American Financial Services Association
Protecting Credit Since 1916

August 31, 2018

Jorge Perez, Commissioner
Connecticut Department of Banking
260 Constitution Plaza
Hartford, CT 06103-1800

Re: HB 5490/Public Act 18-173 acquisition of retail installment contract applicant race, sex, and ethnicity data

Dear Commissioner Perez:

I write on behalf of the American Financial Services Association ("AFSA"),[1] to express our serious concerns regarding Section 97 of Public Act 18-173, which requires sales finance companies to acquire and report the ethnicity, race, and sex of any applicant or co-applicant for a retail installment contract for the sale of a motor vehicle. This requirement is in direct conflict with federal law, making it impossible for sales finance companies or vehicle dealers to comply with the law. The law in its current form is likely to cause significant harm to both Connecticut residents and the larger indirect auto finance market.

Equal Credit Opportunity Act/Regulation B Prohibition on Collecting Certain Prohibited Bases Data

The federal Equal Credit Opportunity Act (ECOA), implemented by Regulation B, prohibits discrimination on any prohibited basis: race, color, religion, national origin, sex, marital status, or age, provided the applicant has the capacity to contract; the fact that all or part of the applicant's income derives from a public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[2] Accordingly, Reg. B generally prohibits collection of race, color, religion, national origin and/or sex, with two express exceptions to this rule: a creditor's self-testing purposes, subject to certain restrictions; and an applicant may be requested to designate a title on an application form (such as Ms., Miss, Mr., or Mrs.) if the form discloses that the designation of a title is optional. An application form shall otherwise use only terms that are neutral as to sex.[3]

ECOA/Reg. B data collection restrictions may also be modified by the Bureau of Consumer Financial Protection (BCFP) or Congress.[4] For example, a creditor must request information for monitoring purposes as required by 12 CFR §1002.13 for credit secured by the applicant's dwelling (relating to the Home Mortgage Disclosure Act (HMDA) and Regulation C). ECOA

[1] Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

[2] *15 U.S.C. §1691(a); 12 C.F.R. §1002.4(a).*

[3] *12 C.F.R. §1002.5(b).*

[4] *12 CFR §1002.5(a)(2).*

also requires collection of information about small business, women-owned business and minority-owned business (subject to rules to be promulgated by the BCFP).[5]

A creditor *may* obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the Attorney General of the United States or a similar state official) to monitor or enforce compliance with the Act, this part, or other Federal or state statutes or regulations.[6] This provision permits limited data collection required by state law or court order.

States may enforce their own duly enacted fair lending laws[7]; however, such laws must be consistent with ECOA/Reg. B.[8] Such states may seek remedies under either their state fair lending law or ECOA (if the violation at issue would also be an ECOA/Reg. B violation), but not both.[9] If a state does not have its own fair lending law, it has no jurisdiction to enforce ECOA/Reg. B, nor can it do so by operation of the Dodd-Frank Act.[10] Because Connecticut has no fair lending law (only this data acquisition statute) it has no substantive requirement or ECOA-like provision to enforce and no such remedies available under ECOA. It only has a pending stand-alone data acquisition requirement with no corresponding law for which the data is required to monitor or enforce compliance. In other words, the only requirement is to collect the data and the only law to enforce is the data collection requirement.

Because Connecticut (1) has no substantive state law to enforce, (2) cannot obtain remedies under ECOA, and (3) there is no order or agreement entered into with a court or enforcement agency requiring compliance with a state fair lending law or ECOA/Reg. B, the ECOA/Reg. B data collection restrictions apply to persons subject to the pending state data collection law. This conflict between Connecticut's data collection requirements and the Reg. B limitations on data collection means that persons complying with the pending state data collection law will be in violation of the ECOA/Reg. B data collection restrictions and subject to liability under ECOA.

Additional Collection Difficulties

In addition to the problem created by the direct conflict with ECOA, sales finance companies are not in a position to acquire the data due to the nature of the indirect vehicle finance market. The vehicle finance market is a disaggregated market with many potential purchasers of retail installment contracts available to dealers. Indirect finance sources include both sales finance companies, which are covered by the statute, and banks, which are not covered by the statute.[11]

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[5] *15 U.S.C. 1691c-2.*
[6] *12 C.F.R. §1002.5(a)(2).*
[7] Note: "regulation" includes a "State statute"; see generally Comment 1 to *12 C.F.R. §1002.5(a)(2)*
[8] *15 U.S.C. §1691d(f).*
[9] *15 U.S.C. §1691d(e).*
[10] See *15 U.S.C. §1691c* and *12 U.S.C. §5552*. While the Dodd-Frank Act preserves state authority, state attorney general enforcement is limited to Dodd-Frank provisions and regulations issued thereunder. Reg. B is issued under ECOA, not Dodd-Frank.
[11] The statute expressly excludes banks from the definition of sales finance company. See *Conn. Gen. Stat. § 36a-535*.

Vehicle dealers are, with limited exception, not covered by the statute.[12] Sales finance companies have no ability to collect the required information independent of the dealers because they do not directly interact with the customer until such time as they acquire a retail installment contract. Given the inability to collect, particularly for accounts potentially but not ultimately assigned to a given sales finance company, the sole source of information is a party to whom the collection statute does not apply: the dealer.

Because dealers relevant to this discussion are not covered by the statute, the implications for those dealers are significant. Even if compliance with this statute didn't independently violate Reg. B for the sales finance company (and it does), for purposes of discussion only, assuming collection were permitted by the dealer and finance company under ECOA, if a dealer collects the information and assigns the account to a non-covered bank, the dealer will have violated ECOA by definition.

Disruption to Credit Markets

Given the risks to all parties involved, this collection requirement is likely to have a material and negative market impact, causing significant disruption of access to credit for vehicle purchases. Burdened by a law with which they cannot comply, sales finance companies will be faced with the option of not purchasing Connecticut contracts or violating the state data collection statute.[13] Faced with that option, sales finance companies, representing a significant portion of the market, are unlikely to purchase those contracts both because of the state law violation and the fact they will be unable to securitize those contracts to obtain access to capital. In such a situation, the sole source of capital for dealers seeking to assign contracts will be non-covered banks. Because of safety and soundness considerations, and with limited exceptions, those Connecticut consumers presenting increased risk of loss based on credit history will be frozen out of the market and have no choice but to purchase and finance vehicles through less scrupulous sources.

The secondary market for retail installment contracts is a robust market and a primary source of capital for sales finance companies. Parties seeking to securitize contracts are required to make numerous representations and warranties as to all aspects of the transactions to be included in the securitization. These representations include that the contracts were validly originated and comply with all applicable laws. Because sales finance companies do not typically retain contracts on their balance sheet, sales finance companies covered by the law would necessarily be forced to exit the market.

Given the prohibitions under ECOA from collecting this information, as well as the implications of this law on the market and access to credit for lower credit quality Connecticut residents, the law in its current form is likely to cause significant harm to both Connecticut residents and the larger indirect auto finance market. For these reasons, we request you issue a no-action letter or similar relief on this section of the Connecticut data collection statute.

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[12] Exception exists for buy-here-pay-here dealers who retain contracts and collect payments under the definition of "sales finance company." See *Conn. Gen. Stat. § 36a-535*.

[13] Some states require sales finance companies to disclose violations of other jurisdictions' laws, creating the prospect of disclosing a Reg. B violation or a CT statutory violation.

Thank you in advance for your consideration. We appreciate the Department's prompt attention on this matter. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 952-922-6500 or dfagre@afsamail.org.

Sincerely,

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