bound to whether the collection of race data should be mandated.[77] The FRB's 2003 decision highlights this connection. In essence, the decision to retain the ban because voluntary collection efforts would be problematic begs the question of whether nonmortgage lenders should be required to collect race data. Thus, a more thoughtful proposal for lifting the ban would have considered this closely related question. The objection then, is not necessarily to the FRB's decision to retain the ban, but to its failure to confront the mandatory data collection issue squarely.

The FRB's second reason for retaining the ban—that nonmortgage lenders would likely use race data in a discriminatory manner—is also problematic.[78] First, this reasoning is merely

[76] *See* Equal Credit Opportunity, 63 Fed. Reg. 12,326, 12,328 (proposed Mar. 12, 1998) ("In April 1995, the Board published for comment a proposed amendment to Regulation B that would have allowed, but not required, creditors to collect information about an applicant's sex, marital status, race, color, and national origin for nonmortgage credit products."); Equal Credit Opportunity, 64 Fed. Reg. 44,582, 44,586 (proposed Aug. 16, 1999) ("[N]otation would be on a voluntary basis . . . The proposed rule provides that applicants may not be required to provide information about their race, color, religion, national origin, or sex.").

[77] *See, e.g.*, Letter from Patrick J. Kelly, Vice President & Senior Compliance Manager, Summit Bank, and James Kreig, Senior Vice President, Grp. Counsel & Assistant Sec'y, Summit Bank, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Nov. 9, 1999) (on file with author) (claiming that the "optional" proposal would create a *slippery slope* and "may eventually lead to mandatory data collection"); Letter from Sharon Lee to Jennifer J. Johnson, *supra* note 65 (advocating for regulators to "go one step further" than simply allowing voluntary data collection by mandating such collection).

[78] *Hearing on GAO Report on Regulation B*, *supra* note 15, at 10 (statement of Sandra Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.). The FRB also mentioned cost, which is typically regarded as a factor to be considered before imposing requirements on lenders. *See id.* at 51 ("[A] requirement to collect applicant

theoretical. The FRB did not explain why contemporary nonmortgage lenders would discriminate against racial minorities. Without more, the FRB is merely theorizing. A bare theory is an inadequate basis for decision and insufficient for resolution of such a controversial issue as expanded race data collection.[79]

At a June 2008 Congressional subcommittee hearing on whether data collection in nonmortgage credit should be mandatory for all lenders, Chairman Melvin Watt (D-NC) asked a Federal Reserve representative to explain why the FRB believes that expanded data collection would encourage lenders to discriminate. The FRB seemed to push back from its "bare theory" position by giving this response:

> That statement was made in the context of voluntary collection not publicly reported. That context was made regarding just lifting the prohibition, which would have led lenders to ask people for this data without anybody checking it. Many of the lenders involved do not get regular examinations from supervisory authorities, so we would have no way of knowing if they were using it for bad purposes. That was in that context, not in the context of a public system.[80]

The above clarification, which relates generally to the need for federal oversight to ensure fair lending compliance, is certainly a plausible explanation of the FRB's intent when it suggested that expanded data collection would likely increase racial discrimination in nonmortgage credit markets. Standing alone, the assertion implies that, unlike mortgage lenders who have been collecting race data for

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characteristic data for non-mortgage loans would impose a cost on creditors"). As always, a cost/benefit analysis will be undertaken and a determination must be made as to whether the advantages of the proposed mandate outweigh the cost to lenders. *See id.* ("These costs must be weighed against the benefits of collecting these data").

[79] *See generally* Kenneth W. Simmons, *Justification In Private Law,* 81 CORNELL L. REV. 698, 740 (1996) ("A legal theory is indeed inadequate if it amounts to no more than taking the results of cases and finding morally attractive purposes that fit the results.").

[80] *Hearing on GAO Report on Regulation B*, *supra* note 15, at 10 (statement of Sandra Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.).

decades, other lenders cannot be trusted with race data. By waiting five years before clarifying its intent, the FRB fueled the debate over whether federal data collection policy is fair. When viewed together, the data collection ban in nonmortgage credit and the mandatory data collection requirement for mortgage lenders seem to give home mortgage applicants greater protection from race-based lending discrimination than nonmortgage applicants protected by the ECOA. This preference is difficult to reconcile with the ECOA's goal of eliminating racial discrimination in all credit markets.

F. Implications of Regulation B's Data Collection Ban for ECOA Racial Discrimination Litigation

This section reveals the challenges ECOA plaintiffs can encounter when litigating nonmortgage lending discrimination claims without systematic race data to support them. Notably, the data collection ban does not affect claims of overt racial discrimination because collected race data is not needed to prove these claims.

1. Applying Disparate Treatment Theory in ECOA Cases

To establish a prima facie case of race-based lending discrimination using the disparate treatment standard, an ECOA plaintiff must show that a lender treated nonminority applicants or borrowers more favorably than similarly situated minorities.[81] Consider, for example, the case of an African American plaintiff who claims that a credit card issuer treated her less favorably than white applicants because of her race. To meet the comparative treatment requirement of the prima facie case, the plaintiff needs some way to identify the lender's applicants along racial lines. Once the plaintiff knows the race of all applicants, she can then compare her treatment to that of white applicants.[82] Without data that specifically captures the race of all credit applicants, the plaintiff would need to find a proxy for race, such as general population statistics or census tract data, to facilitate the requisite comparison. If

[81] Latimore v. Citibank Fed. Sav. Bank, 151 F. 3d 712, 713 (7th Cir. 1998).
[82] Mahoney, *supra* note 41, at 423; *see also* Thomas, *supra* note 28, at 109-12 (summarizing three approaches to proffering evidence in discrimination cases).

there is no suitable proxy, she will be unable to establish the prima facie disparate treatment case on the basis of race by comparing individuals or groups of different racial backgrounds or ethnicity. *Cooley v. Sterling Bank*[83] illustrates the application of the disparate treatment standard in an ECOA case involving a nonmortgage transaction when there is no available racial data.

The plaintiff in *Cooley*, an African American man whose primary source of income came from his ownership of residential properties, applied to Sterling Bank for a $100,000 unsecured line of credit.[84] Cooley had already received two $100,000 lines of credit at two other banks and hoped to amass three more in the same amount to finance a project he had been working on for a few years.[85] Despite Cooley's excellent credit rating, the bank denied his application, stating as its reasons Cooley's "income level, amount of outstanding debt, and open lines of credit."[86] In particular, the bank noted that Cooley was unqualified for the $100,000 line of credit he requested in light of his heavy debts and stated annual income of $51,484.[87] The bank concluded that this debt-to-income ratio was insufficient, even though there were numerous facts that tended to suggest Cooley would have been able to repay the loan: he had $2.6 million in assets, over $500,000 of which was liquid; he had an excellent credit score that resulted from an unblemished financial history; and he had over $100,000 in Sterling Bank itself.[88]

In an effort to demonstrate to the court that Sterling Bank treated him differently because of his race, Cooley offered the credit

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[83] Cooley v. Sterling Bank, 280 F. Supp. 2d 1331 (M.D. Ala. 2003).

[84] *See id.* at 1333-34 (describing plaintiff's attempt to establish five $100,000 lines of credit in order to complete a real estate project).

[85] *Id.* at 1333.

[86] *Id.* at 1336.

[87] *See id.* ("Bottom line, with a potential debt load of $465,000 on an income of $51,584, I was prepared to offer a $25,000 unsecured line or a larger line on a secured basis"). The high debt-to-income ratio resulted from the bank's decision to calculate it with Cooley's stated annual income of $51,484, rather than with Cooley and his wife's combined annual income of $106,214. *Id.*

[88] *Id.* at 1343. An additional hurdle that ECOA plaintiffs must overcome to establish a prima facie lending discrimination case is presenting proof that they actually qualified for the loan. *See id.* (stating Plaintiff failed to meet Sterling's non-discriminatory reason for rejecting Plaintiff's loan partly because Plaintiff could not shoulder another $100,000 worth of debt "head on").

files of twenty Caucasians who applied for and received unsecured loans for an amount equal to or greater than the $100,000 amount he sought.[89] Although the bank does not collect race data for non-mortgage loans, bank officials could deliver the comparative loan information to Cooley's attorney because the bank officials knew the racial identity of certain borrowers based on their interactions with them.[90] Without commenting on how the bank determined the racial identification of the applicants with whom Cooley was compared, the Alabama district court decided that the proffered white applicants were distinguishable from Cooley in that they had a prior credit relationship with Sterling Bank and much higher annual incomes.[91] The court therefore concluded that denial of Cooley's credit application was not because of his race.[92] Consequently, Cooley's racial discrimination claim failed.[93]

The *Cooley* case is significant for several reasons. First, it demonstrates that use of comparative race data in lending discrimination litigation does not ensure a favorable result for ECOA plaintiffs. Second, like all plaintiffs, ECOA plaintiffs must prove their claims. Under the disparate treatment theory, a difference in treatment of minority and nonminority credit applicants creates an inference of discrimination that the lender can rebut by giving a

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[89] *Id.* at 1340.

[90] This information is based on the author's memory of a telephonic conversation she had with Cooley's attorney. Telephone interview with Greg Louis Davis, Attorney (2010); *see also Cooley*, 280 F. Supp. 2d at 1340-41 (describing how the plaintiff offered twenty credit files of white applicants as evidence of discrimination).

[91] *See Cooley*, 280 F. Supp. 2d. at 1341 ("Taken together, the Plaintiff has not directed the court to any evidence to suggest that an applicant similarly situated to the Plaintiff in terms of a prior credit relationship, existing lines of credit, and annual income received a loan from Sterling.").

[92] *Id.*

[93] *See id.* at 1344 (stating Plaintiff has not proved a prima facie case of credit discrimination due to the absence of sufficient evidence). The district court explained that Cooley was unlike the white comparators in several respects. First, unlike the comparators, Cooley was the only person who had active unsecured lines of credit at other financial institutions at the time he applied for his loan. *Id.* at 1341. Second, the closet comparator to Cooley's annual income earned approximately three times as much money as he did. *Id.* Third, Cooley was applying for his first line of credit with Sterling Bank and did not have an established credit relationship, whereas his comparators had been renewed for credit several times. *Id.*

credible explanation for its denial. In order to prevail, plaintiffs must show that the ostensible reason for denial of credit is false and merely a ploy to conceal illegal discrimination.[94] According to the Alabama district court, Cooley did not meet this evidentiary burden.[95] A fatal difficulty was his inability to show that he was qualified to receive the credit he requested.[96]

For the most part, lenders freely set their creditworthiness criteria. The ECOA seeks to remove from consideration only those factors that interfere with free market determinations, such as the credit applicant's race. To eradicate such practices, the antidiscrimination analysis examines not only what lenders say but also what they do. Thus, although some plaintiffs may appear unqualified for the requested credit based on the lender's stated criteria, the inquiry into a lender's practices should not end with this determination. Under the disparate treatment standard, plaintiffs extend the inquiry further to see if a lender discriminated against an applicant despite an apparent lawful justification for the decision. For example, even if the evidence shows that Cooley clearly does not meet a bank's stated criteria for creditworthiness, he could still succeed with a lending discrimination claim if he can show that white applicants with qualifications similar to his were nevertheless granted credit. Because Cooley's lawsuit is rooted in racial comparisons, the bank's evaluation of his ability and willingness to repay the loan cannot be scrutinized in isolation. If "equal credit opportunity" means anything, surely it means the opportunity to be evaluated the same as other applicants similarly situated. This cuts to the essence of illegal discrimination. To obtain the benefit of the law's protection, ECOA plaintiffs must be allowed to search for and find those individuals who are similar but are treated more favorably. Comparative race data permit this exploration.

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[94] *See* Thomas, *supra* note 28, at 109-12 (summarizing three approaches to proffering evidence in discrimination cases).

[95] *Cooley*, 280 F. Supp. 2d at 1344.

[96] *See id.* at 1343 ("Sterling rejected the Plaintiff's loan request because his annual income could not shoulder an additional $100,000 worth of debt."). Proof that the plaintiff qualified for the loan is an additional element of the prima facie disparate treatment case. Since lenders dictate these qualifications and courts accept but do not scrutinize them, the qualifications could mask discrimination. This also makes it more difficult for ECOA plaintiffs to prove racial discrimination claims. The issue of whether a lender's standard should be subject to court review in race-based lending discrimination cases, though important, is beyond the scope of this Article.

It is important to emphasize that *Cooley* is the exceptional nonmortgage credit case where the plaintiff could make comparisons between the lender's treatment of minority and nonminority applicants. Generally, comparative race data is unavailable in nonmortgage credit transactions due in large part to Regulation B. Although Cooley ultimately lost the case, Sterling Bank officials could identify files of Caucasian borrowers so that the requisite comparisons could be made. As a result, theAlabama district court could decide the case based on evidence instead of dismissing it due to the absence of evidence:[97] "For the reasons stated above, the court concludes that the Plaintiff has not proven a prima facie case of credit discrimination due to the *absence of sufficient evidence* to establish that Sterling approved loans for applicants outside of the plaintiff's protected class with similar loan qualifications."[98]

While Cooley had the opportunity to find out exactly where he stood compared to white applicants who received credit from Sterling Bank, plaintiffs in other ECOA disparate treatment cases have not been so lucky.[99] Although courts ruling on ECOA cases often recognize the absence of comparative data necessary to establish a prima facie ECOA case, they do not address the issue of

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[97] *See id.* at 1341, 1344 (noting differences between Cooley and the white applicants). Certainly, it can be argued that Cooley was creditworthy despite his stated income and that Sterling Bank's reliance on his income was a pretext for discrimination given Cooley's other liquid assets. Because Cooley produced no evidence to support this argument, it did not prevail. As for knowing the racial identity of some of its borrowers, Montgomery, Alabama, is a small town where applicants who qualify for credit lines exceeding $100,000 may be well known in the in banking community and beyond.

[98] *Id.*

[99] For instance, in *Saldana v. Citibank Federal Savings Bank*, an Illinois district court found that the plaintiff presented no evidence to establish that Citibank treated him less favorably than other loan customers. No. 93C-4164, 1996 U.S. Dist. LEXIS 8327, at *10 (N.D. Ill. Jun. 12, 1966) (concluding Plaintiff presented no evidence showing that she was treated differently than white applicants with qualifications similar to hers). Similarly, in *Thomas v. First Federal Savings Bank of Indiana*, an Indiana district court found that there was no evidence at trial that the plaintiffs were treated any differently than other loan applicants by First Federal. 653 F. Supp. 1330, 1341 (N.D. Ind. 1987) ("[T]here was no evidence, apart from the conclusory statements by the Thomases, demonstrating a discriminatory intent on the part of defendants").

the general unavailability of this data in nonmortgage credit transactions. Instead, courts brush the missing data issue aside and simply conclude that the plaintiffs failed to meet their evidentiary burden.

2. Applying Disparate Impact Theory in ECOA Cases

ECOA litigation also highlights the serious challenge the missing data problem presents to the establishment of a prima facie disparate impact case of lending discrimination. In many cases, the ECOA plaintiff's disparate impact claim runs into the same imposing obstacle as her disparate treatment claim: lack of data to make comparisons among the lender's applicants. Consider the case of *Cherry v. Amoco Oil Co.*[100]

In *Cherry,* a white woman claimed that Amoco discriminated against her by denying her application for a credit card based on her zip code.[101] She alleged racial discrimination, arguing that the lender's policy of considering and assigning a low score to an applicant's zip code in its credit scoring system had a disproportionate impact on individuals in her predominately black neighborhood.[102] The District Court for the Northern District of Georgia acknowledged the controversy surrounding the use of disparate impact theory to prove lending discrimination cases and decided that ECOA plaintiffs could use this proof method.[103] Despite permitting use of the disparate impact standard, the court noted that it "is apt to be quite difficult for a plaintiff" to meet:

> [T]he [ECOA] specifically proscribes inquiry by the creditor into the race, sex, or marital status of a credit applicant, except in loans secured by

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[100] Cherry v. Amoco Oil Co., 490 F. Supp. 1026 (N.D. Ga. 1980).
[101] *Id.* at 1028.
[102] *Id.*
[103] *Id.* at 1030. Importantly, the court based its conclusion to allow the ECOA plaintiff to use the disparate impact proof method on the "assumption that otherwise, the Act will provide a remedy only in those rare cases where a company deciding on credit expressly states it is denied for a prohibited reason." *Id.; see also supra* notes 4, 5 and accompanying text (acknowledging the non-uniform way in which federal courts have applied the disparate impact theory in lending discrimination cases).

> residential real estate. Therefore, a creditor will not have direct information indicating the racial or other profile of its applicants or of the class of persons whose credit applications were granted.[104]

Conflating the ECOA and Regulation B's data collection ban, the court further observed that under the ECOA lenders can collect race data only for home mortgage loans. Still further, the court acknowledged the difficult burden of proof confronting the plaintiff by surmising that Cherry did not attempt to make a statistical comparison based on Amoco's actual applicant pool "[b]ecause it could not be [done], based on the specific proscription in the Act."[105] The court likely refers to Regulation B's data collection ban as the "proscription" that precludes race data collection. The court's acknowledgment that the data collection ban makes it virtually impossible for ECOA plaintiffs to prove disparate impact in the traditional manner by using comparative race data is unmistakable.[106] As Judge Evans aptly describes it:

> The conventional statistical methodology for showing disparate effect of a facially neutral test or practice is to compare representation of the protected class in the applicant pool with representation in the group actually accepted from the pool. If the statistical disparity is significant, then plaintiff is deemed to have made out a prima facie case.[107]

Because Cherry could not produce collected race data, she attempted to use a race proxy—general population statistics from census tract data—to establish a prima facie case of disparate discrimination.[108] This attempt failed in part because the court found that the resulting statistics did not necessarily reflect the racial composition of the lender's actual applicant pool or a reasonable approximation of it.[109] In other words, the proxy was unworkable

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[104] *Id.*
[105] *Id.*
[106] *See id.* ("[U]tilization of the effects test based on statistical methodology is apt to be quite difficult for a plaintiff.").
[107] *Id.*
[108] *Id.*
[109] *Id.*

because it produced insufficient data. Although the court suggested other possibilities for proving the requisite disparate impact, Cherry was also unable to utilize them because the data needed to make those analogies were likewise unavailable.[110] Due to Cherry's failure to show that Amoco's use of zip codes in its credit scoring system has a disproportionate impact on black applicants, the court dismissed her case.[111]

Similarly, the plaintiff in *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago*[112] failed to establish a prima facie case of lending discrimination using disparate impact theory. In that case, the plaintiff, an African American male, alleged that a bank's practice of considering an applicant's criminal history or arrest record in making business loan decisions had an unlawful discriminatory effect on black males.[113] Acknowledging the uphill battle the plaintiff faced without racial data showing the demographic makeup

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[110] *See id.* at 1031 ("The Court does not think that proof of disparate impact need be shown by statistics in every case nor need it be shown by proof of actual disproportionate exclusion from the applicant pool") For instance, the court indicated that it would consider sufficient, evidence that showed high zip code/race correlations based on the housing patterns in Atlanta. *Id.* Of course, the correlation would have to be high enough for the court to conclude that the zip code criterion itself "takes on racial aspects so that it may be considered as a mere substitute for consideration of the applicant's race." *Id.* Unfortunately for Cherry, the data her attorney presented did not show that based on housing patterns, virtually all white persons live in neutrally-rated or high-rated zip code areas, but virtually all black persons live in low-rated areas under Amoco's credit scoring system. *See id.* (acknowledging a lack of any racial pattern in the evidence). In addition, the court noted that Cherry could present the requisite statistical disparity by showing the economic and racial composition of various areas of the city where one might be able to determine whether the zip code ratings adversely affect income-qualified black persons more than income-qualified whites. *Id.* In sum, if the segregated housing pattern in Atlanta means that the zip code ratings negatively impact a high percentage of income-qualified black persons but only a low percentage of income-qualified white persons, then Cherry will have made out a prima facie case. *Id.*

[111] *Id.* Although the court did not dismiss the case on a summary judgment motion, the case was nevertheless dismissed because Cherry did not have comparative racial data to prove her claim of racial discrimination. *See id.* (finding a lack of evidence sufficient to prove racial discrimination).

[112] A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi., 962 F. Supp. 1056, 1064 (N.D. Ill. 1997).

[113] *Id.* at 1059.

of the bank's applicant pool or borrowers, the court recognized that "[t]he ECOA prohibits creditors from inquiring into the race, sex or marital status of an applicant."[114] The court further observed that "[t]his in turn places plaintiffs in a difficult position of trying to prove disproportionate impact without any access to a creditor's statistical lending profile."[115]

Like the plaintiff in *Cherry*, the plaintiff in *A.B. & S. Auto Service Inc.* attempted to use general population statistics to prove disparate impact but was unsuccessful. The Illinois court rejected this proxy for the same reason the *Cherry* courtrejected it. The plaintiff did not show that the lender's applicant pool possessed approximately the same characteristics as the general population.[116] Further, the plaintiff's expert witness did not produce academic studies or other evidence sufficient to substantiate the claim that the bank's practice of considering the arrest record of applicants had a disproportionate adverse impact on black males.[117]

In another nonmortgage credit case, *Sayers v. GMAC,*[118] the U.S. District Court for the Western District of Missouri highlighted the ECOA plaintiff's difficult burden of proving a prima facie lending discrimination case using disparate impact methodology.[119] While deciding the case using disparate treatment analysis, in dicta the court reasoned that disparate impact theory would be especially challenging for the plaintiff because the ECOA specifically prohibits

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[114] *Id.* at 1063. Here it is important to point out that the court's reference to the ECOA is inaccurate. Because the ECOA makes it illegal for lenders to consider the race or sex of credit applicants, Regulation B prohibits them from gathering race and sex data. Under limited circumstances, Regulation B permits lenders to inquire about an applicant's marital status. *See* 12 C.F.R. § 202.5 (2011) (stating permissible inquiries regarding an applicant's spouse).

[115] *Id.*

[116] *See id.* ("Considering these general population statistics, the court finds that, like both the *Matthews, Hill, Cherry,* and *Saldana* courts found, these statistics are insufficient to make out a prima facie case under the ECOA").

[117] *Id.* at 1062.

[118] Sayers v. GMAC, 522 F. Supp. 835 (W.D. Mo. 1981).

[119] *See id.* at 839 (citing *Cherry* for the proposition that an ECOA plaintiff's prima facie case under the disparate impacts theory is particularly difficult because the ECOA prohibits creditors from inquiring into applicants' race, sex or marital status for all non-mortgage loans).

inquiry by creditors into the race, sex or marital status of a credit applicant, making statistical evidence generally unavailable.[120]

In sum, ECOA plaintiffs who assert disparate impact racial discrimination claims likely encounter an insurmountable proof burden when attempting to make out a prima facie case. Demographic information on a lender's applicant pool and its borrowers is simply unavailable to show disproportionate impact. Without race data, ECOA plaintiffs cannot show that a lender's policies or practices impact minorities to any extent, let alone "disproportionally."[121]

3. Proving Racial Discrimination in Automobile Financing Cases Without Collected Race Data: Anatomy of *Coleman v. GMAC* and *Cason v. NMAC*

For many years, government attorneys and private parties have pursued racial discrimination litigation against auto dealerships and the finance companies that purchase their contracts.[122] Most of

[120] *Id.* The district court refers to the ECOA as implemented by Regulation B, which imposes a data collection ban on nonmortgage lenders. *Compare* 12 C.F.R. § 202.5(b) (2011) ("A creditor shall not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction . . . .") *with* 12 C.F.R. § 202.5(a)(2) (2011) ("Notwithstanding paragraphs (b) through (d) of this section, a creditor shall request information for monitoring purposes as required by § 202.13 for credit secured by the applicant's dwelling.").

[121] A.B. & S. Auto Serv., Inc., 962 F. Supp. at 1063.

[122] *See, e.g.*, John L. Ropiequet, *Racial Discrimination Claims In Current Mortgage and Finance Litigation: The Song Remains the Same,* 63 CONSUMER FIN. L. Q. REP. 156, 156-57 (2009) (observing that private parties have pursued racial discrimination claims against auto finance companies over the past two decades, "a large group" of which settled in 2007, while the Department of Justice has more recently announced settlements with two auto dealers); Jones v. Ford Motor Credit Co., No. 00 CIV. 8330, 2002 WL 88431, at *1, *5 (S.D.N.Y. Jan. 22, 2002) (denying defendant Ford Motor Credit Company's motion to dismiss ECOA class action brought by African American auto credit purchasers alleging racial discrimination in Ford Credit's mark-up policy); Smith v. Chrysler Financial Co., No. Civ.A. 00–6003, 2003 WL 328719, at *1 (D.N.J. Jan. 15, 2003) (denying defendant Chrysler Financial Company's motion to dismiss ECOA class action brought by African American auto credit purchasers, alleging racial discrimination in Chrysler Financial's mark-up policy);

these claims allege direct discrimination by the dealers because, in auto financing, lenders to whom dealers assign their contracts do not usually know the race of the applicants.[123] Consequently, if a dealer discriminates in violation of the ECOA, the dealer's actions are not

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Rodriguez v. Ford Motor Credit Co., No. 01 C 8526, 2002 WL 655679, at *1, *6 (N.D. Ill Apr. 19, 2002) (denying plaintiffs' motion for class certification in ECOA action brought by Hispanic purchasers of auto credit, alleging racial discrimination in defendant Ford Motor Credit Corporation's mark-up policy); Baltimore v. Toyota Motor Credit Corp., No. 00 CV 8415, 2001 WL 637377, at *1 (S.D.N.Y. June 8, 2001) (granting defendant Toyota Motor Credit Corporation's motion to transfer in ECOA action brought by African American purchasers of auto credit, alleging "disparate treatment on African Americans with respect to Defendant's credit pricing policy," which included a subjective mark-up); Cason v. NMAC, 212 F.R.D. 518, 519 (2002) (granting conditional class certification to African American purchasers of auto credit who brought ECOA action against defendant Nissan Motor Acceptance Corporation, alleging NMAC's credit pricing policy violated ECOA); Coleman v. GMAC, 196 F.R.D. 315, 317, 328-29 (M.D. Tenn. 2000) (granting class certification to African American purchasers of auto financing who brought ECOA action against defendant General Motors Acceptance Corporation, alleging GMAC charged class members an average finance charge markup greater than the average mark-up charged white customer), *vacated*, 296 F.3d 443, 450 (6th Cir. 2002) ("[W]e hold that the district court abused its discretion in certifying the proposed class under Rule 23(b)(2) because compensatory damages under the ECOA are not recoverable by a Rule 23(b)(2) class."); Cortez v. Union Acceptance Corp., IP IP02–0105–C–M/S, 2002 WL 31730922, at *1 (S.D. Ind. Nov. 19, 2002) (denying in part and granting in part defendant Union Acceptance Corporation's motion to dismiss ECOA action brought by individual Hispanic purchasers of auto credit, alleging UAC discriminated against them by applying finance charge markups that caused plaintiffs to pay "a disproportionately greater amount of non-risk-related credit charges than similarly-situated white consumers"); Osborne v. Amsouth Bank Corp., No. 3:02-CV-577, 2003 WL 22025067, at *1, *3 (M.D. Tenn. July 15, 2003) (dismissing for lack of standing proposed class action by African American consumers of auto financing who alleged AmSouth Bank's auto financing policies had disparate impact on African American applicants in violation of ECOA); *Osborne*, 234 F. Supp. 2d at 809-12 (holding that individual plaintiffs, African American purchasers of auto financing, can proceed with disparate impact claim against defendant Bank of America in ECOA action alleging discriminatory finance markup charge).

[123] *See* 12 C.F.R. § 202.5(b) (2011) ("A creditor shall not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction . . . .").

imputed to the assignee of the contract unless the assignee had knowledge, or reasonable notice, of the illegal discrimination before it became involved in the credit transaction.[124]

The alleged discriminatory conduct involving the auto dealers and auto finance companies stems from pricing-related discretionary decisions commonly known as "dealer reserves."[125] This commission-driven pricing system allows auto dealers to mark up the risk-based "buy rate" set by finance companies that purchase retail installment contracts from dealers.[126] The "buy rate" is the lowest acceptable interest rate that a lender will charge for financing an automobile purchase.[127] Lenders determine the buy rate by making an assessment of a customer's credit risk.[128] Dealers have the

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[124] The Official Staff Commentary on Regulation B provides that the term "creditor" "may include an assignee or potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated." DIV. OF CONSUMER & CMTY. AFFAIRS, SUPPLEMENT I TO PART 202—OFFICIAL STAFF INTERPRETATIONS 52 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2011-title12-vol2/pdf/CFR-2011-title12-vol2-part202-appI.pdf; *see also Osborne*, 234 F. Supp. at 808 (holding that Bank of America, though an assignee of dealer, was a creditor for purposes of ECOA because dealer issued loans according to Bank of America's policies and procedures, Bank of America took on risk of default as soon as loan approved, and Bank of America issued rebates to dealers for portion of financial markup); *see generally* Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation* 7-8 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 07-01, 2006), *available at* http://ssrn.com/abstract=951827 (discussing auto dealers as agents of lenders).

[125] "The 'Dealer Reserve' (also known as 'Dealer markup') is the difference between the Annual Percentage Rate and the Buy Rate, where the 'Buy Rate' is the rate at which a lender agrees to acquire a contract from [an automobile dealer], expressed in the form of a percentage. Consent Order at 3, United States v. Springfield Ford, Inc., No. 2:07-cv-03469-PBT (E.D. Pa. Aug. 21, 2007).

[126] *See* Brief of the United States as Amicus Curiae in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 2, Cason v. Nissan Motor Acceptance Corp., No. 3-98-0223 (M.D. Tenn. Aug. 21, 2007) (stating that automobile dealers could increase the interest rate set by Nissan Motor Acceptance Corporation).

[127] *Id*

[128] *See id.* (citations omitted) ("NMAC, using a credit scoring system, assigns applicants to a credit risk category. For each risk category, NMAC

discretion to charge an interest rate above the lender's buy rate, ostensibly for their participation in the financing transaction.[129] Some dealers split the discretionary finance charge with the finance company while others retain the entire amount of the markup. In other words, dealers make profits on auto sales by marking up the interest rate the finance company charges buyers.[130] Although the dealers' participation in markup practice is legal, ECOA plaintiffs have alleged that dealers subjectively (without established criteria) make their decisions about the amount of the increase in a racially discriminatory manner.[131] Some litigants claim that dealers intentionally charge African American and Hispanic purchasers higher rates than similarly situated nonminority purchasers.[132] Other litigants claim that the discretionary markup system has illegal discriminatory effects.[133] The litigation therefore includes allegations

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sets a range of acceptable interest rates. The lowest acceptable rate is called the 'buy rate.'").

[129] *See id.* ("A dealer may move a customer to a more expensive risk category (or 'tier'), but not to a less expensive one.").

[130] *See id.* (describing the profit-sharing potential for dealers who charge markups); *see generally* Cohen, *supra* note 124, at 8 (describing competition among dealers to find lenders offering higher markups).

[131] *See* Cohen, *supra* note 124, at 3 ("While charging different prices to different consumers is not illegal, one of the apparent consequences in auto lending is that minority consumers—African-Americans and Hispanics in particular—have systematically been charged a higher markup on auto loans than White borrowers. It is this fact—coupled with federal laws outlawing discrimination in credit markets—that has led to a series of lawsuits against auto lending institutions.").

[132] *See, e.g.,* Complaint at 3, United States v. Springfield Ford, No. 2:07-cv-03469-PBT (E.D. Pa. Aug. 21, 2007) ("Springfield Ford charged African-American consumers higher interest rates than similarly situated non-African-American consumers."); Complaint at 3, United States v. Pacifico Ford, Inc., No. 2:07-cv-03470-PBT (E.D. Pa. Aug. 21, 2007) ("Pacifico Ford charged African-American consumers higher interest rate markups than similarly situated non-African-American consumers.").

[133] *See, e.g.,* Jones v. Ford Motor Credit Co., No. 00 CIV. 8330, 2002 WL 88431, at *1, *5 (denying defendant Ford Motor Credit Company's motion to dismiss ECOA class action brought by African American auto credit purchasers alleging racial discrimination in Ford Credit's mark-up policy); Smith v. Chrysler Financial Co., No. Civ.A. 00–6003, 2003 WL 328719, at *1 (D.N.J. Jan. 15, 2003) (denying defendant Chrysler Financial Company's motion to dismiss ECOA class action brought by African American auto credit purchasers, alleging racial discrimination in Chrysler

of disparate treatment and disparate impact discrimination. Class action lawsuits against lenders involving automobile dealer markups are often settled.[134] Perhaps more so than other litigation, automobile financing cases show the extent to which ECOA plaintiffs may face an expensive, uphill battle when attempting to prove racial discrimination in nonmortgage credit transactions.

In 1996, Addie Coleman sought legal representation from attorneys in Tennessee (Tennessee Attorneys) concerning her automobile purchase, but for a matter unrelated to her financing.[135]When the Tennessee Attorneys reviewed her case, they learned that General Motors Acceptance Corporation (GMAC) had charged her an interest rate of 20.75 % for financing the auto purchase, which included a dealer markup of $809.76 in additional finance charges over the charges she was required to pay based on GMAC's creditworthiness analysis.[136] GMAC paid the dealer who arranged for

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Financial's mark-up policy); Osborne v. Bank of America, Nat'l. Ass'n., 234 F. Supp. 2d 804, 809-12 (M.D. Tenn. 2002) (holding that individual plaintiffs, African American purchasers of auto financing, can proceed with disparate impact claim against defendant Bank of America in ECOA action alleging discriminatory finance markup charge); Cason v. Nissan Motor Acceptance Corp., 212 F.R.D. 518, 519 (2002) (granting conditional class certification to African American purchasers of auto credit who brought an ECOA action against defendant Nissan Motor Acceptance Corporation, alleging NMAC's credit pricing policy violated ECOA); Coleman v. General Motors Acceptance Corp., 196 F.R.D. 315, 317, 328-29 (M.D. Tenn. 2000) (granting class certification to African American purchasers of auto financing who brought ECOA action against defendant General Motors Acceptance Corporation, alleging GMAC charged class members an average finance charge markup greater than the average markup charged white customer).

[134] *See* Kenneth J. Rojc & Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Automotive Financing*, 61 BUS. LAW. 819, 827 (2006) (finding that settlements in dealer rate program litigation during 2005 continued "a trend by plaintiffs and defendants to resolve class action challenges to dealer rate participation programs without judicial decisions").

[135] Joint Declaration of Class Counsel in Support of the Proposed Class Action Settlement and Request for Approval of Attorneys Fees and Reimbursement of Expenses at 5, Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315 (M.D. Tenn. 2004) (No. 3-98-0211) [hereinafter *Joint Declaration of Class Counsel*].

[136] *Id.* at 5-7; *see also* Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 445 (2002) (describing 20.75% interest rate).

the loan a commission based on the discretionary charges that had been added to Ms. Coleman's contract.[137]

In 1998, the Tennessee Attorneys filed a lawsuit against GMAC and the arranging dealer alleging disparate impact discrimination based on the credit pricing policy.[138] They contended that "the successful prosecution of this case [is] totally dependent on plaintiffs' ability to electronically obtain, race-code and analyze million [sic] of GMAC's electronic loan records."[139]On the same day and using the same theory, the Tennessee Attorneys filed a related lawsuit against Nissan Motors Acceptance Corporation (NMAC), *Cason v. NMAC.*[140]

Realizing that race data were essential to their disparate impact case, the Tennessee Attorneys found an alternative means of obtaining this information. In *Cason*, they arranged to have persons go to the Nissan dealer where Ms. Cason bought her car and

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[137] *See Joint Declaration of Class Counsel*, *supra* note 135, at 7 ("GMAC paid the arranging dealer a commission based on the subjective charges that had been added to Ms. Coleman's contract.").

[138] *See Cason*, 196 F.R.D. at 322 (describing disparate impact case); *Joint Declaration of Class Counsel*, *supra* note 135, at 6-7, 9 (describing lawsuit filed in 1998 and amended complaint filed that same year, alleging disparate impact).

[139] *Joint Declaration of Class Counsel*, *supra* note 135, at 8.

[140] *Id.* at 5. To prove the ECOA claim challenging the discretionary credit pricing policy as racially discriminatory, the lawyers needed comparative race data, which they did not have. But they did not have HMDA-like data to support their allegations, in contrast to lawsuits filed previously by the U.S. Department of Justice (DOJ) against mortgage lenders and real estate brokers who used similar subjective credit pricing methods. *See, e.g.*, Complaint for Compensatory and Punitive Damages, Civil Money Penalties and Injunctive Relief at 3, United States v. Long Beach Mortgage Co., No. CV-96-6159 (C.D. Cal. Sept. 5, 1996) ("For example, for loans brought in by Long Beach's loan officers, African American females over the age of 55 were 2.6 times more likely than white males under 56 to be charged fees and points that amounted to 6% or more of the loan amount."); Complaint, United States v. Fleet Mortgage Corp., No. CV-96-2279 (E.D.N.Y. May 7, 1996) ("Fleet imposed overages on home mortgage loans more frequently (and granted underages less frequently) for African-American and Hispanic borrowers than it did for similarly situated white Anglo borrowers."); Complaint, United Stated v. Huntington Mortgage Co., No. 95-CV-2211 (N.D. Ohio Oct. 18, 1995) ("[T]he Cleveland office of Huntington charged whites overages averaging 0.07 percentage points compared to an average overage of 0.83 percentage points for minority borrowers.").

photocopy the 1995 NMAC finance transactions that the dealer originated.[141] At this juncture, the Attorneys had the copies encrypted with corresponding racial information derived from the driver's license identification residing in the financial records and composed a data record for dissection.[142]

A scientific analysis determined that, on average, there was a $621.21 undisclosed finance charge markup for white consumers as opposed to a $1,004.33 markup for African American consumers.[143] It was determined that minorities paid sixty-three percent more in finance charge markups than their white counterparts.[144]

Because the Tennessee Attorneys filed the *Coleman* case as a class action and were seeking to demonstrate disparate impact of a national pricing policy involving millions of automobile purchasers, they concluded that the manual process used to compile race data in *Cason* was too difficult to implement.[145] Consequently, they had to obtain the necessary data to perform a competent disparate analysis in some other manner. The data sought was electronic, and eventually the Tennessee Attorneys were able to:

> . . . document the data path between credit evaluation, credit scoring, contract booking and loan servicing, identify the hundreds of data fields that were available, determine the meaning of the key data fields, determine the codes that were used in coded fields, determine the availability of active, backed up and archived data and to accurately interpret the complex data set that was maintained by GMAC.[146]

At the conclusion of the electronic discovery process in *Coleman*, GMAC had produced and the plaintiffs had calculated markups for over six million electronic data records, each of which contained a multitude of individual data fields.[147] Due to the

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[141] *Joint Declaration of Class Counsel*, *supra* note 135, at 10.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 11.
[146] *Id.*
[147] Cohen, *supra* note 124, at 8-9, 9 n.7, 44; *see also Joint Declaration of Class Counsel*, *supra* note 135, at 12 ("At the conclusion of [*Coleman v.*

exorbitant cost of using data experts to perform this monumental task, the data exploration was performed in-house.[148]

In their request to the judge for approval of attorneys' fees and reimbursement for expenses, the plaintiffs' attorneys reported that in data intensive cases like *Coleman*, it is not unusual for expert fees associated with data acquisition and analysis to greatly exceed one million dollars.[149] Additionally, they noted that such multi-million dollar expenditures could have prevented the successful prosecution of the case because of the attorneys' limited resources.[150]

According to the Tennessee Attorneys, in regards to Ms. Coleman's ECOA disparate impact claim, a major obstacle to executing an effective legal case was the difficulty in distinguishing the race of the borrowers in adequate numbers, so as to produce a qualified data sample.[151] To address this problem, the attorneys searched for a reliable way to race code a competent data set so that they could perform a disparate impact analysis.[152] They eventually decided that driver's license data was a viable way to acquire the requisite sample.[153] After extensive research, the Tennessee Attorneys determined that fourteen states had a policy of capturing and electronically storing a race code for each driver's license.[154] Pursuant to the Tennessee Attorneys' request, the court issued fourteen subpoenas to various departments of motor vehicles, requesting electronic drivers license data in the states of Florida, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, Tennessee, South Carolina, North Carolina, Maryland, Nebraska, Iowa, Wisconsin and Texas.[155]

Gen. Motors Acceptance Corp.], GMAC had produced and the plaintiffs had calculated markups for over six million five hundred thousand electronic data records, each of which contained a multitude of individual data fields.").

[148] *Joint Declaration of Class Counsel*, *supra* note 135, at 12.

[149] *Id.* at 12.

[150] *Id.*

[151] *Id.* at 13 ("[A] significant obstacle to the successful prosecution of Ms. Coleman's disparate impact claim under ECOA was the problem of determining the race of a sufficient number of loan transactions to provide an adequate data sample.").

[152] *Id.*

[153] *Id.* at 12 ("After extensive research, it was determined that drivers license data was a viable way to race code a competent data sample.").

[154] *Id.* at 13-14.

[155] *Id.*

Despite the subpoena, various states were not so inclined to produce the requested data. Many wanted millions to generate the data, sighting state statutes that commanded payment for each driver's license record requested.[156] To address this problem, Coleman's lawyers sought legal relief in Alabama, Louisiana, Oklahoma and North Carolina.[157] Following successful litigation in those states, resistance rapidly dissipated in the remaining states.[158]

The total endeavor, including the creation of the race data base, proved to be an "expensive, time consuming and highly technical undertaking requiring standardization of various electronic data files that were received from the fourteen states on a variety of different media and in varying formats."[159] Ultimately, the efforts of the experts in *Coleman* produced an electronic database that exceeded seventy five million racially associated names.[160]

Given the results of the data analyses, settlement of the *Coleman* case is not at all surprising. GMAC, in 2003, released a catalogue yielding 6.2 million nationwide financing transactions, spanning more than four years, from January 1999 to April 2003.[161] Over a million and a half were racially encrypted as being black or white by virtue of driver's license data, acquired from the aforementioned motor vehicles departments.[162] The statistical experts who analyzed the data for disparate impact discovered that 53.4% of black borrowers were charged a markup, while white borrowers of comparable status were charged little more than half that amount (28.2%).[163] In addition, data revealed that black borrowers nationwide were more than twice as likely to receive a positive markup and were paying a mark-up that was almost $400 more.[164] Black borrowers whose financing contracts were marked up paid $1,229 on average, while white borrowers paid $867.[165] The plaintiffs' experts found that these disparities were highly significant and that GMAC's subjective pricing policy caused a discriminatory impact on African

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[156] *Id.* at 14.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 14-15.
[161] *Id.* at 16.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 17.

American borrowers.[166] Data analysis confirmed a similar impact on Hispanic borrowers.[167] A settlement ended the litigation.[168]

4. Summary

ECOA plaintiffs struggle mightily to make out a prima facie racial discrimination claim regardless of whether the claim is one of disparate treatment or disparate impact. In both types of lawsuits, the inability to make racial comparisons can be fatal. To be sure, the data collection ban is not litigation-friendly to these plaintiffs. One unintended consequence of the ban is that it may shield some financial institutions from liability for racial discrimination. When lending discrimination plaintiffs are unable to compare themselves to others who may be or are similarly situated, their claims will routinely fail. The absence of comparative data thus subverts the fair lending policy objectives embodied in the ECOA. As the *Coleman* case reveals, private efforts to obtain the requisite data are unduly burdensome and prohibitively expensive.

Neither courts nor regulators have adequately addressed how ECOA plaintiffs can meet the heavy evidentiary burden of

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[166] *Id.*

[167] *See id.* at 17-19 (stating that, according to a statistical analysis of race-coded data in Florida, 62.6% of Hispanic borrowers received a markup, whereas 46.8% of white borrowers received such a markup, and that the average price of a markup cost Hispanics approximately $300 more than whites).

[168] In addition to other types of relief, the settlement capped the dealer markups at 2.5% above the buy rate for three years. Settlement Agreement at 11, Coleman v. GMAC, 196 F.R.D. 315 (M.D. Tenn. Feb. 10, 2004) (No. 3-98-0211). The class actions against other lenders were also settled, with the settlements capping markups between 1.75% and three percent above the buy rate. Most of the settlements were reached between 2003 and 2006. Terms of the settlements were between three and five years. *See* JESSICA HIEMENZ, ET. AL, NAT'L CONSUMER LAW CTR., DEALER KICKBACKS: HOW CAR DEALERS ARE PAID TO PUT US IN MORE EXPENSIVE LOANS AND HOW WE CAN STOP IT 30 (2010), *available at* http://www.nclc.org/images/pdf/ conferences_and_webinars/webinar_trainings/presentations/2010/presentation_aug19.pdf (describing settlement caps and other terms of settlement). For further settlement details of the largest class actions involving dealer markups, see *Case Index – Closed Cases: Auto Finance Discrimination,* NCLC NATIONAL CONSUMER LAW CENTER, http://www.nclc.org/litigation/ case-index-closed-cases.html#auto (last visited Nov. 20, 2011).

establishing a prima facie case of racial discrimination in lawsuits against nonmortgage lenders. Theoretically, proxies could supply the absent data in some cases. However, in practice, courts have not accepted general population statistics or census tract data as sufficient proxies for the racial composition of a lender's applicant pool. Plaintiffs have also been unsuccessful in their attempts to use zip codes as a proxy for racial information.

II. Missing Race Data in Nonmortgage Credit and the Implications for Monitoring Fair Lending Compliance

A. Introduction

Federal agencies and other regulators that bring public enforcement actions against nonmortgage creditors encounter the same litigation difficulties as private litigants who find themselves without comparative race data.[169] In particular, race data limitations complicate regulatory efforts to effectively examine and investigate nonmortgage lenders for ECOA compliance. The GAO has issued several reports that highlight the limited data problem in non-mortgage credit and the extent to which it curtails fair lending oversight. The following section briefly describes the ECOA enforcement and oversight responsibilities of federal agencies and thereafter discusses GAO fair lending reports that pertain to race data limitations.

B. Federal Oversight and Enforcement of the ECOA and Data Limitations

Before the CFPB became operational on July 20, 2011, responsibility for oversight of the ECOA was shared among twelve federal agencies.[170] The five depository institution regulators

[169] The new financial reform legislation mandates the collection of race data for minority-owned, women-owned and small business loans. Thus, racial comparisons can be made for this type of nonmortgage lending. Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, § 1071, 124 Stat. 1376, 2056-57 (2010).

[170] The agencies that enforced ECOA compliance prior to the CFCP were the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance

generally had ECOA oversight responsibilities for the insured depository institutions that they directly regulated.[171] With respect to national banks and federal branches, oversight authority was with the Office of the Comptroller of the Currency (OCC). For federal credit unions, authority resided with the National Credit Union Administration (NCUA).[172] Historically, the DOJ had jurisdiction over all depository institutions and non-depository lenders,[173] such as mortgage finance companies, while the FTC's jurisdiction was limited solely to non-depository lenders.[174] Although the CFPB

Corporation, Office of Thrift Supervision, National Credit Union Administration, Surface Transportation Board, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration, Secretary of Transportation and the Federal Trade Commission. 15 U.S.C. § 1691c (2006).

[171] *See id.* § 1691c(a)(1)(A) (granting enforcement authority over "national banks, and Federal branches . . . [to] Office of the Comptroller Currency . . . ."). The depository institution regulators oversee federally insured banks, thrifts, credit unions and, as appropriate, certain subsidiaries, affiliates and service providers of these institutions. While the enforcement agencies can pursue investigations, file complaints, and participate in litigation against lenders in administrative or federal district courts for potential ECOA violations under their independent investigative and enforcement authorities, depository institution regulators are required to refer lenders under their supervision to the Department of Justice for further investigation whenever one has reason to believe a lender has engaged in a pattern or practice of discouraging or denying applications for credit in violation of the ECOA. *See id.* § 1691e(g) ("[T]he agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted.").

[172] *See id.* § 1691c (a)(3) (granting enforcement authority over federal credit unions to the NCAU).

[173] The DOJ may initiate its own investigations of any creditor under its independent authority or based on referrals from other agencies. The DOJ may also file pattern or practice and other fair lending complaints in federal courts. *Id.* §§ 1691e(g)-(h).

[174] *See id.* § 1691c(c) (detailing the FTC's enforcement authority under the ECOA). Pursuant to this authority, the FTC may conduct investigations and file ECOA complaints against nonbank mortgage lenders and brokers, including but not limited to nonbank subsidiaries of banks and bank holding companies that may be violating the ECOA. If the FTC concludes that it has reason to believe that the ECOA is being violated, the agency may file a lawsuit against the lender in federal court to obtain an injunction and

consolidates most of the ECOA's enforcement and oversight authority,[175] this structural change does not resolve the data limitation problem. Consequently, CFPB regulators that will monitor non-mortgage lenders for fair lending compliance will also be limited in their capacity to identify potential lending discrimination due to the absence of race and other personal applicant data.[176]

For depository institutions, supervision regarding compliance with the ECOA typically involves fair lending examinations.[177] Primary federal banking regulators conduct regularly scheduled examinations of the institutions they oversee to generally assess their fair lending compliance and to determine specifically whether there is evidence that lenders have violated the ECOA.[178] In contrast, nonbank lending institutions, such as finance companies and auto dealers, are not subject to regular compliance examinations,[179] but instead have been periodically investigated for noncompliance by the

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consumer redress. If the FTC seems civil penalties are appropriate, the agency may refer the case to the DOJ. Alternatively, the FTC may bring an administrative proceeding against the lender before the agency's administrative law judges to obtain an order similar in effect to an injunction. *See generally id.* § 1691c.

[175] *See* Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, § 1061, 124 Stat. 1376, 2036-39 (2010) (outlining the transfer of "consumer financial protection functions" to the CFPB).

[176] *See supra* note 169 (highlighting that the Dodd-Frank Act limits mandatory collection of race data to small business loans).

[177] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY ET AL., INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES 17-40 (2009), *available at* http://www.ffiec.gov/pdf/fairlend.pdf (outlining the procedures to be used in a fair lending examination); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 9 ("Depository institution regulators conduct examinations of institutions they oversee to assess their fair lending compliance . . . .").

[178] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-96-145, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN 3 (1996) ("For depository institutions, compliance . . . is primarily accessed through regularly scheduled consumer compliance examinations conducted by primary bank regulators."). At the time of this 1996 report, the primary banking regulatory agencies were the FRB, OCC, Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS) and NCUA. *Id.* at 3 n.2.

[179] *Hearing on GAO Report on Regulation B*, *supra* note 15, at 10 (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.).

DOJ, the FTC or other responsible federal agencies.[180] Since July 2011, the CFPB has had the responsibility of conducting fair lending examinations for financial services providers with total assets over $10 billion.[181]

With respect to home loans, the availability of HMDA data has facilitated the fair lending examination process by providing regulators with insights into lenders that might be at high risk of engaging in potentially discriminatory practices in mortgage lending.[182] Of course, HMDA data is only one step in the investigative process given that regulators must evaluate a range of underwriting criteria and practices that may help explain disparities in mortgage lending patterns.[183] But the HMDA data helps regulators "identify outliers—lenders that may have violated fair lending laws—and focus their investigations accordingly."[184] Once these institutions are identified, regulators can prioritize their examination resources.[185] Additionally, the Federal Reserve believes that "the

[180] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 34.

[181] *CFPB Announces Large Bank Supervision to Begin July 21, Provides Additional Details on Supervision Process*, TROUTMAN SANDERS CFPB REPORT, http://www.cfpbreport.com/2011/07/939/ (last visited Nov. 20, 2011).

[182] *Rooting Out Discrimination In Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Servs.*, 110 Cong. 38 (2007) (statement of Sandra L. Thompson, Director, Div. of Supervision and Consumer Prot., Fed. Deposit Ins. Corp.). Critics argue for expanded data collection under HMDA, such as the collection of credit scores, to enhance the ability of regulators to screen out potential ECOA violators. *See* Taylor, *supra* note 1, at 285 ("By amending Regulation C to require subprime lenders to report credit score information, the FRB and other fair lending enforcement agencies can identify potential ECOA violators more accurately and therefore use their resources more efficiently to investigate subprime creditors for discriminatory lending practices.").

[183] *See* Taylor *supra* note 1, at 283 (discussing variables that are not included in HMDA data but are used by lenders to set loan prices).

[184] *Highlights* to U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52.

[185] *See* Taylor *supra* note 1, at 285 ("By amending Regulation C to require subprime lenders to report credit score information, the FRB and other fair lending enforcement agencies can identify potential ECOA violators more accurately and therefore use their resources more efficiently to investigate subprime creditors for discriminatory lending practices."); *see also* GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 28 (mentioning that HMDA data can help regulators prioritize resources, but also mentioning that the

availability of the HMDA data has led mortgage lenders to review their loan decisions more carefully to ensure compliance with their lending laws."[186]

Pursuant to a congressional request for an overview of federal oversight and enforcement of fair lending laws, the GAO noted in a July 2009 report that Regulation B's data collection ban "impedes federal oversight efforts" by prohibiting lenders from collecting personal characteristic data, such as applicants' race, ethnicity and sex for nonmortgage loans.[187] The GAO determined that such data would better ensure that ECOA enforcement agencies and depository institution regulators have the "critical data necessary to help carry out their fair lending responsibilities."[188] In concluding that nonmortgage lenders are not examined rigorously enough for lending discrimination violations, the GAO cited the Federal Reserve's experience.[189] The GAO reported that, since 2005, the Federal Reserve annually used HMDA data to identify approximately 200 lenders with pricing disparities based on ethnicity or race and disseminated this list to other agencies and regulators for their review.[190] Moreover, the Federal Reserve believed that a "requirement to collect, report, and publicly disclose race, ethnicity, and gender data for lending other than mortgages, such as small business, may promote fair lending enforcement."[191] Although most

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lack of key information to measure borrowing risk reduces its effectiveness).

[186] *Hearing on GAO Report on Regulation B*, *supra* note 15, at app. 51 (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.).

[187] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 14 ("[R]egulation B . . . generally prohibits lenders from collecting personal characteristic data, such as applicants' race, ethnicity and sex, for nonmortgage loans, such as small business and credit card loans, which also impedes federal oversight efforts.").

[188] *Id.*

[189] *See id.* at 63 ("While requiring lenders to collect and report personal characteristic data for nonmortgage loans as well as associated underwriting data as may be appropriate raises important cost and complexity concerns, the absence of such data represents a critical limitation in federal fair lending oversight efforts.").

[190] *Id.* at 3.

[191] *Hearing on GAO Report on Regulation B*, *supra* note 15, at 8 (statement of Sandra F. Braunstein, Director, Div. of Consumer & Cmty. Affairs, Bd. of Governors of the Fed. Reserve Sys.).

of the July 2009 report examines HMDA data limitations and the structure of the United States financial regulatory system, a key finding is that data limitations in nonmortgage credit challenge federal ECOA oversight and enforcement efforts.[192]

The GAO reached similar conclusions in two earlier reports concerning federal oversight of the ECOA. In an August 1996 report, the GAO reviewed efforts to oversee and enforce fair lending laws and discussed the challenges of detecting discrimination and ensuring compliance.[193] Of particular concern was possible discrimination in the home mortgage market due in large part to repeated media reports that members of various racial and ethnic groups were more likely to be denied credit for a home mortgage loan than white applicants with comparable income.[194]

With respect to its findings, the GAO concluded that even though banking regulatory agencies had made efforts to strengthen their ability to detect discrimination through improved examination procedures, problems remained in some areas.[195] Among these were the need for uniformity across agencies in the fair lending examination process and better methods for detecting discrimination prior to a prospective borrower's submission of a formal application.[196] Unresolved legal issues involving, among other things, interpretations of statutory language, such as "pattern and practice" discrimination and problems associated with the disparate impact test, were also mentioned as issues that present significant and continuing challenges.[197] Despite these challenges, the 1996 report concluded that federal agencies had made substantial progress in the area of ECOA oversight that was made possible, in part, by the 1989 HMDA amendments that require mortgage lenders to collect and report race data.[198]

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[192] GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 14.

[193] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 178, at 2 (stating that the GAO had been asked to "(1) review federal efforts to oversee and enforce the fair lending laws and (2) discuss the challenges federal regulators face in their efforts to detect discrimination and ensure compliance").

[194] *Id.*

[195] *Id.* at 4.

[196] *Id.* at 58.

[197] *See id.* at 9, 58 (discussing unresolved legal issues revealed through a survey of bank compliance officers and agency examiners).

[198] *See id.* at 5-6 ("Among the more notable of these were amendments to HMDA, which provided for the creation of a database on mortgage lending activity for use by both regulators and the public . . . ."). The GAO Report

The HMDA's instrumentality in increased federal oversight and more vigilant enforcement of the ECOA was revealed further in a June 2008 GAO report.[199] This report specifically addressed the question of whether data limitations in nonmortgage lending created barriers to federal oversight of the ECOA.[200] The report was in response to a request from Congress for the GAO to conduct a review of issues surrounding the ECOA and Regulation B.[201] In one section of the report, the GAO discussed available research on possible discrimination in nonmortgage lending and reviewed the strengths and limitations of the data that researchers and regulators use to detect possible discrimination.[202]

In contrast to nonmortgage credit, the June 2008 GAO report noted that home mortgage loans capture most of the attention of regulators who search for lending discrimination. The report states that:

> Our reviews of agency fair lending examination guidance and discussions with some agency staff [OCC, FDIC, and OTS] suggest that, due in part to HMDA data availability agencies, focus most of their resources on possible discrimination in mortgage lending rather than nonmortgage lending.[203]

In addition, the report noted that examiners at one Federal Reserve Bank were unable to conduct thorough fair lending exami-

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also cited improved examination procedures and techniques as factors contributing to enhanced regulatory oversight of the ECOA.

[199] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 9 ("Representatives from the four federal bank regulatory agencies we contacted (FRB, OCC, FDIC, and OTS) said that the availability of HMDA data had facilitated the fair lending law examination process.").

[200] *See id.* at 2 ("[D]iscuss available research on possible discrimination in nonmortgage lending and review the strengths and limitations of the data that researchers and regulators use to detect possible discrimination . . . .").

[201] *See id.* ("This report responds to [Congress'] request that we conduct a review of the issues surrounding Regulation B.").

[202] *See id.* at app. at 30 ("[The GAO] conducted a literature review to identify studies that used nationwide databases and statistical techniques to identify possible discrimination in nonmortgage lending, identified the reports' key findings, and assessed the strengths and weaknesses of key data used to support the studies' findings, particularly in comparison to HMDA data.").

[203] *Id.* at 10.

nations or review consumer complaints alleging discrimination for nonmortgage loans due to the lack of available data.[204] Further, the report concluded that without data on the personal characteristics of nonmortgage applicants, the capacity of enforcement agencies and regulators to identify potential lending discrimination is limited.[205] In particular, it noted that "[r]equiring lenders to collect and publicly report data on personal characteristics for nonmortgage loan applicants could help address some of the current data limitations that complicate efforts to better understand the potential for discrimination . . . ."[206] With specific reference to the above 2008 GAO report's conclusion, a FRB representative remarked, "we agree with the position that if there was good data collection, it could be helpful."[207] Although the report indicates that the FRB did not take an official position, such language could reasonably be interpreted as an endorsement for the collection of race data.[208]

According to the June 2008 report, some examiners may attempt to overcome the data limitations by using surrogates to make educated guesses about the race of nonmortgage loan applicants.[209] Such "guessing" might involve assuming that an applicant is Hispanic based on the applicant's last name or that an applicant is African American based on the census tract of the address.[210] While

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[204] *Id.* at 18.

[205] *See id.* at 12 ("In the absence of similar data on personal characteristics for nonmortgage loans, regulators may rely on more time-consuming and possibly unreliable techniques to conduct oversight, potentially impeding the relative efficiency of the fair lending examination process for nonmortgage loans.").

[206] *Id.* at 7.

[207] *Hearing on GAO Report on Regulation B*, *supra* note 15, at 18.

[208] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 5 (indicating that the collection of race data may be helpful in order to better understand if "discrimination may play a role in certain types of nonmortgage lending").

[209] *See id.* at 17 ("In the absence of similar race, gender, and other data on personal characteristics for nonmortgage loan applicants, regulators may rely on time-consuming and possibly unreliable techniques to assess lenders' compliance with fair lending laws."); *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY ET AL., INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES 12-13 (2009) (assuming that at least some examiners have followed fair lending enforcement guidelines that suggest the use of these surrogates for the race of credit applicants).

[210] *Highlights* to U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66.

these techniques may be correct in identifying the racial characteristics of some loan applicants, they have great potential for error (e.g., not all residents of a particular census tract may actually be African American, such as the plaintiff in *Cherry*).[211] Consequently, using the "guessing" technique and other proxies to overcome the race data deficiency makes federal oversight of nonmortgage lenders less efficient and more problematic than it is for mortgage lending where HMDA data are available.[212]

C. Summary

In several studies, the GAO has indicated that the lack of personal data on credit applicants profoundly impacts regulatory efforts to monitor nonmortgage lenders for ECOA compliance.[213] The studies point out the difficulty in determining whether racial discrimination is taking place in nonmortgage credit markets without race data.[214] The GAO acknowledges that the use of HMDA-like data is no panacea to rooting out unlawful conduct in nonmortgage credit transactions, as demonstrated by the problems associated with data collection in the home mortgage market.[215] Nonetheless, the GAO concludes that the need for transparency in non-mortgage

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[211] *Id.; see also* Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (noting a white woman living in a predominately black neighborhood).

[212] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 5 (stating that, in the absence of data for nonmortgage lending, examiners use "other approaches that are time-consuming and may be less reliable"); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 19 ("Under the interagency procedures, examiners may make use of established "surrogates" to deduce nonmortgage loan applicants' race, ethnicity, or sex . . . [and] there is the potential for error in the use of such surrogates.").

[213] GOV'T ACCOUNTABILITY OFFICE, *supra* note 178, at 4.

[214] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 12 (stating that, without data on nonmortgage lending, "regulators may rely on more time-consuming and possibly unreliable techniques to conduct oversight, potentially impeding the relative efficiency of the fair lending examination process for nonmortgage loans.").

[215] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 178, at 4 (indicating that identifying unlawful conduct in the mortgage market "was made more difficult by poor quality HMDA data.").

situations is acute and that missing data is a serious deficiency that should be addressed.[216]

III. Should Congress Lift the Regulation B Ban and Mandate Data Collection in All Nonmortgage Credit Markets?

Restricting the collection of applicants' personal information to home mortgage loans presents a delicate problem. On one side of the debate, some argue that the Regulation B prohibition on data collection reduces rather than enhances the rights of consumer complainants and is unduly burdensome or preclusive to ECOA plaintiffs.[217] Proponents for lifting the ban contend that the collection of race data is imperative to effective federal enforcement and oversight of the ECOA.[218] These proponents see the ban as a roadblock in the route to obtaining true equal opportunity in credit markets.[219] On the other side of the debate are those who argue that expanded data collection will heighten the possibility of lending discrimination because financial institutions will know the race and gender of credit applicants.[220] Supporters for retaining the ban suggest that permitting the collection of racial information is reminiscent of the Jim Crow era in American history and could create tension in a nation that already struggles with a myriad of racial issues.[221]

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[216] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 28 ("[F]rom a public policy perspective, considering the trade-offs of various options to enhance available data, from a purely voluntary program to a data collection and reporting requirement, may be warranted.").

[217] *See Highlights* to U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66 ("Requiring lenders to collect and publicly report data on personal characteristics for nonmortgage loan applicants could help address current data limitations that complicate efforts to better assess possible discrimination . . . .").

[218] *Id.*

[219] *Id.* at 6 (explaining that proponents believe that data on nonmortgage lending could "provide important insights into possible discrimination . . . ").

[220] *Id.*

[221] *See* Letter from James A. Landrith, Jr., Editor & Publisher, The Multiracial Activist, and Charles Michael Byrd, Editor & Publisher, Interracial Voice, to Jennifer J. Johnson, Secretary, Bd. of Governors of the Fed. Reserve Sys. (Nov. 10, 1999) (on file with author) (noting that the United States has only recently overcome Jim Crow laws and that retracting the ban would promote "the concept of race as credible and necessary").

Lifting the Regulation B ban and expanding data collection will improve regulatory oversight of the ECOA and ameliorate litigation difficulties that ECOA plaintiffs face. That said, the question becomes whether policymakers should lift the ban and mandate data collection in nonmortgage credit transactions despite compelling justifications that have been advanced for retaining it.[222] It will be recalled that the data ban emerged from the FRB's concern in 1977 that lenders who gather race data will likely use it to unlawfully discriminate against racial minorities protected by the ECOA.[223]

One aspect of the current lending environment that seems to cut against the concerns about increased lending discrimination if the ban is lifted is that, unlike the 1970s when the FRB drafted the ban, most lending decisions today are automated.[224] With the rise of credit scoring systems, which employ computer-based decision making,[225] individual contact between loan officers and credit applicants is rare.[226] This technological advance in evaluating credit applicants has

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[222] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 14 (highlighting potential problems like the imposition of "additional costs, particularly on smaller institutions with limited recordkeeping systems" and the increasing chance that data will be used to discriminate.).

[223] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 1 ("In 1975, FRB established the general prohibition as a means of discouraging discrimination in lending, based on its belief that if lenders could not inquire about or note such information on applicants' personal characteristics, they would be less likely to unlawfully consider it when making lending decisions.").

[224] *See* Noel Capon, *Credit Scoring Systems: A Critical Analysis*, 46 J. MARKETING 82, 83-84 (1982) ("[J]udgment methods that involve the exercise of individual judgment by a credit officer on a case-by-case basis were increasingly being replaced by a new methodology, credit scoring. . . [and] innovative creditors have long sought more automated ways of making credit decisions."); Andrew Leyshon & Nigel Thrift, *Lists Come Alive: Electronic Systems of Knowledge and The Rise of Credit-Scoring in Retail Banking,* 28 ECON. & SOC'Y, 434, 434 (1999) ("[G]reater emphasis has been placed on the more systematic us of empirical information on customers derived from other sources, made possible by the rise of computers, software and databases.").

[225] Credit scoring systems use statistical methods that predict the probability of loan default when evaluating credit applications. David C. Hsia, *Credit Scoring and the Equal Credit Opportunity Act,* 30 HASTINGS L.J. 371, 371 (1978).

[226] *See id.* at 372 ("[T]he creditor seldom knows the applicant personally. . .").

arguably reduced lender prejudice that can taint the decisions of loan officers and others involved in the lending decision-making process because scoring systems can measure all credit applicants on a standardized basis.[227]

Proponents of scoring systems emphatically argue that the objectivity and uniformity of standardized evaluations benefit credit applicants, and that the evaluations will eliminate the bias in lending that stems from the subjective assessments of loan officers.[228] Recognizing that credit scoring models may have adverse effects on certain populations, particularly racial minorities, Congress asked the FRB in 2003 to study how credit scoring has affected the availability and affordability of credit to groups protected under the ECOA. Accordingly, the FRB examined the extent to which credit scoring systems accomplish the promise of non-bias lending decisions and gave them high marks.[229] Similarly, Congress favors the credit scoring evaluation process.[230] The DOJ has also emphasized that scoring technology can reduce, if not eliminate, disparate treatment lending discrimination[231] and the Office of the Comptroller of the

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[227] *See id.* at 377 (contrasting to a judgment system where "[t]he officer employs subjective standards for analysis and creditworthiness, balancing all the pertinent considerations mentally. Two officers of the same judgmental creditor may easily disagree about the acceptability of the same application.").

[228] *See* Winnie F. Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems,* 29 BUFF. L. REV. 73, 117-19 (1980) ("[A]dvocates believe that human judges cannot totally free themselves of bias, and that only scoring systems can provide the objective uniformity implicit in the ECOA's central theme that a creditor shall not treat one applicant less favorably than another for any prohibited reason. . . [c]redit applicants also benefit from the objectivity of scoring systems, since the system's impartiality will in some cases provide the applicant with a more equitable result than would the operation of a loan officer's built-in bias.").

[229] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 113 (2007) (concluding that there is little evidence that any of the credit characteristics included in its generic credit scoring system resulted in disparate effects for any racial or ethnic group).

[230] Hsia, *supra* note 225, at 378.

[231] *See* Deval L. Patrick et al., *The Role of Credit Scoring In Fair Lending Law—Panacea or Placebo,* 18 ANN. REV. BANKING L. 369, 390-91 (1999) ("Credit decisions based solely upon credit scoring models, assuming such

Currency (OCC) has endorsed use of scoring models for the national banks it regulates.[232] Further, the Federal Reserve believes that Regulation B's data collection ban seems inappropriate "for credit that typically is granted using automated underwriting systems without face-to-face contact between the creditor and the consumer . . . ."[233] Consequently, to many, scoring systems mitigate the concern about disparate treatment discrimination resulting from the bias conduct of loan officers that was more prevalent when the FRB imposed the data collection ban in 1977.

As a general matter, however, it cannot be said that scoring systems remedy all lending discrimination. Even if computerized credit scoring arguably has the potential to eliminate disparate treatment results, disparate impact discrimination may still occur.[234] In recognition of this concern, the DOJ made the following observation:

> Those who develop and use credit scoring models should take care to determine whether individual credit scoring factors or the overall systems have a disparate adverse impact on minority and other borrowers in protected classes and, if they do, whether other factors or formulations with lesser impact can be used with similar capability to predict creditworthiness.[235]

Many opponents of expanded data collection believe that the data ban should be retained, as scoring systems are neither a safe haven from disparate treatment claims, nor a shield against disparate impact challenges.[236] As a careful observer of discrimination trends has noted:

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models are properly constructed and validated, can eliminate many of the 'judgmental' types of problems that resulted in the enforcement actions.").

232 *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 97-24, CREDIT SCORING MODELS 1 (1997) [hereinafter OCC BULL. NO. 97-24] ("Credit scoring models can offer a fast, cost-efficient way to make sound decisions based on bank or industry experience.").

233 *Hearing on GAO Report on Regulation B*, *supra* note 15, at 3.

234 OCC BULL. NO. 97-24, *supra* note 232, at 11.

235 *Fair Lending Enforcement Program*, U.S. DEP'T OF JUSTICE (Jan. 2001), http://www.justice.gov/crt/about/hce/bll_01.php.

236 *See* Helen F. Ladd, *Evidence On Discrimination in Mortgage Lending*, 12 J. ECON. PERSP. 42, 59 (1998) ("[C]redit scoring might simply substitute

> [T]here is a danger that a credit scoring model may have built into it standards that have adverse impacts on minority borrowers and that cannot be justified in terms of the riskiness of the loan. In this way, credit scoring might simply substitute discrimination in the form of adverse impacts for discrimination in the form of disparate treatment.[237]

Due to automated evaluation systems, discrete acts of discrimination are no longer the major type of unlawful discrimination that exists in credit markets today.[238] The problem of racial discrimination has become a statistical one.[239] How should the issue of expanded data collection best be resolved in light of this fact? Examining the issue from the lender's perspective, expanded data collection is unnecessary because scoring systems are the answer to fair lending claims of impermissible bias because all applicants are similarly evaluated.[240] When viewed from the consumer perspective, however, one could argue that scoring systems are insidious discriminators because of their apparent objectivity and the extreme difficulty of proving whether they actually produce unlawful disparate effects on ECOA protected groups.[241] Without race data,

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discrimination in the form of adverse impacts for discrimination in the form of disparate treatment.").

[237] *Id.*

[238] *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 121 (1993) ("The most significant form of racial discrimination that exists in contemporary American culture is statistical discrimination."); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1452 (1995) ("[D]iscrete acts no longer constitute the major type of racial discrimination that exists in the United States.").

[239] *See* Spann, *supra* note 238, at 1452 ("As a result, the contemporary problem of racial discrimination has become statistical in nature.").

[240] *See* Patrick et al., *supra* note 231, at 382 (quoting OCC BULL. NO. 97-24, *supra* note 232, at 9) (explaining that lenders feel they "can 'avoid overt discrimination by understanding the prohibited bases . . . and ensuring that the credit scoring systems do not include them as predictive variables'").

[241] *See id.* at 383-84 (listing various ways to prove disparate treatment, all of which require data about the applicants and about the scoring system itself, which does not exist with the prohibition on data collection); Spann, *supra*

how will anyone know whether scoring systems result in racial, gender or other prohibited disparities? Moreover, even with race data, disparate impact lending claims may be almost impossible to prove due to the complexity of credit scoring systems.[242] In addition, assuming theoretically that unlawful disparate effects can be proven, the expense of doing so will likely be problematic for ECOA litigants. Given the enormity of these challenges, data collection policy should assist fair lending enforcement officials in their efforts to provide the oversight necessary to ensure that scoring systems comply with the ECOA. Thus, in the final analysis, the trend toward use of scoring technology supports expanded data collection.

Despite the intuitive appeal of the argument that lending discrimination will likely increase if data collection is expanded to nonmortgage lenders, no one has identified any studies to support it.[243] Indeed, there may be none given the difficulty of testing this theory. There is also no empirical support for the belief that expanded collection of race data in the consumer credit market would increase racial tension nationally. Implicit in this theory is the assumption that racial minorities, in particular, will take umbrage to nonmortgage lenders' requests for race data. Although measuring public opinion on this theory is challenging, it is not impossible. Policymakers should therefore facilitate research on the question of whether the racial climate in contemporary society makes expanded data collection in credit markets infeasible.

Additionally, policymakers should consider social science literature to better inform their decision about mandating the collection of race data beyond home mortgage loans. For instance, the Commonwealth Fund Study, *Patients' Attitudes Toward Health Care Providers Collecting Information About Their Race and Ethnicity*,[244]

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note 238, at 1450-51 (discussing the difficulty that plaintiffs face to satisfy the Article III case-and-controversy requirements).

[242] *See* Spann, *supra* note 238, at 1455-57 (highlighting the difficulty of proving a program's discriminatory effect and discriminatory intent).

[243] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 26 ("The Federal Reserve concluded in 2003 that lifting Regulation B's general prohibition and permitting voluntary collection of data on personal characteristic data for nonmortgage loan applicants . . . could create some risk that the information would be used for discriminatory purposes," but did not specify any study or data to support the FRB claim).

[244] David W. Baker et al., *In the Literature: Patients' Attitudes Toward Health Care Providers Collecting Information About Their Race and Ethnicity*, 21 J. GEN. INTERNAL MED. 895, 895 (2006).

is especially insightful, although it was done to address data collection in another field. According to a study summary, when polled, eighty percent of participants in the study agreed that it was important for health care providers to collect and track information on patients' race and ethnicity.[245] However, black patients were more likely than white patients to express concern that the information would be used to discriminate against them.[246] Also, compared with white patients, black and Hispanic patients more often reported that they would be less likely to go to a hospital that routinely collected race and ethnicity information (nineteen percent and twenty-six percent respectively, compared with seven percent for white patients).[247] Such information on American attitudes in the credit context could contribute much to the policy debate about whether the data ban should be lifted completely and all lenders required to collect personal information from credit applicants.

IV. *If Data Collection Is Expanded Beyond Home Mortgage Credit, Should It Extend to Some, But Not All, Nonmortgage Lenders?*

Whether blanket expansion of the data collection requirement is the best way to ensure fair lending in all credit markets is not an easy question. Even if the research shows that the public is indifferent when it comes to giving racial data in credit transactions, sound policy concerns may nevertheless warrant limited expansion. Most notably, cost must be considered, as the GAO, the FRB and the FTC have pointed out.[248] Cost considerations were also a central focus of a 2008 Congressional subcommittee hearing on whether

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[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 10 (noting that "mandatory data collection and reporting would impose some additional costs on the lending industry, although opinions differed on how burdensome these costs might be."); Letter from William E. Kovacic, Chairman, Fed. Trade Comm'n, to Rep. Melvin L. Watt, Chairman, Subcomm. on Oversight & Investigations 3-4 (July 15, 2008) (on file with author) ("Any benefits would need to be balanced carefully against the costs of such a collection regime, including the need to protect adequately the sensitive data collected.").

mandatory data collection should cover all loans.[249] At that hearing, Chairman Melvin Watt stated "we have made a commitment here this morning to have a hearing about the cost, because I think it is important for us to assess not only the benefit of collecting data, but the cost that would be incurred in the collection process."[250]

As previously mentioned, the GAO concluded in its July 2009 Fair Lending Report that the lack of race and other personal data of borrowers in nonmortgage credit limits federal oversight of such lending.[251] The GAO identified cost concerns as a major obstacle to resolving the missing data problem by expanding data collection.[252] In particular, the GAO noted that requiring non-mortgage lenders to collect and report such data "would impose costs on them, particularly smaller institutions."[253] These costs could consist of "information system integration, employee training, and compliance costs."[254] To address this problem, the GAO suggested that an expanded data collection and reporting requirement could be limited to "larger institutions."[255] The GAO observed:

> Requiring lenders to collect and publicly report additional data could benefit federal oversight efforts as well as independent research into potential discrimination in lending, but also would impose additional costs, particularly on smaller institutions with limited recordkeeping systems. Several options, such as limiting additional data collection and reporting requirements to larger lenders, could help mitigate such costs while better ensuring that enforcement agencies and depository regulators have

[249] *See Hearing on GAO Report on Regulation B*, *supra* note 15, at 8 (explaining that any data collection requirement "could impose significant costs on lenders.").
[250] *Id.* at 34.
[251] *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 26 ("In the absence of personal characteristic data for nonmortgage loans, we found that agencies tended to focus their oversight activities more on mortgage lending rather than on areas such as automobile, credit card, and business lending that are also subject to fair lending laws.").
[252] *See id.* at 27 (identifying potential costs like "information system integration, employee training, and compliance costs.").
[253] *Id.* at 62.
[254] *Id.* at 27.
[255] *Id.* at 14.

> critical data necessary to help carry out their fair lending responsibilities.[256]

I agree with the GAO that to mitigate potential lender costs, smaller lenders should be exempted from a requirement to collect and publicly report personal characteristic data. Exemptions based on an institution's size are not uncommon in banking regulations.[257]

As an additional cost-mitigating factor, lenders could be required to collect personal characteristic data for only certain types of loans.[258] There are many different types of nonmortgage loans, including credit cards and vehicle loans. Several factors should determine which loan types require data collection, particularly the extent to which there is evidence of potential discrimination in a particular market. For instance, public and private ECOA litigation, extensive commentary by legal scholars and expert witnesses in ECOA class actions involving automobile dealer markups all suggest that race data is needed to better enforce fair lending laws with respect to automobile loans.[259] As Professor Ian Ayres has noted:

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[256] *Id.*

[257] *See, e.g.,* 12 U.S.C. § 2803(i) (2006) (providing an exception from reporting requirements for institutions with "total assets . . . of $30,000,000 or less").

[258] GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 27.

[259] *See, e.g.,* Osborne v. Bank of Am. Nat'l Ass'n., 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002) (discussing Plaintiff successfully alleging a causal connection between car loan financing policies and disparate impact on African Americans, although not discussing whether Plaintiff has enough evidence to win the claim); Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315, 324 (M.D. Tenn. 2000) (Stating that "[t]here is a clear dispute between the parties as to the significance of the statistical findings of the experts," which indicates that more empirical evidence in the automobile market may be useful); Smith v. Chrysler Fin. Co., No. 00-CV-6003 (DMC), 2003 WL 328719, at *5-*6 (D.N.J. Jan. 15, 2003) (explaining that necessary facts a Plaintiff must allege in order to claim disparate impact, many of which require statistical data on the overall impact of an allegedly neutral financing system). *See generally,* Ian Ayres, *Fair Driving: Gender and Racial Discrimination In Retail Car Negotiations,* 104 HARV. L. REV. 817, 817 (1991) (pioneering empirical evidence of disparate treatment discrimination against blacks and women by retail car dealerships); Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard For Assessing When Disparate Impacts Are Justified,* 95 CAL. L. REV. 669, 669 (2007) (highlighting the need for enforcement of fair lending laws as

> While the impulse for race and gender discrimination in car markets (for example, the search for high-markup sellers) may not be the same impulse driving discrimination in other markets, the car market probably shares with other markets an important structural aspect that creates an opportunity to discriminate. Just as the car buyer has trouble knowing how other consumers are treated, there are myriad aspects of service and accommodation in which it is difficult for a consumer to know how other consumers are treated. A seller's nondiscrimination along these dimensions of service are a "credence" good that consumers to a large degree must simply take on faith. And these are just the dimensions where discrimination is most likely to persist.[260]

In contrast, there does not appear to be sufficient evidence to justify mandating collection and reporting of race data in the credit card industry, even though large lenders dominate the market.[261]

Unfortunately, the legislative history of the 2011 financial reform legislation that expands personal data collection to small business lenders does not provide insight into why Congress mandated the collection of race and sex data for small business loans. This opportunity for congressional guidance on data collection expansion is sorely missed.

"African-American borrowers paid almost $400 more in markups than white borrowers in loans from these lenders.").

[260] IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 161-62 (2001).

[261] *See* Daryl E. Getter, *Consumer Credit Risk and Pricing,* 40 J. CONSUMER AFF. 41, 60 (2006) (finding discrimination patterns particularly prevalent against Hispanic credit card users); Ethan Cohen-Cole, *Credit Card Redlining* 2-3 (Fed. Reserve Bank of Boston, Working Paper No. QAU08-1, 2008) (concluding that individuals in minority neighborhoods receive less consumer credit from credit card issuers than those living in white neighborhoods, in spite of identical credit scores and community characteristics). *But see* Amberly Hazembuller et al., *Unlocking the Risk-based Pricing Puzzle: Five Keys to Cutting Credit Card Costs,* 53 CONSUMER INT. ANN. 71, 81 (2007) (finding no evidence of racial discrimination in the credit card context).

Conclusion

By promulgating the ECOA, Congress made fair lending and the eradication of discriminatory lending practices a public policy objective. When Congress later required lenders to collect and publicly report personal information on credit applicants in the housing market, Congress signaled that race data collection could be a useful tool in combating lending discrimination. Personal information data could also help further the nation's fair lending policy objectives in nonmortgage credit transactions. A government mandate that requires nonmortgage lenders to collect information on the racial background of potential borrowers in certain transactions may prove to be more beneficial to achieving these antidiscrimination goals than the data collection ban. Accordingly, policymakers should partially lift Regulation B's data collection restriction and mandate collection of race data in automobile financing and other credit markets where there is substantial evidence indicating that racial discrimination may still be a major problem. Credit markets where the ban will continue should be closely monitored and lenders should be admonished that the ban will eventually be lifted in any market where there is compelling evidence that lending discrimination exists.

Limited expansion of the data collection requirement responds to the anti-regulation concerns about data privacy issues, costs to consumers and lenders, and American attitudes toward sharing racial information when applying for credit. Because the CFPB is primarily concerned with ensuring that our society has a marketplace that promotes fairness and transparency for consumer financial products and services, it is uniquely positioned to investigate the missing data problem and draft regulatory mandates to address it. Although Congress could mandate expanded data collection, the CFPB's independent status may better enable it to find shelter from the influence of interest-group politics that can sometimes affect legislative decisions.