



UNSAFE AT ANY BUREAUCRACY, PART II:  
HOW THE BUREAU OF CONSUMER FINANCIAL PROTECTION  
REMOVED ANTI-FRAUD SAFEGUARDS TO ACHIEVE POLITICAL GOALS

REPORT PREPARED BY THE REPUBLICAN STAFF OF THE  
COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES

HON. JEB HENSARLING, CHAIRMAN

114<sup>TH</sup> CONGRESS, SECOND SESSION  
JANUARY 20, 2016

*This report has not been officially adopted by the Committee on Financial Services and may not necessarily reflect the views of its Members.*

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## Executive Summary

On November 24, 2015, the majority staff of the Committee on Financial Services released a staff report entitled [\*Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending\*](#), which focused largely upon the Bureau's activities prior to concluding its enforcement actions against vehicle finance companies under the Equal Credit Opportunity Act (ECOA). This report focuses on the Bureau's actions *after* it secured its first settlement with an auto finance company, Ally Financial Inc. and Ally Bank (collectively, Ally). In announcing the Bureau's settlement with Ally on December 20, 2013, Director Cordray stated that at least 235,000 consumers alleged to have been harmed by Ally would be paid \$80 million, even though at the time of the announcement, Director Cordray did not know the race of a single borrower in any vehicle finance contract purchased by Ally.

In remunerating borrowers, the Bureau thus faced a dilemma. Political exigency required the Bureau to design a process that would ensure that a sufficient number of alleged victims would be identified as eligible claimants; after all, if fewer claimants received checks than Director Cordray initially announced, the validity of the Bureau's disparate impact methodology would be called into question. But, as internal documents reveal, Bureau officials knew that in order to generate a sufficient number of check recipients, they would have to remove a number of safeguards from the claims process, *including confirming the race of claimants alleged to have been discriminated against*, thus making it more likely that non-minority consumers would receive remuneration. Sending remuneration checks to white borrowers as a means of remedying alleged discrimination against African-American, Hispanic, and Asian borrowers is an unorthodox approach to fair lending enforcement, to say the least, and suggests significant problems with the Bureau's

actions against vehicle finance companies. However, confronted with such a dilemma, the Bureau chose to save face by engineering its desired result rather than implementing a claims process reasonably designed to identify alleged victims and discourage fraud.

### **The November 24, 2015 Staff Report**

[\*Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending\*](#) documented that since at least February 2012, the Bureau of Consumer Financial Protection (Bureau), and in particular its Office of Fair Lending and Equal Opportunity, has engaged in an effort to enforce ECOA against vehicle finance companies using a controversial theory of liability known as disparate impact. In doing so, the Bureau has attempted to implement a “global solution” that enlists these companies in an effort to alter the compensation of automobile dealers, over which the Bureau has no legal authority.

As internal documents revealed, the Bureau’s ECOA enforcement actions have been misguided and deceptive. The Bureau has ignored, for instance, the lack of congressional intent to provide for disparate impact liability under ECOA, just as it has ignored the fact that indirect auto finance companies are not always subject to ECOA and have a strong business necessity defense. In addition, memoranda revealed that senior Bureau officials understood and advised the Bureau’s Director, Richard Cordray, on the weakness of their legal theory, including: (1) that the practice the Bureau publicly maintained caused discrimination – allowing auto dealers to charge retail interest rates to customers – may not even be recognized as actionable by the Supreme Court; (2) that they knew that the controversial statistical method the Bureau employed to measure racial disparities is less accurate than other available methods and prone to significant error; and (3) that they knew that factors other than discrimination were causing the disparities they observed, but

refused to control for such factors in their statistical analysis. Notwithstanding the acknowledged weakness of the Bureau's cases, Director Cordray approved the enforcement strategy pursued by Assistant Director for Fair Lending and Equal Opportunity Patrice Ficklin.

## **The Ally Settlement**

As revealed in [\*Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending\*](#), the Bureau pursued – and Director Cordray approved – what it viewed as a potentially “market-tipping” enforcement action against Ally, notwithstanding internal acknowledgement by senior Bureau officials of the weak legal and statistical basis on which the Bureau's case rested, but buttressed by undue leverage the Bureau secured over the company in apparent coordination with the Federal Deposit Insurance Corporation and Federal Reserve.<sup>1</sup> In doing so, the Bureau did not base its case against Ally on actual discrimination (disparate treatment) – the Bureau's case was based on statistics generated by the Bureau's flawed disparate impact methodology, known as Bayesian Improved Surname Geocoding, or BISG.<sup>2</sup> Nonetheless, the Bureau persisted in its enforcement action and entered into a settlement with Ally in conjunction with the Department of Justice (DOJ).<sup>3</sup>

In a press release and phone call with reporters the day after reaching a settlement with Ally, Director Cordray touted the resulting consent order as “the federal government's

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<sup>1</sup> See STAFF OF H. COMM. ON FINANCIAL SERVICES, 114TH CONG., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING (Comm. Print 2015).

<sup>2</sup> October 7, 2013, Draft Decision Memorandum, at 5 n.9. (“At this point in the investigation, the evidence of discrimination on the basis of race and national origin is strictly statistical.”)

<sup>3</sup> See Consent Order, *In the Matter of Ally Financial Bank*, File No. 2013-CFPB-0010, ¶¶ 21-23 (Dec. 19, 2013), available at [http://files.consumerfinance.gov/f/201312\\_cfpb\\_consent-order\\_ally.pdf](http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf); see also Press Release, Consumer Financial Protection Bureau, CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/>.

largest auto loan discrimination settlement in history,” publicly alleged that Ally’s pricing structure caused discrimination against “*more than 235,000* minority consumers” and stated that the Bureau would return \$80 million to them.<sup>4</sup> In fact, Director Cordray did not know how many alleged victims there were in the Ally case because the Bureau could not identify the race of any consumer whose finance contract had been purchased by Ally.<sup>5</sup> Under ECOA and its implementing regulations, automobile dealers are prohibited from collecting information regarding the race of a prospective vehicle financing customer, and as a result, such data is not provided to finance companies, such as Ally, who purchase the resulting Retail Installment Sales Contracts (RISCs) from dealers.<sup>6</sup> Instead, the Bureau employs the BISG proxy method, which uses a consumer’s last name and address to generate probabilities that the consumer belongs to one or more racial or ethnic groups. Thus, at best, the Bureau could generate an estimate of the number of minority consumers within Ally’s portfolio, and, by comparing the rates paid by that cohort to the average

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<sup>4</sup> See Press Release, Consumer Financial Protection Bureau, CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013) (Stating “The CFPB and DOJ determined that more than 235,000 minority borrowers paid higher interest rates for their auto loans” and quoting Director Cordray as saying “We are returning \$80 million to hard-working consumers who paid more for their cars or trucks based on their race or national origin.”), *available at* <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/>. See also Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau, Ally Enforcement Action Press Call (Dec. 20, 2013) (“Today we are announcing that the Consumer Bureau is taking its first enforcement action against discriminatory auto lending. In partnership with the Department of Justice, we are ordering one of the largest indirect auto lenders in the country, Ally, to pay \$98 million to address their auto loan pricing structure, which we believe has caused discrimination against more than 235,000 minority consumers. Ally will pay \$80 million in restitution to consumers and \$18 million in civil penalties to resolve these issues. Our actions today mark the federal government’s largest auto loan discrimination settlement in history.”), *available at* <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-director-richard-cordray-on-the-ally-enforcement-action-press-call/>. The final consent order signed by Director Cordray, whose facts Ally did not admit, alleged that 100,000 African-American, 125,000 Hispanic, and 10,000 Asian/Pacific Islander retail installment sales contracts (RISCs) in Ally’s portfolio showed dealer participation above Ally’s average white RISC dealer participation of 29, 20, and 22 basis points, respectively, which resulted in additional payments over the life of those RISCs of over \$300, \$200, and \$200, respectively (i.e., a total monetary harm of \$30,000,000, \$25,000,000, and \$2,000,000, respectively). See Consent Order, *In the Matter of Ally Financial Bank*, File No. 2013-CFPB-0010, ¶¶ 21-23 (Dec. 19, 2013), *available at* [http://files.consumerfinance.gov/f/201312\\_cfpb\\_consent-order\\_ally.pdf](http://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf).

<sup>5</sup> Moreover, the Bureau’s allegations were not proven in a court of law.

<sup>6</sup> See, e.g., 12 C.F.R. § 1002.5(b) (2015).

interest rate paid by its estimate of the number of white consumers within the portfolio, seek to assess whether members in the two groups paid different rates. However, the Bureau's estimate is only as good as its proxy methodology, and as revealed in [Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending](#), Bureau employees were aware that the Bureau's proxy methodology was deeply flawed.

### **The Bureau's Consideration of Options for Remuneration**

Under the terms of the Bureau's consent order with Ally, responsibility for determining which borrowers are eligible to receive monetary relief rested with the Bureau and the DOJ, which had worked with the Bureau and entered into a simultaneous consent order with Ally.<sup>7</sup> According to Director Cordray, the Bureau selected two principal criteria for determining whether a borrower who entered into a RISC to buy a vehicle financed by Ally within the relevant time period would be eligible for a payment:

- (1) "[A]t least one borrower on the contract must be African American, Black, Latino, Hispanic, of Spanish origin, Asian, Native Hawaiian, and/or other Pacific Islander"<sup>8</sup>; and
- (2) "The customer must also have been identified by the [Bureau and DOJ] as having been overcharged."<sup>9</sup>

Regarding the second criterion, Director Cordray defined being "overcharged" as "paying more than the non-Hispanic white average markup."<sup>10</sup> As explained in pages 15-18 of [Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending](#), the Bureau fundamentally misunderstands the vehicle finance market; a retail interest rate offered by

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<sup>7</sup> See Consent Order, *supra* note 4, ¶ 46. Moreover, the consent order specified that "the total amount of the Settlement Fund shall not be altered based on the number of Identified Borrowers" and "no individual, agency, or entity may request that any court, the CFPB, the DOJ, respondents, or the [Independent Settlement] Administrator review the selection of Identified Borrowers or the amount to be received." *Id.* at ¶ 47-48.

<sup>8</sup> Letter from Director Cordray to Chairman Hensarling (Aug. 31, 2015) (Emphasis added). See also [www.autofinancesettlement.com](http://www.autofinancesettlement.com) FAQ#3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

a dealer and voluntarily accepted by a car buyer is different in kind from a wholesale rate offered by a finance company to a dealer, just as the retail price paid by a consumer for a gallon of milk at a grocery store differs from the wholesale price the grocer pays a dairy farmer. But even accepting *arguendo* the Bureau's assertion that a finance company's failure to prohibit dealer discretion in offering retail interest rates to car buyers gives rise to fair lending risk, Director Cordray's definition of "overcharged" is wholly inadequate. Under his definition, some white borrowers agreed to RISCs with dealer participation that is *greater* than the white average, just as some white borrowers agreed to RISCs with dealer participation that is *less* than the white average. The fact that a particular consumer paid more or less than average says nothing about whether that consumer was treated unfairly. Only by comparing that consumer to other similarly situated consumers – those with a similar creditworthiness, financing a similar amount at the same dealer at around the same time, etc. – can the Bureau draw a meaningful conclusion about whether a particular consumer was "overcharged."

And it should again be noted that the Bureau ignores the fact that financing costs are but one part of the transaction: the price of the vehicle and trade-in value (if applicable) are also negotiated by a car buyer, but not examined by the Bureau for purposes of imposing ECOA liability. If one car buyer pays \$200 more in financing than two other car buyers, but pays \$500 less for the price of the car than the other car buyers, can the first car buyer be said to have been "overcharged"? The Bureau would myopically answer in the affirmative, provided that the first borrower is a member of a protected minority class and the other two borrowers are white, as estimated by its flawed proxy methodology.



By comparing only the dealer participation associated with borrowers the Bureau estimates to be non-white with the average dealer participation associated with all borrowers the Bureau believes to be white on a portfolio-wide basis, the Bureau unfairly compares borrowers who are not similarly situated for purposes of determining eligibility for remuneration. And while not designed to actually assess whether a borrower has been overcharged, the Bureau's methodology does have one benefit: comparing minority borrowers against an arbitrary threshold ensures that a large number of borrowers could be deemed eligible claimants.

Regarding the first criterion, that at least one borrower be non-white, the Bureau's Office of Fair Lending and Equal Opportunity, led by Assistant Director Ficklin, took extraordinary steps in the Spring of 2014 to ensure that the maximum number of borrowers would be deemed non-white for eligibility purposes without actually verifying the race of claimants. Two internal Bureau PowerPoint presentations on "Ally Consumer Remuneration" reveal how any reasonable attempt to limit remuneration recipients to actual minority borrowers would expose the Bureau's flawed methodology. The first PowerPoint presentation begins by discussing two available options for identifying appropriate (i.e., minority) remuneration recipients. The first option considered is as follows:

**"Option 1 - Proportional Method:** Provide damages to individuals proportional to their probability of being in a protected class."<sup>11</sup>

For instance, if BISG assigned Borrower A a 40% probability of being a minority, and Borrower A paid \$200 more interest than the average white borrower, Borrower A would

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<sup>11</sup> Spring 2014, PowerPoint presentation #1 "Indirect Auto Loan Discrimination: Ally Consumer Remuneration," at 3.

receive \$80 (\$200 x .40) remuneration. Bureau employees argued that this approach “results in many more individuals receiving payment” and “identifies more protected class borrowers than alternative methods.”<sup>12</sup> Bureau employees conceded, however, that “damages will go to many non-Hispanic White borrowers; this method may result in more false positives than other methods because, in the lower minority thresholds, many of the individuals are not protected class members.”<sup>13</sup> In other words, the Bureau considered remunerating borrowers in proportion to their statistical probability of being a minority, rather than simply asking borrowers to verify their race, which demonstrates the Bureau’s extraordinary aversion to testing the accuracy of BISG’s race assignments by comparing them to borrowers’ actual races.

The second option considered by the Bureau is as follows:

**“Option 2 – Threshold Method:** Provide full damages to individuals who meet a specified threshold of their probability of being in a protected class (e.g., greater than 50% probability of being African American).”<sup>14</sup>

Regarding this option, Bureau employees recognized a key tradeoff: “[t]he higher you set the threshold, the fewer individuals you will identify as victims, resulting in either leftover funds or overcompensating identified victims (below a zero markup). *To identify the same number of individuals as the estimated number of victims, threshold must be set fairly low (e.g., 30-40%).*”<sup>15</sup> Bureau employees also conceded that “the higher the threshold, the smaller the percentage of those receiving compensation who are non-Hispanic White. *Regardless of the threshold, damages will go to non-Hispanic White borrowers;* if combined

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 4 (emphasis added).

with verification methods, may limit risks.”<sup>16</sup> In other words, Bureau employees acknowledged that generating 235,000 alleged victims in the Ally case, as Director Cordray announced, would necessarily result in the payment of settlement funds to white borrowers.

The PowerPoint presentation went on to discuss three “verification methods” for ensuring that claimants are minorities:

**“Option 1 – Opt-out Forms:** consumers receive remuneration unless they opt out

- Because we expect few opt-outs, we should send notices only to consumers with a strong probability of being in a protected class (*e.g.*, consumers who have 50% or more probability of being Black)
- Provides some protection from criticism that we are giving damages to non-Hispanic White borrowers, but it may not be useful in filtering out non-Hispanic White borrowers[.]”<sup>17</sup>

In other words, the Bureau reasoned, despite the fact that very few people will submit opt-out forms admitting they are not minorities and declining remuneration, this approach allows the Bureau to claim that it has taken precautions against sending White borrowers remuneration checks. The PowerPoint presentation went on to discuss the two other options:

**“Option 2 – Opt-in Forms:** consumers must opt in to get remuneration

- Provides strong protection from criticism that we are giving damages to non-Hispanic White borrowers; could be sent to all consumers or only borrowers with a strong probability of being in a protected class
- Anticipate limited uptake rate such that many victims will not get damages

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<sup>16</sup> *Id.* at 4 (emphasis added).

<sup>17</sup> *Id.* at 5.

**Option 3 – No verification:** consumers receive remuneration without verifying identity

- More efficient and less costly; likely maximizes take-up
- Risks critique that the CFPB is remunerating non-Hispanic White borrowers
- *The DOJ will likely strongly oppose[.]*<sup>18</sup>

The Bureau’s employees made an initial recommendation that the Bureau employ the threshold approach (as opposed to the proportional approach) for identifying remuneration recipients with a multi-tiered opt-in/opt-out approach for verifying race:

Tier 1: Send direct mailings and allow opt out above high threshold (e.g., borrowers with >80% likelihood of being a minority). Although two mailings are contemplated, *eligible borrowers need only cash a check to receive remuneration.*

Tier 2: Send direct mailings and require opt in for mid-range probabilities (e.g., borrowers with 40-80% likelihood of being a minority). Eligible borrowers must respond before receiving a check.

Tier 3: Allow other borrowers to self-identify.”<sup>19</sup>

In other words, the Tier 1 option contemplates sending direct mailings to borrowers above a threshold probability of being a minority, then sending them a check unless they take an affirmative step by returning a form stating they are not a minority – if these borrowers do nothing, they receive a check.<sup>20</sup> The Tier 2 approach involves sending direct mailings to borrowers and requiring them to opt-in by submitting a form (included in the mailing) verifying that they are a minority, after which they receive a check. Under Tier 3, all other borrowers (below the lower opt-in threshold) must self-identify by requesting an opt-in form through the Bureau’s website.

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<sup>18</sup> *Id.* at 5 (emphasis added).

<sup>19</sup> *Id.* at 6 (emphasis added).

<sup>20</sup> *Id.* at 4.

Significantly, an appendix to the PowerPoint presentation also included a chart intended to help the Bureau select a probability threshold that would generate a sufficient number of eligible claimants.<sup>21</sup> The appendix also explained that the minority threshold probability used by the Bureau “is the *sum* of the probabilities of being Black, Asian/Pacific Islander, *and* Hispanic.”<sup>22</sup> In other words, the Bureau never actually categorizes an individual as belonging to a particular race; for its purposes, eligibility hinges only on the Bureau’s estimate of the probability that an individual is non-White. This leads to odd results. For instance, if the Bureau used a 95% threshold for determining probability of minority status – under the Tier 1 approach described above, such consumers would receive remuneration unless they affirmatively opted-out – the Bureau would deem such a consumer eligible for payment where it estimated that the consumer’s BISG probability was 32% Black, 32% Hispanic, 32% Asian, and 4% White (for a combined 96% probability of not being White).<sup>23</sup> However, the Bureau would not deem a consumer whose BISG probability was 94% Black, 0.2% Hispanic, 0.2% Asian, and 5.6% White eligible for remuneration under the proposed Tier 1 approach.

In the second PowerPoint presentation, Bureau employees disclosed that “*DOJ is firmly against employing the Tier 1 opt out.*”<sup>24</sup> DOJ’s position was that the Bureau should eliminate the Tier 1 (opt out) approach for verifying the race of claimants and instead provide remuneration based on Tiers 2 (opt in) and 3 (borrowers self-identify).<sup>25</sup> The Bureau employees further explained that DOJ’s main concern with using Tier 1 “is that *non-*

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<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.*

<sup>23</sup> As noted later, the Bureau ultimately chose to use a 95% opt-out threshold rather than the 80% threshold used for demonstrative purposes in its PowerPoint presentations.

<sup>24</sup> Spring 2014, PowerPoint presentation #2 “Indirect Auto Loan Discrimination: Ally Consumer Remuneration,” at 5 (emphasis added).

<sup>25</sup> *Id.*

*Hispanic White consumers will receive checks unless [the Bureau] require[s] written verification of eligibility.”*<sup>26</sup> The employees further warned “*DOJ is considering requiring all eligible consumers to verify their identity under penalty of perjury.*”<sup>27</sup>

In the second PowerPoint presentation, Bureau employees also evaluated options for responding to DOJ’s concerns about its proposed remuneration plan. One option involved “*push[ing] back at senior levels* against DOJ’s proposal and advocat[ing] employing the three-tiered approach the CFPB previously proposed.”<sup>28</sup> In evaluating this option, the Bureau employees noted that the Bureau’s approach “is likely to result in checks sent to more affected consumers, but *likely will result in checks being sent to some non-Hispanic White consumers* who fail to opt out.”<sup>29</sup> The Bureau also considered accepting DOJ’s position and remunerating consumers based on a two-tiered approach involving opt-in mailings and self-identification.<sup>30</sup> However, despite the fact that this would “minimize[] the possibility that checks will be sent to non-Hispanic White consumers,” the Bureau employees noted that this approach “is likely to result in fewer payments” and that “[r]equiring verification of eligibility under penalty of perjury will likely reduce uptake rate.”<sup>31</sup>

The Bureau employees then compared the Bureau’s approach to DOJ’s approach for a variety of uptake rates (the number of opt-in notices that consumers return divided by the total number of opt-in forms mailed) and concluded that “if we adopt DOJ’s proposed limitation to opt ins and use a 50% BISG threshold,” only 36,000-143,000 consumers would

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<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 6 (emphasis added).

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (emphasis added).

receive checks.<sup>32</sup> However, Director Cordray had claimed publicly that Ally had harmed 235,000 minority borrowers; accordingly, adopting DOJ's plan would expose that estimate as wildly inflated. The Bureau employees noted as much in the PowerPoint, stating:

“Consent Orders[] identify \$80 million in damages and approximately 235,000 affected consumers. Because the DOJ's approach will likely result in lower uptake rates, it will be more difficult to exhaust the fund if we don't allow opt-out above 80%.”<sup>33</sup>

In other words, unless the Bureau decided to send remuneration checks to a large number of consumers based on nothing more than its surmise that the consumers belonged to a protected minority class, Bureau employees recognized that the Bureau could not hope to generate enough claimants to exhaust the settlement fund.

### **The Bureau's Decision**

The first option considered by Bureau employees in the second PowerPoint presentation was to “[p]ush back at senior levels against DOJ's proposal and advocate employing the three-tiered approach the CFPB previously proposed.”<sup>34</sup> This approach apparently carried the day. In an August 31, 2015, letter to Chairman Hensarling, Director Cordray confirmed that the Bureau had employed a combined opt-out/opt-in approach, and that beginning on June 26, 2015, a settlement administrator hired by Ally as a condition of its consent order had sent two different direct mailings to consumers.<sup>35</sup>

One group of consumers – those the Bureau determined had a combined 95% BISG probability of being non-White – received a mailing indicating that they would receive

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<sup>32</sup> *Id.* at 7, 9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6.

<sup>35</sup> Letter from Director Cordray to Chairman Hensarling (Aug. 31, 2015), at 1-2.

remuneration unless they opt out.<sup>36</sup> According to a sample mailing later provided to the Financial Services Committee by the Bureau and signed by Patrice Ficklin and Steven H. Rosenbaum, DOJ's Chief of the Housing and Civil Enforcement Section, these borrowers are not required to confirm their race. The letter states:

“Based on a preliminary assessment, the government agencies have determined that you are eligible for a payment from the settlement fund ... To receive your payment, **you do not need to do anything.**”<sup>37</sup>

These consumers are not required to verify their identity under penalty of perjury, as DOJ had initially insisted, nor are they advised that cashing the remuneration checks will be considered their affirmation that they are members of a protected minority class.<sup>38</sup> At a December 17, 2015, briefing for Committee staff, Rebecca Gelfond, the Bureau's Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, confirmed that at the Bureau's direction, the Ally claims administrator had mailed 201,212 opt-out packets to consumers.<sup>39</sup> Of the consumers who received the letter, only 0.46% opted out to date.<sup>40</sup>

The second group of consumers – those the Bureau determined had a combined 50-95% BISG probability of being non-White – received a mailing requiring them to return a form opting in to the settlement.<sup>41</sup> This mailing, a sample copy of which the Bureau later provided to the Committee, stated:

“You're receiving this letter because you may be eligible to receive a payment...from a legal settlement with Ally .... Based on a preliminary assessment, the government agencies have determined that you likely are eligible for a payment from the settlement fund. To be eligible, you, or at

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<sup>36</sup> Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015).

<sup>37</sup> Ally opt-out remuneration letter, at 1 (emphasis in original).

<sup>38</sup> *Id.*

<sup>39</sup> Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



least one co-buyer on the account, must be African American, Black, Hispanic, Latino, of Spanish origin, Asian, Native Hawaiian, or other Pacific Islander and have purchased a vehicle between April 1, 2011 and December 31, 2013 that was financed by Ally. If eligible, you will receive at least \$300.00. Your actual payment amount may be greater depending on how many eligible customers participate. If you are eligible, **to receive your payment from the settlement you must fill out and sign the attached Participation Form.**"<sup>42</sup>

Customers returning the participation form are not required to supply any kind of oath or affirmation, and the form contains no warnings about perjury or penalties for misrepresenting one's race.<sup>43</sup> The opt-in form does not even require borrowers to indicate the protected minority race/ethnicity to which they belong. Borrowers need only sign their name under a statement indicating they are a member of *any* of the protected races/ethnicities.<sup>44</sup> According to Deputy Assistant Director Gelfond, the Bureau instructed the Ally claims administrator to mail 218,457 of these opt-in packets, and 47.92% of recipients returned opt-in forms.<sup>45</sup>

## The Engineered Result

In total, the Bureau ordered the mailing of 419,669 letters to potential claimants, despite Director Cordray's earlier announcement that there were approximately 235,000 alleged victims. Deputy Assistant Director Gelfond reported that the Bureau's mailings

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<sup>42</sup> Ally opt-in remuneration letter, at 1 (emphasis in original). Deputy Assistant Director Gelfond informed Committee staff that the \$300 figure was specific to the sample letter provided to Committee Staff, and, depending on the Bureau's calculation of individual harm, a consumer could receive any amount between \$100 and \$520.

<sup>43</sup> *See Id.*, at 3. Moreover, there is a third – similarly unverified – way for consumers to receive remuneration from the Ally settlement. Even someone whom the Bureau did not contact because it believed him or her to be less than 50% likely to be a minority can go to the settlement administrator's website and obtain a form that will allow him or her to self-identify as eligible to receive a payment. *See* Letter from Director Cordray to Chairman Hensarling (Aug. 31, 2015), at 2. This eligibility request form requires borrowers to check a box claiming to be either African-American, Hispanic, or Asian or Pacific Islander. *See* Ally eligibility request form, at 1. However, even this universally-available form *does not require the submitter to certify his or her eligibility under penalty of perjury.* *See id.*, at 1.

<sup>44</sup> *See* Ally opt-in remuneration letter, at 1.

<sup>45</sup> Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015). An additional 94 borrowers and co-borrowers, representing 88 RISCs, self-identified by submitting claims to the settlement administrator.

ultimately generated 235,319 Ally accounts eligible to receive checks.<sup>46</sup> According to Gelfond, “at the end of the day, this validated the proxy methodology we utilized.”<sup>47</sup> However, Gelfond’s confidence is belied by the fact that the Bureau has declined to estimate the number of consumers allegedly harmed in subsequent enforcement actions. In announcing settlements with American Honda Finance Corp. and Fifth Third Bank the Bureau ventured only that “thousands” of minority consumers were allegedly harmed.<sup>48</sup>

When Committee staff inquired why the Bureau was not requiring potential check recipients to confirm their eligibility based on protected class status under penalty of perjury, Gelfond replied that the requirement had been “considered and rejected” by the Bureau and DOJ.<sup>49</sup> It is unclear whether Director Cordray personally approved this action, or whether the decision was made by Assistant Director Patrice Ficklin. When Committee staff asked why the Bureau had rejected the requirement, Gelfond replied “we are not in a position to question self-identification of race.”<sup>50</sup> Remuneration checks with values between \$100 and \$520 are scheduled for distribution to recipients in January 2016, and

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<sup>46</sup> This figure represents 301,645 borrowers and co-borrowers. See Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015).

<sup>47</sup> *Id.*

<sup>48</sup> See Consent Order, *In the Matter of American Honda Finance Corporation*, File No. 2013-CFPB-0014, ¶¶ 18-20 (July 14, 2015), available at [http://files.consumerfinance.gov/f/201507\\_cfpb\\_consent-order\\_honda.pdf](http://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf); Consent Order, *In the Matter of Fifth Third Bank*, File No. 2013-CFPB-0024, ¶¶ 18-19 (Sept. 28, 2015), available at [http://files.consumerfinance.gov/f/201509\\_cfpb\\_consent-order-fifth-third-bank.pdf](http://files.consumerfinance.gov/f/201509_cfpb_consent-order-fifth-third-bank.pdf). See also Press Release, Consumer Financial Protection Bureau, CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing (July 14, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/>; Press Release, Consumer Financial Protection Bureau, CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices (Sept. 28, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-fifth-third-bank-for-auto-lending-discrimination-and-illegal-credit-card-practices/>.

<sup>49</sup> See Rebecca Gelfond, Deputy Assistant Director for the Office of Fair Lending and Equal Opportunity, briefing of Committee Staff by CFPB Staff (Dec. 17, 2015).

<sup>50</sup> *Id.*

according to Gelfond, the Bureau anticipates that the full amount of the \$80 million in settlement proceeds announced by Director Cordray will be distributed.<sup>51</sup>

## **Conclusion**

As described in [\*Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending\*](#) and in this report, in pursuing its ECOA enforcement agenda, the Bureau has pursued disparate impact cases without justifiable statutory authority. It has asserted, without valid legal basis, that permitting dealers to charge retail interest rates to consumers – a matter reserved for the discretion of the dealer – is a “practice” giving rise to liability for finance companies under the fair lending laws. It has issued industry enforcement “guidance” designed to function as a rulemaking without due process of law. It has employed a statistical proxy methodology it knows is flawed. It has deliberately refused to consider non-discriminatory factors that explain alleged pricing disparities. It has pursued a “global solution” that would force finance companies to regulate dealer compensation on its behalf, notwithstanding Congress’s express intent that the Bureau have no legal authority over auto dealers. Moreover, it targeted a company that it knew had a strong incentive to settle for business reasons and applied undue leverage against the company to extract a large settlement. And as this report demonstrates, once it has secured settlement proceeds, the Bureau employs a remuneration process designed to achieve political ends notwithstanding its acknowledgement that funds will be distributed to ineligible recipients.

In this respect, the Bureau does a disservice to legitimate fair lending investigations undertaken by federal agencies. This staff report, coupled with the November 24, 2015,

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<sup>51</sup> *Id.*

staff report, is intended to give the American public a clearer understanding of the manner in which the Bureau exercises its substantial power.