Before the
CONSUMER FINANCIAL PROTECTION BUREAU
Washington, DC

Enhancing Public Data on Auto Lending
Docket No. CFPB-2022-0075 (Non-rulemaking docket)

Comments
Of

Americans for Financial Reform Education Fund
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
Center for Responsible Lending
National Association of Consumer Advocates
National Consumer Law Center, on behalf of its low-income clients
UnidosUS
U.S. PIRG

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I. Introduction

These comments are submitted by the Americans for Financial Reform Education Fund, Consumer Action, Consumer Federation of America, Consumers for Auto Reliability and Safety, Center for Responsible Lending, National Association of Consumer Advocates, National Consumer Law Center, on behalf of its low-income clients, UnidosUS and U.S. PIRG. We applaud the Consumer Financial Protection Bureau ("CFPB" or "Bureau") for its efforts to enhance public data on auto lending and appreciate the opportunity to comment on the issue.[1] Auto credit and cars in general have an enormous impact on the majority of households, and auto credit is the third largest consumer credit market in the United States. Yet publicly available data is minimal and often excludes important portions of the marketplace and important details of the transactions—details that impact performance of the credit and success for consumers. The data is also highly aggregated, making it almost impossible to evaluate in a meaningful way. The opaqueness and asymmetry of information regarding data in the auto finance marketplace in many ways mirror the opaqueness and asymmetry of information between consumers and finance personnel in the finance and insurance "F&I" office at a dealership.

A data set built by the CFPB can and should address many of the current deficiencies in our knowledge of the auto finance marketplace through better and more available auto credit data. In order to create a robust data set that allows for better understanding of the market and its trends the CFPB should:

- Collect data from a broad variety of sources that reflects the broad array of credit transactions and creditors, and which focuses on the consumer experience rather than dollar volumes.

- Ensure that auto lending data is publicly available and usable, as granular as possible, and updated on a regular basis.

- Collect transaction level data about origination, consumer payment performance, and the entire repossession process from beginning to end.

- Collect data about consumer demographics, including race, ethnicity, age, gender, and other characteristics.

- Collect data about Buy-Here-Pay-Here finance entities, and subprime and regional financing entities.

[1] Consumer Financial Protection Bureau, Enhancing Public Data on Auto Lending, Docket No. CFPB-2022-0075 (non-rulemaking docket) (Nov. 19, 2022), available at: https://www.regulations.gov/docket/CFPB-2022-0075.

II. The Current State of the Auto Finance Marketplace and Available Data

It would be difficult to overstate the impact of auto related debt on U.S. households. Access to a vehicle is critical for economic opportunity[2] but high costs have led to increasingly high levels of debt. There is a wealth of useful information gathered and maintained by financial institutions and other market participants, but few requirements to provide this information to any other entity. As such, the public, consumer advocates, policymakers, regulators, enforcement entities, academics and even some market competitors themselves lack access to data that would help them understand the markets, identify risks to consumers from specific consumer financial products or services, and follow developments, all of which would help to create a more competitive and fair marketplace.

A. Cars are an economic necessity, yet increasingly expensive.

For most households in the United States, a car is vital not only for physical mobility but also for economic mobility. Car access improves families' economic outcomes in a variety of ways. In the short term, having a car provides access to more and better job opportunities and expanded affordable housing options. In the long term, research has shown that shorter commute times, which are often possible only with a car, are one of the strongest factors in helping families escape poverty.[3] Transportation has a stronger role in social mobility than other community characteristics, including elementary school test scores, percentage of two-parent families, or crime.[4]

At the same time, owning a car is expensive and drives millions of households to take on significant debt. As prices paid for cars rise, so too does the risk of non-payment and loss of the car, which often jeopardizes access to employment and other necessaries of living.

An auto purchase is the second largest financial transaction for millions of consumers, second only to buying a home. And, for the 45 million households (35% of American households) that don't own homes, it is their most significant financial transaction. Latino consumers reported in

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[2] Even in the nation's most transit-oriented metropolitan area, New York City, only 15% of jobs are accessible within an hour by transit. Andrew Owen & Brendan Murphy, Accessibility Observatory, Center for Transp. Studies, Univ. of Minn., Access Across America: Transit 2019, at 2 (Oct. 2020), *available at* https://ao.umn.edu/research/america/transit/2019/documents/AccessAcrossAmerica-Transit2019_sm.pdf (comparing Table 2, at 4-Number of Jobs Reachable by Number of Minutes, 2019, with Table 1, at 2 - Metropolitan Areas Ranked by Total Employment, 2019). Further, in 2019, only 60% of rural counties nationwide had public transit, and 28% of those had very limited service. TRIP, Rural Connections: Challenges and Opportunities in America's Heartland 5 (May 22, 2019), *available at* https://tripnet.org/wp-content/uploads/2019/08/Rural_Roads_TRIP_Report_May_2019.pdf.

[3] Raj Chetty & Nathaniel Hendren, Harvard University and NBER, The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates 70 (May 2015), *available at* http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf.

[4] Mikayla Bouchard, *Transportation Emerges as Crucial to Escaping Poverty*, New York Times (May 7, 2015), *available at* https://www.nytimes.com/2015/05/07/upshot/transportation-emerges-as-crucial-to-escaping-poverty.html (reporting on discussion with Nathaniel Hendren, one of the authors of the Chetty & Hendren study, *supra* note 3).

2022 that "car loans" were one of the two most common sources of credit for this community.[5] Automobiles are the only regular major purchase that is financed primarily by the seller[6]-- 87% of buyers finance the purchase of their vehicle car through the dealership, making the dealer the original creditor.[7] A car purchase is arguably "the most complicated transaction a consumer ever faces, even more so than a home purchase."[8]

The cost of new and used vehicles has risen steadily such that the average price of a new car is now more than $42,000, and the average price of a used car is more than $26,000.[9] These are significant expenditures for almost any American family. But for low-income, and even medium-income families, the cost of a vehicle purchase can equal or exceed an entire year's income. These average used car price of $26,000 figures represent 124% of the annual income for a family living at the federal poverty line ($20,832), and over a third of the annual income for a family of three living at the median in the U.S.[10]

The expense of purchasing a car—either new or used—represents such a significant proportion of many American households' total annual income that financing the purchase is essential. Indeed, over 88% of new car purchases and 45% of used cars are financed.[11] An additional 27% of new cars are leased.[12] Transportation is the second largest expense for American households after housing.[13]

For consumers with disabilities, the price of the vehicle itself is only one part of the total cost. It can cost between $20,000 and $80,000 to modify a new vehicle with adaptive equipment for

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[5] UnidosUS & Opportun, Latinos' Access to Credit Remains Uneven and Stratified, Oct. 13, 2022, *available at* https://www.unidosus.org/wp-content/uploads/2022/10/unidosus_oportun_latinosaccesstocreditremainslowandstratified.pdf.

[6] Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 Geo. L.J. 1257, 1262 (2020), *available at* https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf [hereinafter Levitin, The Fast and the Usurious].

[7] *See id*. at 1316.

[8] *Id.* at 1262.

[9] Federal Trade Comm'n Motor Vehicle Dealers Trade Regulation Rule, Notice of Proposed Rulemaking, 87 Fed. Reg. 42012 (July 13, 2022) at 2012, nn.5 & 6.

[10] CoPilot, Return to Normal Index (July 6, 2022), *available at* https://www.copilotsearch.com/index-report-07-2022/; Emily A. Shrider et al., 51 U.S. Census Bureau Income and Poverty in the United States: 2020, at 51 (Sept. 2021), *available at* https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf; Census Report, Median Household Income in the Past 12 Months (In 2020 Inflation-adjusted Dollars) by Household Size American Community Survey 5-year estimates, *available at* https://censusreporter.org/data/table/?table=B19019&geo_ids=01000US&primary_geo_id=01000US.

[11] Melinda Zabritski, Experian, State of the Automotive Finance Market: Q2 2022, at 6 (Aug. 2022), *available at* https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q2-2022-state-auto-finance-market.pdf.

[12] *Id.*

[13] News Release, U.S. Bureau of Labor Statistics, Consumer Expenditures – 2020, at 4, 9 (Sept. 2021), *available at* https://www.bls.gov/news.release/pdf/cesan.pdf.

someone with disabilities.[14] It is important to note how increasing vehicle costs and debt burdens affect multiple populations of consumers.

In 2022, Americans carry more auto debt than at any time in history, and the amount of this type of indebtedness continues to increase. Auto debt is now the third largest consumer credit market in the U.S. and has doubled in the past ten years.[15] More Americans owe outstanding auto debt than ever before. And among certain groups of Americans – particularly older Americans – auto debt is rising even more quickly than it is for the general population.[16]

- Americans currently owe more for their cars than ever before; total outstanding auto debt currently sits at an all-time high of over $1.5 trillion.[17]
- This debt is widespread, with over 109 million accounts currently open - equivalent to nearly one in three Americans paying off their cars.[18]
- Auto financing debt is originated more frequently than mortgages or student loans. As a result, although the total dollar amount of vehicle credit is less than the dollar value of mortgage credit or student loan credit, the number of vehicle financings each year far exceeds the total number of both mortgage and student loans combined.[19] Each origination poses additional possibilities for risk to consumers.
- Auto debt has also grown across almost every metric that could put consumers at risk. The amount financed for new cars has increased by 17% since 2020; the average amount financed now sits at $39,540.[20]
- The size of monthly payments for used car debt has jumped by 27% in the same period; for the first time, used car monthly payments exceed $500.[21]

[14] National Highway and Traffic Safety Administration, Adapting Vehicles for People with Disabilities, (June 2015), *available at* https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/adapting_motor_vehicles_brochure_810733.pdf. NHTSA also notes in this brochure that some manufacturers offer rebates on adaptive equipment, but it is typically only up to $1,000.

[15] *See* Ryan Kelly et al., Consumer Fin. Prot. Bureau, Rising prices means more auto loan debt (Feb. 24, 2022), *available at* https://www.consumerfinance.gov/about-us/blog/rising-car-prices-means-more-auto-loan-debt/.

[16] Greg Iacurci, CNBC, *Debt among oldest Americans skyrockets 543% in two decades* (Feb. 26, 2020), *available at* https://www.cnbc.com/2020/02/26/debt-among-older-americans-increases-dramatically-in-past-two-decades.html.

[17] As of the second quarter of 2022. Federal Reserve Bank of New York, Center Microeconomic Data, Household Credit and Debt Report (Q2 2022) (downloaded Aug. 18, 2022) at https://www.newyorkfed.org/microeconomics/hhdc.

[18] *Id.*

[19] National Consumer Law Center, New Ways to Understand the Impact of Auto Finance on Low-Income Families, *available at* http://www.nclc.org/images/pdf/car_sales/ibImportance_AutoFinanceFINAL53116.pdf.

[20] Melinda Zabritski, Experian, State of the Automotive Finance Market Q1 2022 (May 23, 2022), *available at* https://www.experian.com/content/dam/noindex/na/us/automotive/finance-trends/2022/q1-2022-state-of-automotive-finance-market.pdf.

[21] *Id*.

- Loan terms continue a decade-long trend of getting longer, extending the time consumers are "underwater" and more vulnerable to financial trouble; of new car loans issued in the first quarter of 2022, 73% carried a term of 60 months or longer.[22]

B. There are a wide array of credit types and creditors in the auto lending market.

Debt related to motor vehicles represents a bewildering array of types of extensions of credit, holders, and transactions. Even just looking at purchase money debt and excluding things like leases, title loans, and refinancings, some of the debt is originated as a loan but most of the debt takes the form of retail installment sales contracts with dealer/originators being the original creditors but assignees playing a very active role in decisions around the extension of credit. There are thousands of different entities that hold consumer auto debt, including banks, credit unions, large captive non-bank entities, smaller and regional finance companies, Buy Here Pay Here (BHPH) dealers, and more.

The relationship between finance entities and car dealers varies greatly. Some purchase most of the auto credit they hold from dealer/originators at below face value. Often the financing entity will have a complex arrangement with dealers, governing the price that the financing entity will pay for the dealer's retail installment sales contracts. Some require the inclusion of products such as Vendor Single Interest (VSI) insurance for which the consumer is charged.

In addition to these secured creditors, there are other types of auto related creditors (such as debt buyers) that hold debt from auto purchases after the security interest has ended through repossession, destruction of the collateral, or other occurrences. Some of these creditors participate in credit reporting and some do not. Some are included in credit surveys conducted by government entities and others are not.

C. Existing data sources do not provide a full picture of the auto lending market.

The highly fragmented nature of the auto finance market, as discussed above, results in a highly fragmented data landscape, underscoring the need for one centralized data collection process that can provide information on all segments. Current data sources have several limitations that prevent a robust understanding of the dynamics of this increasingly important consumer credit market. The Bureau should exercise its market monitoring authority[23] to request data from a variety of relevant sources and develop a data set which would complement existing sources. This would allow the CFPB to fulfill its statutory obligation to monitor developments and consumer risks in this important market. What follows are some examples of the types of limitations posed by currently available data sources; this is not meant to be an exhaustive overview of all data sources about auto lending.

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[22] Ronald Montoya, Edmunds, *How Long Should a Car Loan Be?* (Apr. 1, 2022), *available at* https://www.edmunds.com/car-loan/how-long-should-my-car-loan-be.html [hereinafter Montoya Edmunds].

[23] 12 U.S.C. § 5512(c)(4), Section 1022(c)(4)(B)(ii) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Bureau's Consumer Credit Panel data set provides de-identified loan-level origination and performance information directly from lenders. However, credit bureau data, the underlying source of this information, excludes large segments of the sub-prime auto loan market, including Buy Here Pay Here lenders, providing a skewed and incomplete snapshot of the market. Furthermore, this data set does not include key variables concerning other related costs such as fees, down payments, or information about the collateral itself.[24]

Asset-Backed Securities data helps provide a snapshot of market trends both broadly and within some submarkets, but is limited to only those lenders, primarily larger in size, who securitize this debt. The omission of smaller market participants means this data set is not representative of the auto lending industry as a whole.[25] Furthermore, the data is designed for use by investors, making it difficult to work with for research or advocacy purposes.

Survey data can provide the precise variables that are of interest, but the sample is again not necessarily representative.[26] Due to the high cost of administering surveys, such data collection efforts are also not regularly updated or repeated, limiting their usability for market monitoring and research purposes, especially in these times of significant cost upheavals.

Call report data from credit unions and banks provides insights into the portfolios of specific institutions, but cannot be segmented further, and many other types of lenders are not covered by this data source.[27] Repossession data inferred from information known to some private auto auctions provides some information about repossession activity, but it is both proprietary and incomplete--both in that it does not capture the entire marketplace and in that it lacks relevant information about the history of the transaction pre-repossession as well as the post-repossession collection activity.[28]

Virtually none of this data is made publicly available, and commercial sources from private vendors are prohibitively expensive for advocates. [29] The Bureau has a stated commitment to

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[24] Consumer Financial Protection Bureau, Data Gaps Presentation, Docket No. CFPB-2022-0075-0028 (Dec. 7, 2022) available at: https://www.regulations.gov/document/CFPB-2022-0075-0028, at 4 [hereinafter CFPB Data Gaps Presentation].

[25] *Id*. at 6.

[26] *Id*. at 7.

[27] *Id*. at 5.

[28] Cox Automotive Q3 Manheim Used Vehicle Value Index Call (Oct. 7, 2022), *available at* https://publish.manheim.com/content/dam/consulting/ManCons-qtrly-call-202210.pdf

[29] For example, Experian's AutoCount database provides data about auto finance originations obtained through 46 state Departments of Motor Vehicles, but only at an aggregated level. *See* Consumer Financial Protection Bureau, Sources and Uses of Data at the Consumer Financial Protection Bureau, September 2019, available at: https://files.consumerfinance.gov/f/documents/bcfp_sources-uses-of-data.pdf, at 34, 168 [hereinafter CFPB Data Sources 2018]; Consumer Financial Protection Bureau, Sources and Uses of Data at the Consumer Financial Protection Bureau – Supplement, June 2019, *available at*: https://files.consumerfinance.gov/f/documents/cfpb_sources-and-uses-of-data_supplement-report_201906.pdf

releasing information for the broader public, noting that "the ability to disclose information, whether in its raw form, in aggregation, or as part of reports, studies, or other analytical outputs, is fundamental to the CFPB's mission." A robust and thoughtful data release plan, which balances the need for greater public information with privacy and the need to protect trade secrets, will be crucial, given the lack of existing data on auto finance.[30]

III. General Considerations for Better Collection and Dissemination of Auto Finance Data

There are a number of general concerns that a data set collected and provided by the CFPB should address.

A. The data should focus on consumers, credit costs to consumers, and the successful acquisition of cars.

Much of the currently available public data focuses on dollars and not consumers. Origination data focuses primarily on total dollar volume of credit extended rather than the vehicles and families involved or the number of times that financing is originated. While some publicly available data sources have attempted to include this information, it has been inconsistent. As an example, the Bureau's Auto Loans dashboard[31]was a very helpful tool that provided information about overall auto credit originations by month, including the number of originations in addition to dollar volume.[32] However, this dashboard has not been updated since 2019.

In regards to performance of auto credit, much of the focus of existing, publicly available data is limited to matters such as delinquencies and net loss levels and does not provide sufficient information about the impact of these occurrences on families. Issues like repossession sale outcomes, subvented interest rates, and excess spread all significantly affect the consumer's experience, but are not reflected in available data, much less in data which is aggregated. Without the ability to review granular, individual-level data and specific originators, add-ons, demographics and the like, aggregate data may actually show largely "successful" extensions of credit while hiding these negative consumer experiences.

B. The data should be publicly available to the extent possible.

Auto lending data gathered by the CFPB or otherwise required to be reported should be made publicly available to the greatest extent possible. The CFPB has used its authority to gather and analyze data in the financial sector, and it has brought much transparency to the marketplace since its inception. Auto lending is a notable outlier here, in that little information is gathered as a matter of course, and even less information is readily available to the public.

[30] CFPB Data Sources 2018 *supra* note 29, at 73.

[31] https://www.consumerfinance.gov/data-research/consumer-credit-trends/auto-loans/, last updated April 2019.

[32] This does not appear to the be the case for the category of origination activity by neighborhood relative income level, however. This category only included dollar volume information and not the number of originations.

It would be a tremendous improvement to expand the data which the CFPB obtains about auto lending and to provide aggregated information to the public, but there are other entities and market participants who would also benefit from the ability to review and analyze the underlying data instead of solely reviewing reports issued by the CFPB or another government entity. Researchers and advocates would be able to perform analysis on multiple aspects of auto lending where the CFPB or another entity may not have the capacity to do so. Advocates would also benefit from having as much data as possible to review trends and educate both the public and lawmakers about positive and negative outcomes of certain practices in auto lending. If data is not made publicly available or is only available for purchase, it is unlikely that researchers and advocates would be able to conduct the kind of deep and thorough analysis that is necessary for meaningful and effective results.

Further, publicly available data should be in a useable format. An example here is information obtained through asset-backed securities filings. While this information is technically available to the public, it is not always made available in a widely usable format. It requires the purchase and use of specialized software and often involves data analysis experts to convert the data into a format which can be manipulated for research purposes. Any data that is made available to the public should be in a format that is readily useable.

C. The data should be granular to the extent possible.

Similarly, any data that is gathered and shared should be as granular as possible. There is no doubt that auto lending is a data desert, and any increase in information would be a significant benefit to the public. To that end, we would welcome increased data in any format, including aggregated data from the CFPB. However, some of the data that is already available is highly aggregated and has not proven useful to provide a realistic picture of auto lending. Researchers cannot utilize aggregated reports to generate their own research in the same way as they could with access to the underlying data. The use of aggregated reports can also compromise the reliability of the results of studies in which they are used.[33] In order to ensure that the data which is gathered can be meaningfully evaluated, compared with other data sources, and used to produce the most reliable results possible, it should be as granular as possible.

D. The data should be updated regularly.

The auto lending data which is gathered should be updated regularly, and at a minimum on a quarterly basis. An overwhelming gap in the information currently available is that there are very few sources which consistently report on the same data over periods of time. Proprietary sources especially have an incentive to report different aggregated data from one release to the next to encourage purchase of their data. For example, Experian releases a very informative quarterly report of the auto finance market, but the specific aggregated details provided often change from quarter to quarter. Even the CFPB stopped updating its auto lending dashboard after 2019, making this source less useful as time goes on.

[33] For instance, any research that attempts to compare two sets of data, one of which is based on an aggregate report, would need to include caveats explaining the differences in the data sources.

The past three years would have been an extraordinary learning opportunity for market participants, but the lack of regularly updated lending data has made that impossible. The COVID-19 crisis had a tremendous impact on auto lending, and the inability to review a consistent data set before, during and after the height of the pandemic is a lost opportunity for researchers and regulators. Much of the existing research and data looks at a moment in time, rather than trends over years. In order to produce research which is reliable and accurate for regulatory policymaking and enforcement, it is critical to review trends over a period of time rather than at a single moment. The average length of a retail installment sales contract for a new car is nearly 6 years long,[34] and only by tracking payments and delinquency over the full term of the credit transaction will the data provide an accurate picture of how many transactions ended successfully for the consumer.

IV. Specific Data Gaps in the Auto Lending Marketplace

There are numerous areas of concern in the auto finance marketplace that cannot be effectively understood and addressed without adequate data.

A. Underwriting and other information from origination

Currently much of the data available about the origination and performance of auto finance lacks information that was used or should have been used in underwriting the transactions. Gathering such information would allow analysis of how best practices in underwriting influence successful completion of the financing resulting in ownership of a paid-off vehicle. Some of the specific data which would be helpful includes:

1. Consumer information

Information about the consumer's situation at the time of purchase and origination would be very helpful. While a good deal of publicly available aggregate data includes credit scores in relation to dollar volume origination, a credit score is only one piece of the puzzle. Additional data is required to understand the marketplace and, in particular, evaluate whether auto lenders are taking appropriate account of the consumer's ability to make the required payments. As discussed previously, aggregated data can hide many important insights, and the use of dollar volume as a metric rather than individual originations is problematic. While credit score is useful, much of the currently available data does not allow analysis by income, an important metric, or by the debt-to-income or payment-to-income ratio. While some creditors do not collect this information, many do. With enough granularity in the data, observations regarding income can be made even when consumer income is not collected, based upon the consumer's geographic location.

2. Vehicle Information

Much of the existing public data lacks information about the vehicle being purchased, which is the collateral securing the transaction. Knowing if the vehicle being financed is new or used, the make, model, the mileage, the book value, whether the vehicle was previously totaled or is a

[34] Montoya Edmunds, *supra* note 22.

salvage vehicle, would all contribute to a holistic understanding of the finance transaction. Data about the vehicle that is the subject of the transaction would allow an understanding of how vehicle characteristics may affect performance of the financing transaction and enable market participants to better evaluate the success or failure of transactions. It would also provide a better understanding of other aspects of financing, such as an aid to value calculation in determining loan-to-value ratios and evaluating whether underwriting decisions appropriately account for the collateral.

3. Down payment

Information about the down payment and/or trade-in associated with the finance and purchase of the vehicle would contribute to a holistic understanding of the finance transaction. For those vehicles for which there was a down payment, it would be useful to know if the down payment was paid in cash, by credit card, or by some other means. Such information could provide a number of insights. For instance, this information could be used to determine whether the use of a captive finance company's credit card facilitated a successful finance transaction, or whether adding on a second layer of interest, fees and delayed payments negatively impacted the consumer's ability to pay the RISC monthly amounts.

For trade-ins, it would be useful to know the book value of the trade-in, amounts owed on the vehicle traded in, the amount of negative or positive equity, and the disposition of the trade-in vehicle (i.e., whether it was sold at auction or on the dealer's lot and the amount obtained). This information would provide useful insights about the sale and finance transaction. It could aid in understanding to what extent negative equity is being rolled into a consumer's next car and, if so, how that affects the performance of the financing for that car. It could aid in understanding practices as they pertain to certain categories of consumers (are consumers with certain credit scores experiencing different down payment requirements?), and it could also be used in connection with other factors, such as the payment performance over the life of the RISC and underwriting processes.

4. Loan to Value (LTV)

LTV ratios (both front end and back end[35]) can be very useful aids in understanding a vehicle finance transaction. While some origination data contains the LTV or has data sufficient to calculate the LTV, others do not. Even when sufficient data is ostensibly available to compute the LTV, many abuses that occur in the auto sales and finance market can obscure LTV numbers. Misinformation about the vehicle being purchased, such as powerbooking,[36] or misstatements about the vehicle's condition or history can inflate the alleged value of the vehicle. Having a more accurate picture of the balance between the debt taken on by consumers and the value obtained would be useful in evaluating the benefits of particular financing for consumers in this

[35] Front-end LTV ratio looks at the consumer's actual monthly income compared to the monthly payment amount, and back-end LTV looks at the consumer's other debt obligations in connection with the RISC payment amounts.

[36] Terry O'Loughlin, Powerbooking and Its Evil Cousins, Providers and Administrators, (Jul. 18, 2018), *available at*: https://www.providers-administrators.com/349330/powerbooking-and-its-evil-cousins .

marketplace, the performance of various underwriting methods, and provide a more complete explanation for the performance of various financing transactions than could be determined without detailed LTV information.

5. Add-ons

Expensive add-ons can play a key role in the performance of vehicle finance. These items are often sold at incredibly high prices and provide little to no value.[37] Creditors understand this and gather information about add-ons sold with the vehicle and often have limits on individual add-ons and/or overall add-ons that may be sold as part of the purchase and sale transaction. Add-ons are sold at widely varying costs, leading to discriminatory pricing, with people of color paying higher amounts than white consumers. This important information is often lacking from data sets regarding the origination and performance of vehicle finance, despite the fact that it can and often does add thousands of dollars to a transaction without providing additional value to the consumer. Data regarding add-ons could help determine how various add-ons and the costs and benefits or lack thereof associated with them affect financing performance and ultimately success in a consumer fully paying off their car. It could also help determine how much of the cost of add-ons that allegedly protect the consumer's interest in the financing transaction such as GAP, or the creditor's interest such as VSI, are recovered for the consumer's benefit in when financing is paid off early such as through a prepayment or repossession.

B. Consumer payment performance data

There is a wealth of information about these debts and how they perform over the duration of the retail installment sales contract that creditors have access to and which would be beneficial to gather and share. There is currently no available data set that provides a consistent, ongoing picture of consumers' payment and delinquency information over the life of the RISC. While some consumer credit reporting data provides very high-level information about general trends, these reports exclude portions of the auto lending market[38] and do not provide sufficiently granular data. Market participants would benefit from having more information about consumer payment trends. Consumers who have knowledge about payment and delinquency trends would be better prepared for the significant payment obligations attendant to a retail installment sales contract, creditors would benefit by being better able to predict outcomes in their own portfolios, and researchers and advocates would be better able to educate the public about risks, benefits, and needed policy changes.

It would be useful to obtain data about consumer payment history, including information about whether payments are timely, which consumers (categorized based on other, obtainable information such as credit score, geographic location, etc.) fall behind in their payments, whether consumers get back into a current payment status after becoming delinquent, whether and what

[37] National Consumer Law Center, Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing (Oct. 11, 2017) [hereinafter NCLC Add-Ons]. Analyzing a large national data set, this report shows what dealers actually pay for automobile add-ons versus what they charge consumers, and it exposes how the arbitrary and inconsistent pricing of these optional products fosters discriminatory pricing.

[38] For instance, this only includes lenders who report to credit reporting agencies. Some creditors do not report at all, and some do not report accurately.

percentage of consumers who become delinquent escalate into a default status, and at what point during the contract term consumers become delinquent (i.e., within the first few months, after the first or second year, toward the end of the contract).

Similarly, it would be useful to obtain information about consumer default rates, including whether and what percentage of consumers get back into a current payment status after defaulting, at what point during the contract duration consumers default, and how many defaults progress to acceleration and repossession before the consumer is able to become current.

C. Repossession Information

A security interest in a vehicle is an extraordinarily powerful tool to force consumers to make payments, and, like so many aspects of auto lending, occurs with little oversight. A speedy repossession may benefit the creditor with a higher price when remarketing the vehicle, but a too-hasty repossession that fails to allow the consumer to catch up on past payments and make the remaining payments may result in the creditor receiving less in the end. In any case, the loss of a vehicle can be devastating for a consumer. For many, it quickly escalates into the loss of their job (and, consequently, the income from which they derive the ability to make payments on the contract) and a severe negative impact on their credit rating. The consumer is also burdened with the costs of repossession and of finding and paying for alternate transportation. For consumers with disabilities whose vehicles have been specially adapted, repossession is particularly alarming and can lead to a tremendous financial loss when considering the high costs of modifying the vehicle to fit their needs.

Despite its extreme impact, consumers and other market participants generally have very little access to data which would inform them about repossession trends. Some repossession conduct has the potential to be particularly abusive, but without the data necessary to understand the scope of this abusive conduct and its impact on the lending marketplace overall, it is even more difficult to identify and stop. The CFPB has recently identified abusive behavior in repossessions by loan servicers through its supervision activity, but its supervision authority is limited.[39]

As the CFPB notes, no government entity collects data regarding repossessions. While at least one private company attempts to provide some information here, it is created using proprietary information, preventing meaningful reliance on its results. Like many of the other currently available data sources, it is likely not representative of the auto lending market as a whole. Consumer credit reporting data may also provide some insight about repossessions, but some creditors do not furnish data to credit bureaus at all or may not furnish to all three bureaus.[40] The CFPB has also noted that the relationship between charge-offs and repossessions in credit reporting is unclear, and the Metro 2 credit reporting guidelines provide examples of how an auto debt may be "charged off" without a repossession.[41]

[39] CFPB Bulletin 2022-04: Mitigating Harm from Repossession of Automobiles, Compliance Bulletin and Policy Guidance March 3, 2022, 87 F.R. 11951.

[40] CFPB Data Point: Subprime Auto Loan Outcomes by Lender Type, September 2021, Data Point No. 2021-10 at 9 [hereinafter CFPB Data Point].

[41] CFPB Data Gaps Presentation, *supra* note 24, at 12.

Greater transparency into auto repossessions would benefit all market participants: consumers would have more information about their rights in the process and whether and when repossession is a risk, creditors would have more information about the costs and benefits of repossession, and researchers and advocates would be able to study repossession trends and methods to see where advocacy or education may be the most impactful.

Creditors are in a position to have nearly all of the information we believe would be useful to fill in the particular "data gaps" here, including:

1. Calculation of amounts owed

Before and after the vehicle is repossessed, the creditor needs to be extremely precise about the calculation of the amounts owed. It uses this information to initiate the repossession process, furnish data to credit bureaus, and generate the requisite notices throughout the repossession process. It would be useful to have data regarding how the creditor allocates the consumer's payments on the retail installment sales contract, including what amounts are being paid to the creditor and in what order. It would also be useful to have data about the amounts owed at the time of repossession, including an itemization of the fees and costs included in the calculation.

2. Timing of repossession.

It would be useful to have data about the point in the term of the retail installment sales contract that lenders conduct repossessions (e.g., does this occur within the first 3-6 months, within the last year, etc.), and how soon after a delinquency or default the creditor initiates the repossession process.

3. Repossession methods

Secured creditors use varying methods of repossession. Taking physical possession of the vehicle through self-help repossession (where the creditor takes the vehicle without judicial process) is common. Sometimes these physical takings are aided through electronic repossession activities such as the use of GPS locators, license plates readers, and more. Sometimes electronic repossession methods are used not just to take physical possession of the vehicle, but to pressure the consumer into making payments. These may include electronic disablement devices, devices that make annoying sounds to remind the consumer to make payments, and GPS tracking devices that not only facilitate repossessions, but also restrict the consumer's use of a car to a certain area. These methods have a strong *in terrorem* effect on consumers and there is a high potential for the abusive use of electronic repossession. Although the use of these methods may involve a third-party provider, it is often the creditor that requires their implementation as a condition of extending credit, so creditors will have access to information about the extent to which electronic repossession is used. Understanding the marketplace requires data about the range of repossession methods required for financing and used by creditors, which creditors use electronic repossession and how often, whether the costs of electronic repossession devices are passed on to consumers, the amounts of such costs, and which consumers are subjected to these methods.

The use of electronic repossession tactics as a way to force payment, rather than with the present intent to actually take the vehicle means that to understand the market, we must obtain data about how often these methods are used in connection with a physical taking of the vehicle versus on a routine basis to simply obtain a regular monthly payment. Information that may provide guidance here would include the frequency of their use as compared with the frequency of actual physical takings of the vehicles.

4. Repossession statistics

At a minimum, it would be extremely useful to have data about the number of repossessions, and to analyze this in connection with other factors. This data should include the number of repossessions the creditor has conducted each month (or on some regular basis, to evaluate trends), how many repossessions have been conducted per consumer, and how many repossessions have been conducted per vehicle. Some consumers may also engage in a "voluntary" repossession, whereby they permit the creditor to take the vehicle or bring it to the creditor themselves, knowing that they cannot afford to continue to make payments on the vehicle. Consumers may engage in a voluntary repossession believing that it will be reported more favorably on their credit than an involuntary repossession. Data regarding repossession statistics should provide information to distinguish between voluntary and involuntary repossessions.

5. Use of the right to cure

A number of jurisdictions give consumers the right to cure a default prior to repossession. It would be useful to obtain data about whether consumers are offered the ability to cure a default, how many consumers were able to cure, and whether consumers who cured default gained further use of the vehicle, completed their loan payments, or defaulted again and progressed into a repossession and sale of the collateral. This information would help creditors, advocates, and policymakers evaluate how helpful the right to cure is, and consider ways of making it more effective as a way of enabling the consumer to avoid repossession and succeed in purchasing the car.

6. Reinstatement and redemption

For many consumers, defaulting on auto debt will lead to an automatic acceleration of the full debt and a repossession, but some states require creditors to allow consumers to reinstate the contract after a repossession by paying the past amounts due instead of the full accelerated contract amount.[42] It would be useful to obtain data about whether consumers are offered the ability to reinstate, how many consumers were able to reinstate, and whether reinstated consumers completed their loan payments or progressed into a repossession and sale of the

[42] These include, but are not limited to, California, Cal. Civ. Code §§ 1812.2, District of Columbia, D.C. Mun. Regs. tit. 16, §§ 340–343, Illinois, 625 Ill. Comp. Stat. § 5/3-114(f-7), Maryland, Md. Code Ann., Com. Law §§ 12-624 to 12-625, 12-921, 12-1021, Mississippi, Miss. Code Ann. § 75-9-623, New York, N.Y. Pers. Prop. Law § 316, Rhode Island, R.I. Gen. Laws § 6-51-4(c), and Wisconsin Wis. Stat. § 425.208.

collateral. This information would help creditors, advocates, and policymakers to evaluate the effectiveness of a right to reinstate in comparison with a right to cure, and would guide them in crafting contract terms and public policies that enhanced the likelihood that consumers will succeed in purchasing vehicles.

Different from a right to reinstate is the right to redeem, which UCC Article 9 provides to a consumer up until the date of disposition of the vehicle.[43] The debtor may redeem repossessed collateral by tendering an amount sufficient to satisfy all obligations secured by the collateral plus the cost of repossession, which may include the full accelerated amount if this is what the contract provides. This is much more difficult, as consumers whose vehicles are repossessed due to the inability to make their monthly payments will face extraordinary difficulty gathering the full accelerated amount. Data that would be useful here includes how many consumers were able to redeem the vehicle prior to the time of disposition, and whether the redemption amount included a full acceleration of the amounts due on the contract.

7. Repossession sales

The actual physical taking of the vehicle itself is only the first step in the repossession process. Article 9 of the Uniform Commercial Code emphasizes the need for a commercially reasonable sale, and sets forth in great detail the methods of calculating owed amounts, the sale notices, how to conduct the sale and administer the proceeds. This level of detail underscores that the purpose of a repossession is to satisfy or reduce the consumer's debt obligation by selling the vehicle and fetching a price that will reduce the debt owed. The consequences of the sale, any available surplus, any remaining deficiency still owed, and the collection and sale of the deficiency debt are equally important to understanding the full picture of repossession and creditor activity, yet there is very little publicly available data here.

Data should be made available about the number of repossessed vehicles which are sold, and the number of vehicles sold privately and at public auctions.[44] It would also be useful to have data about the results of the sale, including how many sales result in a surplus amount owed to the consumer, and how many sales do not provide enough money to satisfy the underlying obligation and lead to a deficiency balance owed by the consumer. Data should also be made available about the total dollar amounts of these surpluses and deficiencies per creditor.

If there is a remaining deficiency balance, the creditor may continue to collect on this amount in various ways, including traditional collection methods but also through filing a collections lawsuit against the consumer. Data here should be provided about the number of such lawsuits filed against consumers, the number of judgments obtained, and the dollar amounts of these judgments.

Finally, the creditor may sell and assign this deficiency balance to a third party, and data here should be provided about the number and volume of such sales by creditors, including the

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[43] U.C.C. § 9-623.

[44] *See* U.C.C. § 9-613(1)(C), requiring the creditor to notify the debtor about the method of the sale.

amounts assigned via a sale to a third party as compared with the amounts the third party paid to acquire the deficiencies.

8. Credit reporting

As stated previously, credit reporting regarding the various events in the course of an auto loan has a very significant impact on consumers. Some credit-challenged consumers take on auto-related debt in an effort to improve their credit score, believing that a positive payment history will give them the ability to take on a more significant debt obligation, like purchasing a house. Not all creditors furnish data, however, or they may not do so accurately. It would be useful to obtain data sufficient to identify how and whether creditors furnish this data about each of these events to credit bureaus.

D. Underwriting and other information from origination

Collection and dissemination of demographic information regarding consumers in auto finance transactions is sorely needed. It is necessary to understand the roles that income, race, ethnicity, geographic location and other attributes play in the extension of credit and its terms, the servicing and performance of credit, and the likelihood of ultimate success in auto financing--the ownership of a safe, reliable, fully paid for vehicle. Better understanding of these issues can help market players ensure that their activities and policies do not inadvertently create a disparate impact which adversely impacts a protected class. Helping market participants better understand these issues would help create a fair and equitable credit marketplace.

Existing studies show that a consumer's race or ethnicity can increase the cost the consumer is charged for the purchase of a car, for add-ons sold with the car, and for financing. This discrimination reduces the ability of households with people of color to obtain a car and benefit from car ownership and the physical and economic mobility that comes with it. Of those at or below the poverty line, 31% of African American households and 20% of Hispanic households lack access to a car, compared with just 13% of white households. This disparity holds true for households above the poverty level and in both metro and non-metro areas.[45] Better data regarding consumer demographics and outcomes could help address these issues.

1. Discrimination increases the raw price charged for the cars.

Several studies have shown that some races and ethnicities are charged higher prices for the car itself. Two studies by Ian Ayres in 1991 and 1995 found that African Americans were quoted

[45] *See* John W. Van Alst, National Consumer Law Center, Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car (Apr. 2019) *available at* https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-cars-april2019.pdf.

higher prices than whites.[46] A 2003 analysis of more than half a million car purchase transactions at over 3,500 dealerships made similar findings.[47]

2. Discrimination increases the price for add-on products sold with the car.

In a comprehensive 2017 study of millions of add-on products sold to consumers as part of car sale transactions,[48] NCLC found that variation between add-on prices was often dramatic. Many dealers charged one consumer hundreds or even thousands of dollars more than another consumer for the same product. One dealer, who paid $50 for a window etching product, marked the price up to as low as $349 for some consumers and as high as $5,000 for others.[49]

As with other discretionary charges in auto sales and finance, NCLC found that where there was discretion and inconsistency, there was disparate impact by ethnicity. Examining service contract data from forty-eight states and the District of Columbia, NCLC found that average percentage markups for service contracts were higher for Hispanics than for non-Hispanics in forty-four states.

In addition to being targeted for higher prices, minority buyers may be targeted for more add-ons by dealers than other car buyers. A 2014 study conducted by the Center for Responsible Lending found that African Americans and Latinos were sold multiple add-on products almost twice as often as white consumers. Thirty percent of African Americans and 27% of Latinos were sold multiple add-ons compared to 16% of whites. The study also found that car purchases that included multiple add-ons were associated with higher delinquency rates and greater risk of repossession.[50]

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[46] Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 *Mich. L. Rev*. 109 (1995); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817 (Feb. 1991). *See also* Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, The Am. Econ. Review, Vol. 85, No. 3, at 304-321 (Jun. 1995) (analyzing over 300 paired audits and finding that white male car buyers were quoted significantly lower prices than African American or female buyers).

[47] Fiona Scott Morton, Florian Zettelmeyer, & Jorge Silva-Risso, Consumer Information and Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?, Quantitative Mktg. & Econ. 1: 65 (2003), *available at* https://doi.org/10.1023/A:1023529910567.

[48] NCLC Add-Ons, supra at note 37.

[49] *Id.* at 21-22.

[50] Delvin Davis, Center for Responsible Lending, Non-Negotiable: Negotiation Doesn't Help African Americans and Latinos on Dealer-Financed Car Loans (Jan. 2014), *available at* https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/CRL-Auto-Non-Neg-Report.pdf [hereinafter CRL Non-Negotiable].

3. Discrimination increases the financing costs of car purchases for households of color.

Dealers make much of their profit from marking up interest rates.[51] Discrimination is often the only basis for different rates between consumers. Minority borrowers pay seventy basis point higher interest rates, but default less, all other things being equal.[52] Analyses of these markups show that consumers with the same credit risk can pay very different interest rates, depending on how much the dealer marks up the interest rate for each customer, and that minority car buyers are marked up more often and by a greater amount than other car buyers.[53]

These discriminatory patterns were confirmed in an investigation by the CFPB and the U. S. Department of Justice (DOJ), which determined that over 235,000 people of color were charged higher interest rates for car loans than other consumers between April 2011 and December 2013.[54]

More recently, research has shown continued differences in financing terms between white and minority car buyers. In 2018, the National Fair Housing Alliance released findings showing that better qualified non-white testers were quoted more expensive financing options than white testers, with their average total payment being $2,662.56 higher.[55]

In 2020, the FTC filed a complaint and stipulated order against a New York car dealer that included data analysis showing that the practices at the dealership resulted in higher charges to

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[51] Ian Ayres, *Guess how much cheaper your auto loan would be if dealers had to play fair*, The Wash. Post, June 26, 2019, *available at* https://www.washingtonpost.com/opinions/2019/06/26/guess-how-much-cheaper-your-auto-loan-would-be-if-dealers-had-play-fair/.

[52] Alexander W. Butler, Erik J. Mayer, & James P. Weston, Racial Discrimination in the Auto Loan Market 41-42 (Mar. 31, 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_mayer_racial-discrimination-in-the-auto-loan-market.pdf.

[53] Analyses showed that African Americans were marked up more often than whites and that their average markup was higher. Since the buyer's credit score and other indicia of creditworthiness are already included in the buy rate, the differences in markup were not a reflection of any differences in creditworthiness. *See* Ian Ayres, Expert Report, Willis v. American Honda Fin. Corp., No. 3-02-0490 (M.D. Tenn. July 1, 2004), *available at* https://www.nclc.org/images/pdf/litigation/closed/ahfc-ianayresreportexhibits.pdf; Mark A. Cohen, Report on the Racial Impact of AHFC's Finance Charge Markup Policy, Willis v. American Honda Fin. Corp., No. 3-02-0490 (M.D. Tenn. June 30, 2004), *available at* https://www.nclc.org/images/pdf/litigation/closed/ahfc-cohenreportappendices-a-c.pdf.

[54] Administrative Proceeding Consent Order, *In re* Ally Financial Inc. & Ally Bank, File No. 2013-CFPB-0010 (CFPB Dec. 20, 2013), *available at* https://files.consumerfinance.gov/f/201312_cfpb_consent-order_ally.pdf. This analysis focused on just one major car financing company, Ally Financial, Inc. Subsequent enforcement actions followed, based on similar analyses against American Honda Finance Corporation, Fifth Third Bank, and Toyota Motor Credit Corporation. Information about the enforcement actions is available at https://www.consumerfinance.gov/policy-compliance/enforcement/actions/?page=1&topics=auto-loans#o-filterable-list-controls.

[55] Lisa Rice & Erich Schwartz Jr., National Fair Housing Alliance, Discrimination When Buying A Car: How the Color of Your Skin Can Affect Your Car-Shopping Experience (Jan. 2018), *available at* https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.

African American and Hispanic customers, who were charged the maximum allowable interest rate markup 50% more often than non-Hispanic white borrowers. Non-Hispanic white consumers were not charged any markup or were given an interest rate below the buy rate the dealer was provided about twice as often as African American or Hispanic borrowers. [56]

Consumers have no way of knowing that their interest rate is being marked up or by how much.[57] Even those charged with supervising auto finance for fair lending purposes find it difficult to research this issue and determine if there is racial bias in these markups because the Equal Credit Opportunity Act (ECOA) prohibits the collection of race data for consumers financing a car.[58]

4. Discrimination reduces the ability of consumers to successfully negotiate for better terms.

One hypothesis that is sometimes suggested to explain why people of color are charged more for cars, financing, and add-ons is that perhaps they just do not negotiate enough to obtain a lower price, but this is almost certainly not the case. Research by the Center for Responsible Lending looking at attempts to negotiate financing terms for car sales at dealers found that African-American and Latino consumers attempted to negotiate financing terms slightly more often than white car buyers, yet were still left with worse terms.[59]

These results are in line with what we might expect from a process that places a great deal of discretion with a dealership employee in an F&I office. The need to quickly size up a potential car buyer and reach the most profitable deal possibly leads many to rely, consciously or subconsciously, on race and ethnicity.[60]

The impacts of race and ethnicity extend beyond the origination of financing. Racial disparities in debt collection mean that consumers of color are more likely to be contacted by a debt collector and collection lawsuits are more common in communities of color.[61]

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[56] Complaint, Federal Trade Comm'n v. Liberty Chevrolet, Inc. d/b/a Bronx Honda, Case No. 20-CV-3945 (S.D.N.Y. May 21, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf.

[57] *Id.*

[58] 12 C.F.R. §§ 1002.5(b), 1002.12(a), (b).

[59] *See* CRL Non-Negotiable, *supra* note 50.

[60] Gregory Arroyo, *The Editor Goes One-On-One With the Man who Helped Chart the CFPB's Course Into the Auto Finance Industry*, F&I and Showroom, Apr. 2014 (citing Rick Hackett, former assistant director at the CFPB who represented auto finance companies both before and after his service with the CFPB, and who was told by a dealer: "Look, you've got to understand, we've got a very short period of time to figure out the best way to put together all the moving parts of a complex transaction for the consumer, and how we're going to be able to negotiate to have a deal the consumer can accept and is adequate for the dealership. And so we have to make quick judgments when we sort out the process. So when you pick that initial rate for negotiating a finance rate, we all know Asians are better negotiators.").

[61] National Consumer Law Center, Racial Disparities in Consumer Debt Collection, available at: https://www.nclc.org/wp-content/uploads/2022/10/Fact-Sheet-Racial-Disparities-in-Debt-Collection.pdf.

E. Specific Financing Entities

Some specific auto financing entities operate differently from the auto finance marketplace in general, with different incentives and practices. Because of these differences, it is important to gather and use data specific to these entities.

1. Buy Here Pay Here (BHPH) Financing

BHPH dealers operate differently and have different incentives than many other auto finance entities. Gathering and disseminating data specific to these transactions is vitally important to understanding the auto finance marketplace as a whole. It is especially important when looking at some of the most challenged consumers, including those with lower incomes, poor credit scores, thin credit files, or other credit challenges that disproportionally engage in BHPH transactions. This includes consumers that believe themselves to be more credit challenged, whether they are in fact or not.

The CFPB has noted that subprime auto finance transactions typically involve higher delinquency rates: "between 25 percent and 40 percent" of borrowers were delinquent for finance company and buy-here-pay-here (BHPH) borrowers.[62] BHPH dealers incentives may be less aligned with successful outcomes from a consumer perspective than many other types of auto finance. Defaults and repossessions may actually be more beneficial to BHPH dealers than a consumer's successful completion of making financing payments. BHPH transactions often involve sizable down payments for lower cost cars that often represent an immediate breakeven if not an outright profit for dealers. The inventory at BHPH dealers is often made up of vehicles that have previously been sold to other consumers and repossessed.[63] Defaults and repossessions may provide a tax advantage to some dealers. BHPH dealers make more money from multiple repossession and sales of the same vehicle than they would from the successful completion of a single financing of a single vehicle over the same period of time.

Unfortunately, many existing data sets either largely exclude BHPH or under-represent BHPH. For those that include BHPH it is often aggregated with different sectors of the marketplace. Additional data is needed to better understand this important sector of the auto finance marketplace. A number of additional data points would help shed light on this area.

a. Dealer vehicle cost and down payment

BHPH dealers are often advised to obtain a down payment equal to or in excess of the cost to the dealer of the vehicle sold. In fact, salespersons' commissions are often based upon the down payment amount rather than the sales price of the vehicle. This means that any subsequent

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[62] Jasper Clarkberg, Jack Gardner, and David Low, Data Point: Subprime Auto Loan Outcomes by Lender Type Data Point No. 2021-10, CFPB (Sept. 2021), available at: https://files.consumerfinance.gov/f/documents/cfpb_subprime-auto_data-point_2021-09.pdf.

[63] For an enlightening explanation of the BHPH industry, see L.A. Times, Ken Bensinger, A Vicious Cycle in the Used Car Business: Sign, Drive, Default, Repossess and Resell—That's the Game at Buy Here Pay Here Dealerships,Oct. 30, 2011, *available at* http://articles.latimes.com. *See also* Mark McDonald, Used Cars: When Does an $8,000 Vehicle Cost $21,000?, Car and Driver, Feb. 28, 2021, *available at* https://www.caranddriver.com.

payment is profit and that BHPH dealers can repossess a vehicle without worrying about losing money on an unsuccessful credit transaction. In order to understand this dynamic, it is important to have information about the cost of the vehicle to the dealer and the amount of any down payment.

b. Resale of vehicle to different buyers

Many BHPH dealers rely heavily on repossessed cars to provide inventory for their lot.[64] Understanding the source of the vehicle that is the subject of BHPH financing is important to understand the transaction and the incentives of various parties.

c. Data about repossessions

BHPH dealers frequently engage in repossession and the threat of repossession. They will use the easy threat of electronic repossession to force consumers to make payments. Some dealers will frequently actually repossess cars and are often described as repossession mills. The repossessions provide their inventory and multiple repossessions and sales of the same vehicle can produce greater profit than one sale to consumer that pays off the vehicle in full. Understanding what is happening when repossessions take place or are threatened is vital to understand the BHPH sector of the marketplace. BHPH data regarding repossessions should include:

- Total of payments made by each buyer
- Total of payments made by all the buyers for each vehicle which is sold multiple times
- Use of electronic repossession to compel payment
- Use of electronic repossession to recover vehicle
- Number of repos by consumer and by vehicle

2. Subprime Finance Entities

Subprime finance entities have important differences from other auto finance entities. Many are smaller and regional. They often do not report to credit reporting agencies. Many have very strong influence over the business practices of the dealers whose retail installment sales contract they buy. They typically purchase RISCs with much higher interest rates than average. While this may compensate creditors for higher potential defaults, it may also lead to higher defaults. The CFPB has noted subprime auto finance transactions typically involve higher delinquency rates: "between 25 percent and 40 percent" of borrowers were delinquent for finance company and buy-here-pay-here (BHPH) borrowers.[65] In some instances the transactions may be structured so that they creditors are themselves largely insulated from negative impact from defaults, especially for aged accounts.

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[64] *See* L.A. Times, Ken Bensinger, A Vicious Cycle in the Used Car Business: Sign, Drive, Default, Repossess and Resell—That's the Game at Buy Here Pay Here Dealerships (Oct. 30, 2011), *available at* http://articles.latimes.com.

[65] CFPB Data Point, *supra* note 42 at 3.

a. <u>Assignees that routinely purchase vehicle financing below face value</u>

It is a very common practice by subprime vehicle finance entities to purchase retail installment sales contracts (RISC) from originating dealers at below face value.[66] Some pay a flat "acquisition fee" to the assignee when the RISC is sold. For some the amount paid by the assignee to the dealer is reduced by amounts described as "dealer reserve." Other finance entities reduce the amount paid by the assignee to the dealer by deducting amounts described as "loss reserve." Some impose an "increased risk charge."[67] Some have complex agreements where various amounts are retained by the assignee. with some of them released to the dealer if the consumer pays in full specified event occurs, such as payment in full by the customer.[68]

There has been considerable litigation about whether or not these costs constitute a finance charge.[69] However, there has not been data available to determine if such charges, rather than

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[66] See, e.g., Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998); Sampler v. City Chevrolet Buick Geo, Inc., 2000 WL 263695 (N.D. Ill. Feb. 24, 2000), *rev'g* 10 F. Supp. 2d 934 (N.D. Ill. 1998); Taylor v. Bob O'Connor Ford, Inc., 1998 WL 177689 (N.D. Ill. Apr. 13, 1998), *motion to dismiss state law claims denied in part and granted in part*, 2000 WL 876920 (N.D. Ill. June 29, 2000); Hoffman v. Grossinger Motor Corp., 1997 WL 793316 (N.D. Ill. June 27, 1997), *aff'd*, 1998 WL 547312 (N.D. Ill. Aug. 27, 1998), *class certified in* 1999 WL 184179 (N.D. Ill. Mar. 29, 1999), *summary judgment for dealer aff'd*, 218 F.3d 680 (7th Cir. 2000).

[67] Balderos v. City Chevrolet, 214 F.3d 849 (7th Cir. 2000).

[68] See, e.g., Bangor Car Care, Inc. v. State Tax Assessor, No. BCD-AP-11-12, Business and Consumer Court (ME 2013) describing the financial arrangement between Persian Acceptance Corp. (PAC), a regional subprime finance entity and Bangor Car Care, Inc. (BCCI) a Maine auto dealer:

The agreement between BCCI and [PAC] was somewhat complicated, but typically worked as follows. At the time of each sale, [PAC] advanced to BCCI a portion of the amount financed by the customer. BCCI retained any down payment or trade-in vehicle provided by the customer. Customers made their payments directly to [PAC], not to BCCI.
In determining the advance, [PAC] first discounted the amount financed for every contract by 15%; this discount was an amount that BCCI would never receive, even if the customer paid [PAC] in full. [PAC] also deducted 15% of the amount financed and placed it into a fund called the "dealer reserve," which was controlled by [PAC]. The amount financed less the discount and less the dealer reserve was called the gross advance or base advance. If a customer defaulted, BCCI had to reimburse [PAC] for the gross advance amount with certain adjustments discussed infra.
The gross advance was not, however, the amount of funds advanced to BCCI. [PAC] deducted another 20% of the amount financed and placed it in a loss reserve fund that it controlled. The loss reserve was used to reimburse [PAC] when customers defaulted. The gross advance less the loss reserve and less a flat $50 acquisition fee was the amount actually advanced to BCCI on the transaction. This was called the "net advance." In the aggregate, the net advance is 50% of the amount financed less $50. If the customer paid in full, [PAC] would return the amount of the dealer reserve on the contract to BCCI, unless BCCI owed money to [PAC] for other transactions. If the customer did not pay in full, BCCI forfeited some or all of the dealer reserve depending on how much the customer had failed to pay. (internal citations omitted).

[69] Walker v. Wallace Auto Sales, Inc., 155 F.3d 927 (7th Cir. 1998) (at motion to dismiss stage, it is adequate to allege that the dealer passed the cost of the discount onto credit customers only and failed to disclose it as a finance charge); Sampler v. City Chevrolet Buick Geo, Inc., 2000 WL 263695 (N.D. Ill. Feb. 24, 2000), *rev'g* 10 F. Supp. 2d 934 (N.D. Ill. 1998) (adopting the *Walker* pleading standard); Taylor v. Bob O'Connor Ford, Inc., 1998 WL 177689 (N.D. Ill. Apr. 13, 1998), *motion to dismiss state law claims denied in part and granted in part*, 2000 WL 876920 (N.D. Ill. June 29, 2000) (court held under TILA it is permissible for a car dealer to assign contracts at a

expanding the availability of good credit likely to lead to the successful acquisition of car, instead pose a risk to consumers of increased costs and subsequent risk of default without benefit. Better availability of data could help determine if similarly situated consumers would be unable to obtain credit but for such charges, if such charges lead to a higher risk of default, and what risks such practices hold for consumers.

b. VSI requirements

A number of auto finance creditors, particularly those that primarily deal in subprime auto finance, require that dealers include VSI coverage in every retail installment contract they purchase, set the cost and terms of coverage, and specify that the VSI premium should be included in the calculation of the amount financed. Sometimes the VSI mandated by the assignee includes coverages that not only protect the creditor's interest in tangible property, but also coverages that are more accurately seen as credit loss insurance. Such non-traditional VSI coverages are typically not excludable from the finance charge.[70] What has not been sufficiently examined for lack of good data is the impact such VSI requirements have on risks to consumers. It makes intuitive sense that the inclusion of such charges with no benefits to the consumer may protect the creditor from losses while increasing the consumer's risk of default. Additional data access is needed to answer this question.

V. Conclusion

We very much appreciate the Bureau's focus on data collection to better understand risks to consumers and new developments in the auto finance marketplace.

Respectfully submitted, this the 19th day of December, 2022, by:

discount to a finance company without disclosing the discount to consumers and to attempt to recoup the costs of the discount by charging *all* consumers a higher price; but the charge is "separately imposed" and hence a finance charge if the higher price is charged only to consumers who are buying on credit); Hoffman v. Grossinger Motor Corp., 1997 WL 793316 (N.D. Ill. June 27, 1997) (pre-*Walker* court imposed court imposed a slightly different burden upon the consumer; must show that a vehicle comparable to the one purchased on credit was or would have been sold to a cash-paying customer for less money), *aff'd*, 1998 WL 547312 (N.D. Ill. Aug. 27, 1998), *class certified in* 1999 WL 184179 (N.D. Ill. Mar. 29, 1999), *summary judgment for dealer aff'd*, 218 F.3d 680 (7th Cir. 2000) (see discussion in subsequent text in this section). *See also* Irby-Greene v. M.O.R., Inc., 79 F. Supp. 2d 630 (E.D. Va. 2000) (adopting the *Walker* standard but dismissing case against the assignee holding that the discount was not apparent on the face of the documents assigned; *see* § 12.3.2, *infra*); Owens v. Tranex Credit Corp., 1998 WL 35983384, at *5–6 (S.D. Ind. Aug. 11, 1998) (denying motion to dismiss where the discount is imposed only on consumers buying on credit, discount is separately imposed).

[70] 15 U.S.C. §§ 1601 *et seq*.

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