

Lending Discrimination By ADR Staff

The Consumer Financial Protection Bureau (CFPB) is responsible for enforcing the Equal Credit Opportunity Act (ECOA) and the implementing Regulation B. The Office of Fair Lending and Equal Opportunity at the CFPB issued notice in early 2012 that they are prepared to use every tool at their disposal to ensure that lenders abide by both the letter and the spirit of the ECOA. In their words:

“We are letting both lenders and consumers know that in our examination and enforcement work, we will combat unlawful, discriminatory practices – including those that have an illegal disparate impact on protected borrowers. We will look not only at mortgage lending, but also at other types of credit including student loans, loans for cars, and credit cards.”

As a reminder to our dealers, the ECOA prohibits discrimination based on

- Race or color
- Religion
- National origin
- Sex
- Marital status
- Age (provided the applicant has the capacity to contract)
- The applicant’s receipt of income derived from any public assistance program
- The applicant’s exercise, in good faith, of any right under the Consumer Credit Protection Act.

The courts have recognized three types of proof of lending discrimination under the ECOA:

- Overt evidence of disparate treatment
- Comparative evidence of disparate treatment
- Evidence of disparate impact

It’s important to realize that discrimination in lending practices is not necessarily obvious. Discrimination can occur by discouraging an applicant, by withholding assistance, or even by establishing a business policy that – however unintentionally – has the effect of excluding certain classes of persons. Following are examples of situations the courts would consider lending discrimination.

Overt Evidence of Disparate Treatment

Overt evidence of disparate treatment exists when a lender openly discriminates on a prohibited basis.

Example: A lender offers a credit card with a limit of up to \$750 for applicants age 21-30 and \$1,500 for applicants over 30. This policy violates the ECOA’s prohibition on discrimination on the basis of age.

Overt evidence of discrimination also exists even when a lender expresses – but does not act on – a discriminatory preference.

Example. A lending officer tells a customer, “We do not like to make loans to Native Americans, but the law says we may not discriminate and we have to comply with the law.” This statement violates Regulation B, which prohibits discouraging applicants on a prohibited basis.

Comparative Evidence of Disparate Treatment

Disparate treatment occurs when a lender treats a credit applicant differently on the basis of one of the prohibited factors. It’s important to note that intention to discriminate does not have to be present. Discrimination can occur, for instance, based upon the level of assistance provided by the lender in completing a credit application.

Example. A nonminority couple applies for an automobile loan. The lender finds adverse information in the couple’s credit report. The lender discusses the credit report with the couple and determines that the adverse information, a judgment against the couple, was incorrect, as the judgment had been vacated. The nonminority couple was granted a loan. A minority couple applied for a similar loan with the same lender. Upon discovering adverse information in the minority couple’s credit report, the lender denies the loan application on the basis of the adverse information without giving the couple an opportunity to discuss the report.

Evidence of Disparate Impact

A disparate impact occurs when a lender applies a racially (or otherwise) neutral policy or practice equally to all credit applicants but the policy or practice disproportionately excludes or burdens certain persons on a prohibited basis.

Example. A lender’s policy is to deny loan applications for single-family residences for less than \$60,000. The policy has been in effect for ten years. This minimum loan amount policy is shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live.

Although the law on disparate impact as it applies to lending discrimination continues to develop, it has been clearly established that a policy or practice that creates a disparity on a prohibited basis is not, by itself, proof of a violation. To not be considered a violation, however, the practice must first be justified by “business necessity”. If business necessity is established, the practice may still be a violation if an alternative practice could serve the same purpose with less discriminatory effect. It’s important to note, again, that discriminatory intent is not necessary to establish discrimination.

If your dealership is involved in financing your sales, take steps to ensure you are abiding by both the letter and the spirit of the ECOA. Consider posting a written statement of non-discrimination, educating your staff, and reviewing your policies. **BE IN COMPLIANCE.**