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CFPB Bulletins

Current through December 1, 2015

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Note: Bulletins 2013-01 and 2012-07 are omitted because they were superseded by later guidance. There are no bulletins numbered 2013-03 or 2013-04. Bulletin 2013-05 was referred to as 2013-03 in a CFPB Annual Report, but we refer to it as 2013-05 in this document.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Compliance Bulletin 2015-06

Date: November 23, 2015
Subject: Requirements for Consumer Authorizations for Preauthorized Electronic Fund Transfers

A. Introduction

The CFPB is issuing this Compliance Bulletin to industry to remind entities of their obligations under the Electronic Fund Transfer Act (EFTA) and Regulation E when obtaining consumer authorizations for preauthorized electronic fund transfers (EFTs) from a consumer's account. The CFPB has observed that some entities may not fully comply with the requirements imposed by EFTA and Regulation E. Others may be uncertain of their obligations under EFTA and Regulation E, as well as the intersections between Regulation E and the Electronic Signatures in Global and National Commerce Act (E-Sign Act).[1] For instance, this Compliance Bulletin explains that oral recordings obtained over the phone may authorize preauthorized EFTs under Regulation E provided that these recordings also comply with the E-Sign Act. Further, this bulletin outlines entities' obligations to provide a copy of the terms of preauthorized EFT authorizations to consumers. This Compliance Bulletin summarizes the current law, highlights relevant supervisory findings, and articulates the CFPB's expectations for entities obtaining consumer authorizations for preauthorized EFTs to help them ensure their compliance with Federal consumer financial law. [2]

B. Background

The CFPB has supervisory authority over certain covered persons, including very large depository institutions, credit unions and their affiliates;[3] certain nonbanks;[4] and service providers.[5]

EFTA is intended to protect individual consumers engaging in EFTs and remittance transfers.[6] EFTs are defined broadly and generally include any transfer of funds

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[1] Although the CFPB's authority to interpret the E-Sign Act is limited, *see* 15 U.S.C. § 7001 et seq., this additional guidance based on current law will assist entities in complying with EFTA and Regulation E.
[2] This Compliance Bulletin specifically focuses on preauthorized EFTs *from* consumers' accounts as governed by 12 CFR § 1005.10(b)-(d). This document does not address transfers *to* consumers' accounts, which are governed by different rules.
[3] 12 U.S.C. § 5515(a).
[4] 12 U.S.C. § 5514.
[5] 12 U.S.C. §§ 5514(e), 5515(d).

initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account.[7] EFTA is implemented through Regulation E, which includes official interpretations.[8] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) generally transferred rulemaking authority under EFTA from the Board of Governors of the Federal Reserve System ("the Board") to the CFPB.[9] The CFPB is authorized, subject to certain exceptions, to enforce EFTA and Regulation E against any person subject to EFTA and Regulation E.[10]

Consumer Authorization Requirements for Preauthorized EFTs from a Consumer's Account.

Entities must comply with EFTA and its implementing Regulation E when using preauthorized EFTs. Preauthorized EFTs refer to an "electronic fund transfer authorized in advance to recur at substantially regular intervals."[11] During examinations, the CFPB has noted that many companies – including those engaging in mortgage servicing, student loan servicing, debt collection, and short-term, small-dollar lending – solicit authorizations from consumers for payment by preauthorized EFT.

C*onsumer Authorizations in Compliance with EFTA and Regulation E*

EFTA and Regulation E establish requirements for entities that obtain consumer authorizations for preauthorized EFTs.[12] These requirements include specific rules related to consumer authorizations. Regulation E requires that preauthorized EFTs from a consumer's account be authorized "only by a writing signed or similarly authenticated by the consumer."[13] A copy of the authorization must also be provided to the consumer.[14]

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[6] *See generally* 15 U.S.C. § 1693 et seq; *see also* 12 CFR § 1005.1(b) ("[EFTA] . . . establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer and remittance transfer services and of financial institutions or other persons that offer these services. The primary objective of [EFTA and Regulation E] is the protection of individual consumers engaging in electronic fund transfers and remittance transfers.").
[7] *See* 15 U.S.C. § 1693a(7); 12 CFR § 1005.3(b).
[8] *See* 12 CFR § 1005 et seq.
[9] Dodd-Frank Act §§ 1002(12)(C), 1061, and 1084, 12 U.S.C. §§ 5481(12)(C), 5581, and 15 U.S.C. § 1693 et seq. Section 1029 of the Dodd-Frank Act generally excludes from this transfer of authority, subject to certain exceptions, any rule making authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. The transfer of authority also did not include Section 920 of EFTA, which concerns debit card interchange fees charged to merchants. Section 920 of EFTA is implemented by Board regulations at 12 CFR part 235.
[10] *See* EFTA § 918(a)(5), 15 U.S.C. § 1693o(a)(5); *see also* 12 U.S.C. §§ 5536, 5564.
[11] *See* 12 CFR § 1005.2(k).
[12] *See* 15 U.S.C. § 1693e; 12 CFR § 1005.10(b) and (d).
[13] *See* 12 CFR § 1005.10(b).
[14] *See id*.

Under EFTA and Regulation E, companies can obtain the required consumer authorizations for preauthorized EFTs in several ways. Consumer authorizations can be provided in paper form or electronically. The commentary to Regulation E explains that the rule "permits signed, written authorizations to be provided electronically," and specifies that the "writing and signature requirements . . . are satisfied by complying with the [E-Sign Act] which defines electronic records and electronic signatures."[15] Regulation E does not prohibit companies from obtaining signed, written authorizations from consumers over the phone if the E-Sign Act requirements for electronic records and signatures are met.[16] The E-Sign Act establishes that electronic signatures and electronic records are valid and enforceable if they meet certain criteria.[17] An electronic signature is "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[18] An electronic record is "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."[19]

In at least one examination, Supervision has concluded that one or more entities did not violate EFTA or Regulation E merely because they obtained by telephone consumer authorizations that were signed or similarly authenticated by the consumer orally.[20] Regulation E may be satisfied if a consumer authorizes preauthorized EFTs by entering a code into their telephone keypad,[21] or, Supervision concluded, the company records and retains[22] the consumer's oral authorization, provided in both cases the consumer intends to sign the record as required by the E-Sign Act.

In addition, any recording of telephone conversations with consumers should be conducted in accordance with applicable State laws. Whether an authorization is provided in paper form or electronically, to comply with Regulation E, the

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[15] 12 CFR part 1005, Supp. I, comment 10(b)-5. The E-Sign Act establishes that electronic signatures and electronic records are valid and enforceable if they meet certain criteria. *See* 15 U.S.C. § 7001(a)(1). An electronic signature is "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. § 7006(5). An electronic record is "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." *Id*. § 7006(4).

[16] In 2006, the Board explained that if certain types of tape-recorded authorizations constituted a written and signed (or similarly authenticated) authorization under the E-Sign Act, then the authorization would satisfy Regulation E requirements as well. 71 Fed. Reg. 1638, 1650 (Jan. 10, 2006).

[17] *See* 15 U.S.C. § 7001(a)(1).

[18] 15 U.S.C. § 7006(5).

[19] *Id*. § 7006(4).

[20] While Section 7001(c)(1) of the E-Sign Act restricts the use of oral recordings as electronic records "where a statute, regulation or other rule of law requires that information . . . be provided or made available to a consumer in writing," that rule does not apply when obtaining a consumer's authorization for preauthorized EFTs because Regulation E does not specify that entities must provide a writing to consumers when obtaining the authorization. *See* 12 CFR § 1005.10(b).

[21] 12 CFR part 1005, Supp. I, comment 10(b)-5 ("Examples of electronic signatures include, but are not limited to, digital signature and security codes.").

[22] Regulation E generally imposes a two-year record retention requirement on persons subject to EFTA. *See* 12 CFR § 1005.13(b).

authorization must be readily identifiable as such to the consumer and the terms of the preauthorized EFTs must be clear and readily understandable to the consumer.[23] The authorization process should evidence the consumer's identity and assent to the authorization.[24]

Providing a Copy of the Authorization to the Consumer

Regulation E requires persons that obtain authorizations for preauthorized EFTs to provide a copy of the terms of the authorization to the consumer.[25] The copy of the terms of the authorization must be provided in paper form or electronically.[26] Two of the most significant terms of an authorization are the timing and amount of the recurring transfers from the consumer's account.[27]

In at least one examination, CFPB examiners observed that one or more companies provided consumers a notice of terms for preauthorized EFTs from a consumer's account. Supervision determined that these notices of terms did not satisfy Regulation E, because the notices did not disclose important authorization terms such as the recurring nature of the preauthorized EFTs, or the amount and timing of all the payments to which the consumer agreed.

As an alternative to providing a copy of the authorization after its execution, a company can comply with the Regulation E requirement to provide the consumer a copy of the authorization by using a confirmation form. For instance, a company may provide a consumer with two copies of a preauthorization form, and ask the consumer to sign and return one and to retain the second copy.[28] However, a company does not satisfy Regulation E by only making a copy of the authorization available upon request in lieu of providing the copy.[29]

C. CFPB Expectations

The CFPB expects all entities obtaining consumer authorizations for preauthorized EFTs to know and comply with the requirements under 12 CFR 1005.10(b) that entities obtain appropriate consumer authorizations before initiating preauthorized EFTs and provide a copy of that authorization to consumers. When practical, the

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[23] 12 CFR part 1005, Supp. I, comment 10(b)-6.
[24] 12 CFR part 1005, Supp. I, comment 10(b)-5.
[25] 12 CFR § 1005.10(b); 12 CFR part 1005, Supp. I, comment 10(b)-5.
[26] *See* 12 CFR part 1005, Supp. I, comment 10(b)-5.
[27] *Cf.* 12 CFR § 1005.2(k) ("'Preauthorized electronic fund transfer' means an electronic fund transfer authorized in advance to recur at substantially regular intervals."); *id.* 1005.10(d) ("When a preauthorized electronic fund transfer from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount, the designated payee or the financial institution shall send the consumer written notice of the amount and date of the transfer at least 10 days before the scheduled date of transfer.").
[28] *See* 12 CFR part 1005, Supp. I, comment10(b)-4.
[29] *See* 12 CFR § 1005.10(b) ("The person that obtains the authorization *shall provide* a copy to the consumer.") (emphasis added).

CFPB encourages entities obtaining consumer authorizations for preauthorized EFTs to provide the copy of the authorization to the consumer before the first preauthorized EFT is initiated.

If the CFPB determines that an entity has engaged in acts or practices that violate EFTA and Regulation E, or any other Federal consumer financial law, it will take appropriate supervisory or enforcement action to address the violations and seek all appropriate corrective measures, including remediation of harm to consumers and assessment of civil money penalties.

D. Regulatory Requirements

This Compliance Bulletin summarizes existing requirements under the law and findings the Bureau has made in the course of exercising its supervisory authority, and is a non-binding general statement of policy articulating considerations relevant to the CFPB's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b).

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a).

The CFPB has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq.

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Compliance Bulletin 2015-05

Date: October 8, 2015
Subject: RESPA Compliance and Marketing Services Agreements

The Consumer Financial Protection Bureau (CFPB or the Bureau) issues this compliance bulletin to remind participants in the mortgage industry of the prohibition on kickbacks and referral fees under the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601, *et seq*.) and describe the substantial risks posed by entering into marketing services agreements (MSAs).[1] The Bureau has received numerous inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of MSAs, but has not received similar input suggesting the use of those agreements benefits either consumers or industry. Based on the Bureau's investigative efforts, it appears that many MSAs are designed to evade RESPA's prohibition on the payment and acceptance of kickbacks and referral fees. This bulletin provides an overview of RESPA's prohibitions against kickbacks and unearned fees and general information on MSAs, describes examples of market behavior gleaned from CFPB's enforcement experience in this area, and describes the legal and compliance risks we have observed from such arrangements.

Overview of RESPA and Marketing Services Agreements

Congress enacted RESPA in 1974 as a response to abuses in the real estate settlement process. Thus, a primary purpose of RESPA is to "eliminat[e] … kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services." 12 U.S.C. 2601(b)(2). The statute, which has both civil and criminal penalties, covers myriad settlement services, including "any service provided in connection with a real estate settlement," such as title searches, examinations, and insurance; services rendered by an attorney; document preparation; property surveys; rendering of credit reports or appraisals; inspections; services rendered by a real estate agent or broker; and

[1] Regulation X, which implements RESPA, is codified at 12 C.F.R. Part 1024.

loan origination, processing, and underwriting. 12 U.S.C. 2602(3), 12 U.S.C. 2607(d) (penalty provision); *see also* 12 C.F.R. 1024.2(b).

Section 8(a) of RESPA prohibits the giving and accepting of "any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. 2607(a); *see also* 12 C.F.R. 1024.14(b). Section 8(c)(2) states that "[n]othing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2); *see also* 12 C.F.R. 1024.14(g).

MSAs often involve providers of settlement services in a mortgage loan transaction, such as a lender, real estate agent or broker, or a title company.[2] They may also involve third parties who are not settlement services providers, such as membership organizations. MSAs are usually framed as payments for advertising or promotional services, but in some cases the payments are actually disguised compensation for referrals.

Bureau Experience

In the Bureau's experience, determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation. The nature of this fact-intensive inquiry means that, while some guidance may be found in the Bureau's previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another. Nevertheless, any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction.

The Bureau's Office of Enforcement has identified violations of RESPA Section 8(a) in the course of its investigations, including investigations that involved the use of oral or written MSAs. In addition, the Bureau has received numerous examples of MSAs from industry whistleblowers that, upon initial review, appear to use MSAs to disguise kickbacks and referral fees. In the course of

[2] HUD issued an interpretive rule addressing the issue of real estate brokers or agents providing marketing services for home warranty companies. *See* Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 FR 36271 (June 25, 2010); 75 FR 74620 (Dec. 1, 2010) (response to public comments).

one investigation resulting in an enforcement action that specifically involved MSAs, the Bureau observed a title insurance company entering MSAs as a quid pro quo for the referral of business. The fees paid under the agreements were based, in part, on how many referrals the title insurance company received and the revenue generated by those referrals. From its investigation of the underlying facts, the Bureau found that the number of referrals increased significantly when MSAs existed, and the differences in referrals were statistically significant and not explained by seasonal or year-to-year fluctuations.

Impermissible actions that some MSAs attempt to disguise, such as the steering of business in connection with kickbacks and referral fees, may result in consumers paying higher prices for mortgages than would likely be the case without disguised kickback or referral fees. These practices also tend to indirectly undermine consumers' ability to shop for mortgages, which can raise costs for consumers. In terms of thwarting shopping, one investigation that ended with an enforcement action revealed that consumers' ability to shop was hindered when a settlement service provider buried the disclosure that consumers can shop for settlement services in a description of the services that its affiliate provided. *See* 12 U.S.C. 2607(c)(4); 12 C.F.R. 1024.15(b)(1). In another instance that also resulted in an enforcement action, a settlement service provider did not disclose its affiliate relationship with an appraisal management company and did not tell consumers that they had the option of shopping for services before directing them to the affiliate. The steering incentives that are inherent in many MSAs are clear enough to create tangible legal and regulatory risks for the monitoring and administration of such agreements.

The Bureau has also seen cases where companies fail to provide some or all of the services required under their agreements. In the course of investigations that have led to enforcement actions, the Bureau has found many examples of settlement service providers keeping payments received from other providers without actually performing any contractually-obligated services. They include instances of not performing underwriting, processing, and closing services; not executing title insurance work; not carrying out marketing services; and not delivering financing to fund the origination of loans. When services promised under an MSA are not performed, but payments are being made, a reasonable inference can be drawn that the MSA is part of an agreement to refer settlement services business in exchange for kickbacks.

Illegal kickbacks and referral fees, including those disguised by MSAs, present compliance risks not just for the individuals who are directly involved in the impermissible conduct, but also for the companies that employ them. As an example of such liability, in another matter that resulted in an enforcement action, a title company entered into unwritten agreements with individual loan officers in which it paid for the referrals by defraying the loan officers' marketing expenses. The

title company supplied loan officers with valuable lead information and marketing materials. In exchange, the loan officers sent referrals to the title company. The lenders did not detect these RESPA violations and/or correct or prevent them, even when they had reason to know that the title company was defraying the marketing expenses of the lenders and their loan officers.

Other circumstances involving MSAs may also indicate broad risks of noncompliance with RESPA. For example, instead of directing their advertising and promotional services toward consumers, as MSAs purport to contemplate, some companies that frequently enter into MSAs actually direct the bulk of their advertising and promotional efforts toward other settlement service providers in an effort to establish more MSAs. Certain other companies use a third-party consultant to set prices for the services that the MSA purports to cover, but independently established market-rate compensation for marketing services, alone, does not suffice to ensure the legality of an MSA.

As of the date of this bulletin, the Bureau has taken a significant number of public enforcement actions under RESPA. The payment of improper kickbacks and referral fees has been the basis of almost all of these actions. Resolving these matters has entailed injunctive relief including bans on entering MSAs or working in the mortgage industry for periods of up to five years. RESPA violations have cost industry participants over $75 million in penalties so far. In addition to corporate liability, some of these enforcement actions have required individuals in charge of companies that committed the violations to pay significant monetary penalties.

Legal and Compliance Risks Created by Marketing Services Agreements

In recent months, various mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements. Accordingly, certain lenders have dissolved existing agreements and decided that they will no longer enter into MSAs. The Bureau encourages all mortgage industry participants to consider carefully RESPA's requirements and restrictions and the adverse consequences that can follow from non-compliance.

As described above, the Bureau has found that many MSAs necessarily involve substantial legal and regulatory risk for the parties to the agreement, risks that are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past. MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business. The Bureau also found that efforts made to adequately monitor activities that in turn are performed by a wide range of individuals pursuant to MSAs are inherently difficult. Especially in view of the strong financial incentives and pressures

that exist in the mortgage and settlement service markets, the risk of behaviors that may violate RESPA are likely to remain significant. That can be true even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.

In sum, the Bureau's experience in this area gives rise to grave concerns about the use of MSAs in ways that evade the requirements of RESPA. In consequence, the Bureau reiterates that a more careful consideration of legal and compliance risk arising from MSAs would be in order for mortgage industry participants generally. This review is especially warranted insofar as whistleblower complaints about MSAs that violate RESPA have been increasing. The Bureau intends to continue actively scrutinizing the use of such agreements and related arrangements in the course of its enforcement and supervision work. Any industry participant that suspects unlawful activity by others or that wishes to self-report its own conduct that may have violated RESPA is encouraged to contact the CFPB. Self-reporting and cooperation, consistent with the Responsible Business Conduct bulletin, CFPB Bulletin 2013-06, will be taken into account in resolving such matters.[3]

Regulatory Requirements

This compliance bulletin summarizes existing requirements under the law as well as findings and conclusions the Bureau has made in exercising its enforcement authority. The bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[4] The Bureau has determined that this compliance bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[5]

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[3] *See* CFPB Bulletin 2013-06, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation* (June 25, 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

[4] 5 U.S.C. 603(a), 604(a).

[5] 44 U.S.C. 3501, *et seq*.

PARTS 10003–10049—[RESERVED]

Dated: August 11, 2015.

Rebecca Cokley,

Executive Director.

[FR Doc. 2015–20140 Filed 8–14–15; 8:45 am]

BILLING CODE 8421–03–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1010

Compliance Bulletin—Amendment to the Interstate Land Sales Full Disclosure Act

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: The Bureau of Consumer Financial Protection is issuing a compliance bulletin titled ''Amendment to the Interstate Land Sales Full Disclosure Act'' to provide information to developers and other interested parties relating to a recent Congressional amendment to the Interstate Land Sales Full Disclosure Act.

DATES: This bulletin is applicable August 17, 2015.

FOR FURTHER INFORMATION CONTACT: Amanda Quester, Senior Counsel, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Compliance Bulletin

The Consumer Financial Protection Bureau (Bureau) issues this compliance bulletin to provide information to developers and other interested parties relating to Public Law 113–167, 128 Stat. 1882 (2014), which amended the Interstate Land Sales Full Disclosure Act (ILSA). This ILSA amendment was signed by the President on September 26, 2014. It became effective on March 25, 2015, and is codified primarily at 15 U.S.C. 1702(b)(9) and (d).

The amendment exempts from ILSA's registration and disclosure requirements the sale or lease of a condominium unit that is not exempt under 15 U.S.C. 1702(a). Under 15 U.S.C. 1702(d), a ''condominium unit'' is defined for purposes of this new exemption as a unit of residential or commercial property to be designated for separate ownership pursuant to a condominium plan or declaration provided that upon conveyance: (1) The owner of such unit will have sole ownership of the unit and an undivided interest in the common elements appurtenant to the unit; and (2) the unit will be an improved lot.

Pursuant to § 1010.4(d) of the Bureau's ILSA regulations, eligibility for an exemption under 15 U.S.C. 1702, including the exemption of section 1702(b)(9), is self-determining, and a developer is not required to file notice with or obtain the approval of the Bureau in order to take advantage of an exemption. Section 1010.4(d) also provides that a developer is responsible for maintaining records to demonstrate that the requirements of an exemption have been met if a developer elects to take advantage of an exemption. The Bureau will continue to process filings made by developers seeking to fulfill their obligations under ILSA and its implementing regulations.

If you have questions about ILSA program operations, you may contact ILSA program staff via email to *CFPB_ILS_Inquiries@cfpb.gov* or at the address below: Consumer Financial Protection Bureau, Interstate Land Sales Program, 1700 G St. NW., Attn: 1625 Eye St., Room 3093, Washington, DC 20552.

If you have a question regarding the interpretation of ILSA or the Bureau's implementing regulations, please email *CFPB_reginquiries@cfpb.gov* with your specific question, including reference to the applicable regulation section(s).

Bureau staff responding to queries cannot provide legal advice and are not authorized to provide official interpretations of ILSA or of the Bureau's implementing regulations.

II. Regulatory Requirements

This Compliance Bulletin summarizes existing requirements under the law, and does not itself establish any binding obligations. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Bureau has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Dated: August 10, 2015.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2015–19998 Filed 8–14–15; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–3398; Directorate Identifier 2015–CE–031–AD; Amendment 39–18232; AD 2015–16–07]

RIN 2120–AA64

Airworthiness Directives; REIMS AVIATION S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for REIMS AVIATION S.A. Model F406 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as detachment of the pilot's rudder control pedal in flight. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective August 18, 2015.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of August 18, 2015.

We must receive comments on this AD by October 1, 2015.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact ASI Aviation, Aérodrome de Reims Prunay, 51360 Prunay, FRANCE; phone: +33 3 26 48 46 65; fax: +33 3 26 49 18 57; email: none; Internet: *http://asi-aviation.fr/asi-aviation-support/1.html* (requires user name and password). You may view this referenced service information at the FAA, Small Airplane Directorate, 901

CFPB Bulletin 2015-03

Date: August 4, 2015

Subject: Compliance Bulletin: Private Mortgage Insurance Cancellation and Termination

The Bureau of Consumer Financial Protection (CFPB) is issuing this compliance bulletin to provide guidance to assist residential mortgage servicers and subservicers (collectively, servicers) in their compliance with the private mortgage insurance (PMI) cancellation and termination provisions of the Homeowners Protection Act of 1998 (HPA). This compliance bulletin explains HPA requirements and describes examples from CFPB's supervisory experience of PMI cancellation and termination procedures that violate the HPA or create a substantial risk of noncompliance.

A. HPA Requirements

1. Passage of the HPA

The HPA became effective on July 29, 1999, and was later amended on December 27, 2000, to provide technical corrections and clarification. Prior to its enactment, no federal law provided borrowers with a right to cancel their PMI coverage, and the few state laws that provided PMI cancellation rights at that time each contained separate and different standards. While some lenders would terminate PMI coverage when a borrower reached a certain level of equity in the property, other lenders would keep PMI coverage in place for the life of the loan, and borrowers often had trouble determining their lenders' PMI cancellation standards. Congress passed the HPA to address these borrower difficulties in cancelling PMI and to institute uniform nationwide standards for PMI cancellation and termination.[1]

2. Borrower-Requested Cancellation

A borrower may initiate cancellation of PMI coverage for residential mortgage transactions by submitting a written request to the servicer. For a borrower who has initiated cancellation, the HPA provides that, if the borrower meets certain requirements, PMI shall be cancelled on the "***cancellation date***."[2] If the borrower does not meet those requirements on the "cancellation date," the HPA provides that PMI shall be canceled at a later date once the borrower meets the specified requirements. The HPA defines "cancellation date" as, at the option of the borrower, either: (1) the date on which the principal balance of the mortgage is first scheduled to reach 80 percent of the "***original value***" of the property (regardless of the outstanding balance), or (2) the

[1] While this compliance bulletin uses the term "borrower" throughout for ease of reference, the HPA uses the term "mortgagor," which is defined as "the original borrower under a residential mortgage or his or her successors or assignees." 12 USC 4901(11).
[2] 12 USC 4902(a).

date on which the principal balance of the mortgage reaches 80 percent of the "***original value***" of the property based on actual payments.[3]

As noted, in addition to reaching the 80% loan-to-value (LTV) threshold, the borrower must meet certain other requirements for borrower-requested cancellation:

- The borrower must have a good payment history;[4]
- The borrower must be current on the loan;[5]
- The borrower must satisfy any requirement of the holder of the mortgage for certification that the borrower's equity in the property is not subject to a subordinate lien;[6] and
- Finally, the borrower must satisfy any requirement of the holder of the mortgage for evidence (of a type established in advance and made known to the borrower by the servicer) that the ***value of the property has not declined below the original value***.[7]

A borrower may make extra principal payments that advance the cancellation date. In determining whether a borrower meets the requirements for borrower-requested cancellation of PMI coverage, servicers may require a property appraisal as evidence that the value of the property has not declined below the original value, and servicers may require the borrower to pay for the appraisal. While the appraisal may be appropriate evidence to establish that the current value of the property has not declined below the original value, the CFPB cautions servicers and consumers that for timing purposes, the "cancellation date" is calculated based on the original value and not the current value. This appraisal should be used only to determine whether the property's value has declined below the original value. If the property's value has not declined below the original value, the servicer must assess the timing of the borrower's PMI cancellation by calculating when the principal balance of the mortgage is scheduled to reach or has reached 80% of the original value of the property, based either on the appropriate amortization schedule or actual payments.

3. Automatic Termination

In addition to providing borrowers with a right to request PMI cancellation, the HPA provides that, if the borrower is current on the loan, the requirement for PMI must automatically be terminated for residential mortgage transactions on the "***termination date***."[8] The HPA defines

[3] 12 USC 4901(2). For fixed rate mortgages, the amortization calculation is based on the initial amortization schedule. For adjustable-rate mortgages, the amortization calculation is based on the amortization schedule then in effect for the mortgage. The term "original value" generally means the lesser of the sales price of the secured property, as reflected in the contract, or the appraised value at the time of loan consummation. 12 USC 4901(12).
[4] 12 USC 4902(a)(2). The HPA defines "good payment history" generally as the borrower having made no payments that were 30 days or more past due in the prior 12 months, or payments that were 60 days or more past due in the 12-month period beginning 24 months before the later of the cancellation date or the date the borrower requests cancellation. 12 USC 4901(4).
[5] 12 USC 4902(a)(3).
[6] 12 USC 4902(a)(4)(B).
[7] 12 USC 4902(a)(4)(A).
[8] 12 USC 4902(b)(1).

the "termination date" as the date on which the principal balance of the mortgage is first scheduled to reach 78 percent of the original value of the property securing the loan (irrespective of the outstanding balance for that mortgage on that date).[9] If the borrower is not current on the loan on the "termination date," the HPA requires that PMI automatically terminate on the first day of the first month beginning after the date that the borrower becomes current on the loan.[10]

If these conditions are met, automatic termination of PMI is required even if the current value of the property has declined below the original value. Because current value is not a factor in determining the "termination date," servicers may not require a borrower to pay for a property valuation as a condition of automatic termination of PMI. Additionally, a borrower cannot advance the "termination date" by making additional payments to lower the principal balance of the mortgage. This is unlike the borrower-requested "cancellation date" described above, which is the date on which the principal balance of the mortgage is first scheduled to reach 80 percent of the "original value" of the property ***or*** the date on which the principal balance of the mortgage reaches 80 percent of the "original value" ***based on actual payments***.[11]

Supervision has identified violations of this provision in one or more examinations, both for borrowers who were current on the "termination date" and for borrowers who were delinquent on the "termination date" but later became current. The CFPB encourages servicers to be mindful that in contrast to the cancellation date, the termination date does not permit a mortgage holder to require evidence of the property's current value, nor is a servicer required to determine the actual principal balance based on actual payments. Rather, the automatic termination date is not dependent on fluctuations in property value.

4. Final Termination

If PMI is not terminated under the borrower-requested cancellation or automatic termination provisions, the HPA provides that a requirement for PMI coverage cannot be imposed beyond the first day of the month following the date that is the midpoint of the amortization period of the loan if, on that date, the borrower is current on the loan.[12] The midpoint of the amortization period is the point in time halfway through the period that begins on the first day of the amortization period established at consummation and ends when the mortgage is scheduled to be amortized. For a standard 30-year mortgage loan, the midpoint of the amortization period would be the first day of the month following the 180th payment.[13]

Since the HPA applies only to residential mortgage loans consummated on or after July 29, 1999, standard 30-year mortgage loans would not have started becoming eligible for final PMI termination under this provision until August 2014. The CFPB reminds servicers that they

[9] 12 USC 4901(18). For fixed rate mortgages, the amortization calculation is based on the initial amortization schedule. For adjustable-rate mortgages, the amortization calculation is based on the amortization schedule then in effect.
[10] 12 USC 4902(b)(2).
[11] 12 USC 4901(12).
[12] 12 USC 4902(c).
[13] 12 USC 4901(7).

should have appropriate policies, procedures, and processes in place to ensure that they are terminating borrowers' PMI coverage consistent with the HPA requirements, particularly with respect to the final termination provisions.

5. PMI Refunds

In general, the HPA prohibits a servicer from collecting PMI premiums more than 30 days after the termination date, or, when a borrower requests cancellation, more than 30 days after the later of the date the borrower's request is received or the date on which the borrower satisfies any evidence and certification requirements of the holder of the mortgage for PMI cancellation.[14] When a servicer collects unearned PMI premiums, the HPA requires the servicer to return such unearned premiums to the borrower no later than 45 days after the termination or cancellation of the borrower's PMI coverage.[15] In one or more mortgage servicing examinations, CFPB examiners have found instances of improper collection of unearned PMI premiums and excessive delays in processing borrower requests for PMI cancellation.[16]

Supervision has also noted in one or more prior examinations that some servicers engage in a practice of placing the amount of the returned premiums into the borrower's escrow account. Supervision has cited at least one servicer for a Section 4902(f) violation because, after crediting funds to the borrower's escrow account, the servicer's vendor kept the returned premiums in the borrower's escrow account indefinitely rather than returning the premiums to the borrower within 45 days. The CFPB cautions servicers to monitor third-party vendors and to ensure that any unearned PMI premiums are returned directly to the borrower within 45 days rather than placed indefinitely in the borrower's escrow account.

6. Annual Disclosures

When PMI is required in connection with a residential mortgage transaction, the HPA requires a servicer to provide the borrower an annual written statement disclosing the borrower's right to PMI cancellation or termination and an address and telephone number that the borrower may use to contact the servicer to determine whether the borrower may cancel PMI.[17] In one or more prior mortgage servicing examinations, CFPB examiners have found instances in which servicers did not send the required annual disclosures to borrowers, or in which servicers did not include in the annual disclosures the contact information that the HPA requires.

[14] 12 USC 4902(e). The "evidence and certification requirements" are those referenced in 12 USC 4902(a)(4) (*see supra at* footnotes 6 and 7).
[15] 12 USC 4902(f).
[16] *See* Supervisory Highlights: Summer 2013, Section 2.2.2 (Payment Processing), *available at* http://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf, and Supervisory Highlights: Winter 2013, Section 2.1.3 (Payment Processing), *available at* http://files.consumerfinance.gov/f/201401_cfpb_supervisory-highlights-winter-2013.pdf.
[17] 12 USC 4903(a)(3).

B. Investor Guidelines

Many mortgage loans are owned by Government-Sponsored Enterprises, or GSEs, such as Fannie Mae or Freddie Mac. These and other loan investors often create their own internal PMI cancellation guidelines that may include PMI cancellation provisions beyond those that the HPA provides.

The CFPB cautions servicers to implement investor guidelines in a way that does not lead them to violate consumer financial law. Both the HPA and some investor requirements contain similar LTV thresholds for PMI cancellation and termination, and use similar measures of the property's value. Servicers should nonetheless remember that investor guidelines cannot ***restrict*** the PMI cancellation and termination rights that the HPA provides to borrowers.

1. Loan-to-Value Requirements

Some investor guidelines base the PMI cancellation date LTV calculations on the ***current*** value of the borrower's property, in contrast to the HPA, which bases the cancellation date LTV calculations on the property's ***original*** value. Investor guidelines using LTV calculations based on the current value of the property may permit PMI cancellation in some situations when the HPA does not provide borrowers with a right to request PMI cancellation based on the original value of the property. For example, as described above, a borrower whose property value has declined below the original value may not be eligible for borrower-requested PMI cancellation under the HPA.[18] Such a borrower may nonetheless still be able to request PMI cancellation under investor guidelines that permit PMI cancellation using LTV calculations based on the current value of the property, if such guidelines do not disqualify a borrower whose property has declined below the original value. As another example, increases in a borrower's property value after the origination of the loan do not affect the borrower's PMI cancellation right under the HPA, because the HPA bases the cancellation right on the original value of the property. However, such property value increases may affect the borrower's LTV ratio based on the current value of the property, and may allow PMI cancellation under investor guidelines at an earlier date than the date the HPA provides borrowers with a right to request PMI cancellation.

In one or more prior mortgage servicing examinations, Supervision has observed that many servicers confuse or replace HPA requirements with elements of investor guidelines. For example, in at least one examination, CFPB examiners noted that a servicer incorrectly applied an investor's 75% PMI cancellation LTV threshold to the original value of the property, instead of the 80% LTV threshold required by the HPA, and improperly denied a borrower's cancellation request on that ground. Similarly, in at least one examination, CFPB examiners noted that a servicer relied entirely on investor guidelines to determine a borrower's PMI cancellation rights and had no policies in place to ensure that PMI was properly canceled in accordance with HPA requirements.

[18] Under the HPA, the borrower's PMI automatic termination right would be unaffected by the property's decline in value.

2. Seasoning

The HPA does not contain any requirements for a loan's tenure before a borrower may request cancellation or be eligible for automatic PMI termination. Nonetheless, in at least one examination, CFPB examiners noted that a servicer imposed a two-year seasoning requirement to automatically terminate PMI, when the HPA does not provide for such a requirement.[19]

The CFPB expects mortgage servicers, among others subject to the HPA, to incorporate into their compliance management systems adequate measures to ensure compliance with HPA requirements.

C. Regulatory Requirements

This compliance bulletin summarizes existing requirements under the law and findings the Bureau has made in the course of exercise of its supervisory and enforcement authority under the HPA. It does not itself establish any binding obligations. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[20] The Bureau has determined that this compliance bulletin summarizes existing requirements and does not establish any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[21]

[19] *See* Supervisory Highlights: Winter 2013 at Section 2.1.3.
[20] 5 U.S.C. 603(a), 604(a).
[21] 44 U.S.C. 3501, *et seq*.

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2015-02

DATE: May 11, 2015

SUBJECT: Section 8 Housing Choice Voucher Homeownership Program

The Consumer Financial Protection Bureau (Bureau) issues this compliance bulletin to remind creditors of their obligations under the Equal Credit Opportunity Act (ECOA)[1] and its implementing regulation, Regulation B,[2] to provide non-discriminatory access to credit for mortgage applicants using income from the Section 8 Housing Choice Voucher (HCV) Homeownership Program.[3]

The Section 8 HCV Homeownership Program was created to assist low-income, first-time homebuyers in purchasing homes. The program is a component of the Department of Housing and Urban Development's (HUD) Section 8 HCV Program, which also includes a rental assistance program. These programs are funded by HUD and administered by participating local Public Housing Authorities (PHAs).

[1] 15 U.S.C. § 1691 *et seq*.

[2] 12 C.F.R. pt. 1002 *et seq*.

[3] For purposes of this bulletin, "Section 8 Housing Choice Voucher Homeownership Program" refers to the homeownership assistance program authorized by the Quality Housing & Work Responsibility Act of 1998 (Pub.L.105-276, approved October 21, 1998; 112 Stat. 2461), and the applicable implementing regulations, 24 C.F.R. §§ 982.625-982.643. The program is also referred to as the Voucher Homeownership Program, the Housing Choice Voucher Homeownership Option, or the Section 8 Homeownership Program.

Through the Section 8 HCV Homeownership Program, the participating PHA may provide an eligible consumer with a monthly housing assistance payment (HAP) to help pay for homeownership expenses associated with a housing unit purchased in accordance with HUD's regulations.[4] In addition to HUD's regulations, the PHAs may also adopt additional requirements, including lender qualifications or terms of financing.[5]

The Bureau has become aware of one or more institutions excluding or refusing to consider income derived from the Section 8 HCV Homeownership Program during mortgage loan application and underwriting processes. Some institutions have restricted the use of Section 8 HCV Homeownership Program vouchers to only certain home mortgage loan products or delivery channels.

ECOA and Regulation B prohibit creditors from discriminating in any aspect of a credit transaction against an applicant "because all or part of the applicant's income derives from any public assistance program."[6] "Any Federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need, is 'public assistance' for purposes of the regulation. The term includes (but is not limited to) . . . mortgage supplement or assistance programs . . . ."[7] As such, mortgage assistance provided under the Section 8 HCV Homeownership Program is income derived from a public assistance program under ECOA and Regulation B.

Regulation B further provides that "[i]n a judgmental system of evaluating creditworthiness, a creditor may consider . . . whether an applicant's income derives

[4] 24 C.F.R. § 982.625(c).

[5] 24 C.F.R. § 982.632(a).

[6] 15 U.S.C. § 1691(a)(2); 12 C.F.R. §§ 1002.2(z), 1002.4(a).

[7] 12 C.F.R. pt. 1002, Supp. I, § 1002.2, ¶ 2(z)-3.

from any public assistance program only for the purpose of determining a pertinent element of creditworthiness."[8] However, "[i]n considering the separate components of an applicant's income, the creditor may not automatically discount or exclude from consideration any protected income. Any discounting or exclusion must be based on the applicant's actual circumstances."[9]

Disparate treatment prohibited under ECOA and Regulation B may exist when a creditor treats applicants differently on a prohibited basis, for example, when a creditor excludes or refuses to consider Section 8 HCV Homeownership Program vouchers as a source of income or accept the vouchers only for certain mortgage loan products or delivery channels. ECOA and Regulation B may also be violated if an underwriting policy regarding income has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.[10]

An institution's clear articulation of underwriting policies regarding income derived from public assistance programs; training of underwriters, mortgage loan originators, and others involved in mortgage loan origination; and careful monitoring for compliance with such underwriting policies can all help the institution manage fair lending risk in this area and comply with the requirements of ECOA and Regulation B. Such compliance will help increase access to credit for eligible Section 8 HCV Homeownership Program consumers and open the opportunity of homeownership to these low-income, first-time homebuyers.

[8] 12 C.F.R § 1002.6(b)(2)(iii).

[9] 12 C.F.R. pt. 1002, Supp. I, § 1002.6 ¶ 6(b)(5)-3(ii).

[10] See 12 C.F.R. § 1002.6(a); 12 C.F.R. pt. 1002, Supp. I, § 1002.6, ¶ 6(a)-2. For more information about compliance with the fair lending requirements of ECOA and Regulation B, please refer to CFPB Bulletin 2012-04: Lending Discrimination (April 18, 2012), available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

1700 G Street, N.W., Washington, DC 20552

CFPB Compliance Bulletin 2015-01

Date: January 27, 2015

Subject: Treatment of Confidential Supervisory Information

The Consumer Financial Protection Bureau (CFPB) issues this compliance bulletin as a reminder that, with limited exceptions, persons in possession of confidential information, including confidential supervisory information (CSI), may not disclose such information to third parties.[1] More particularly, this bulletin:

1. Sets forth the definition of CSI;
2. Provides examples of CSI;
3. Highlights certain legal restrictions on the disclosure of CSI; and
4. Explains that private confidentiality and non-disclosure agreements (NDAs) neither alter the legal restrictions on the disclosure of CSI nor impact the CFPB's authority to obtain information from covered persons[2] and service providers[3] in the exercise of its supervisory authority.

[1] "Confidential information" means "confidential consumer complaint information, confidential investigative information, and confidential supervisory information, as well as any other CFPB information that may be exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. 552(b). Confidential information does not include information contained in records that have been made publicly available by the CFPB or information that has otherwise been publicly disclosed by an employee with the authority to do so." 12 CFR 1070.2(f). CSI, the focus of this bulletin, is but one type of confidential information. *See* 12 CFR 1070.2(i) (defining "confidential supervisory information").

[2] "Covered person[s]" include "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person." 12 U.S.C. § 5481(6).

[3] "Service provider" means "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes) . . . . The term 'service provider' does not include a person solely by virtue of such person offering or providing to a covered person—(i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media." 12 U.S.C. § 5481(26).

Background

The CFPB has supervisory authority over certain covered persons, including very large depository institutions, credit unions and their affiliates;[4] certain nonbanks;[5] and service providers[6] (collectively, supervised financial institutions).[7] Many supervised financial institutions became subject to federal supervision for the first time under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[8]

Pursuant to authority granted under the Dodd-Frank Act,[9] the CFPB has issued regulations that govern the use and disclosure of CSI.[10] The CFPB expects all supervised financial institutions to know and comply with the regulations governing CSI, and provides the following guidance to assist with such compliance.

Definition of CSI

Under the CFPB's regulations, "confidential supervisory information" means:

- Reports of examination, inspection and visitation, non-public operating, condition, and compliance reports, and any information contained in, derived from, or related to such reports;

- Any documents, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Federal, State, or foreign government agency in the exercise of supervisory authority over a financial institution, and any supervision information derived from such documents;

[4] 12 U.S.C. § 5515(a).
[5] Under 12 U.S.C. § 5514, the CFPB has supervisory authority over all nonbank covered persons offering or providing three enumerated types of consumer financial products or services: (1) origination, brokerage, or servicing of consumer loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. 12 U.S.C. § 5514(a)(1)(A), (D), (E). The CFPB also has supervisory authority over "larger participant[s] of a market for other consumer financial products or services," as the CFPB defines by rule. 12 U.S.C. § 5514(a)(1)(B), (a)(2). Additionally, the CFPB has the authority to supervise any nonbank covered person that it "has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity . . . to respond[,] . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services." 12 U.S.C. § 5514(a)(1)(C).
[6] 12 U.S.C. §§ 5514(e), 5515(d).
[7] "Financial institution" means "any person involved in the offering or provision of a 'financial product or service,' including a 'covered person' or 'service provider,' as those terms are defined by 12 U.S.C. § 5481." 12 CFR 1070.2(l). "Supervised financial institution" means "a financial institution that is or that may become subject to the CFPB's supervisory authority." 12 CFR 1070.2(q).
[8] Public Law No. 111-203 (codified at 12 U.S.C. § 5301 *et seq.*).
[9] 12 U.S.C. § 5512(c)(6)(A).
[10] *See* 12 CFR Part 1070. In addition to the confidentiality protections afforded by the CFPB's regulation, CSI may also be subject to other laws regarding disclosure, including the bank examination or other privileges, privacy laws, and other restrictions.

- Any communications between the CFPB and a supervised financial institution or a Federal, State, or foreign government agency related to the CFPB's supervision of the institution;

- Any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services, or to assess whether an institution should be considered a covered person, as that term is defined by 12 § U.S.C. 5481, or is subject to the CFPB's supervisory authority; and/or

- Information that is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(8).[11]

CSI does not include documents prepared by a financial institution for its own business purposes and that the CFPB does not possess.[12]

Examples of CSI

Supervised financial institutions and other persons that may come into possession of CSI should understand what constitutes CSI in order to comply with the applicable rules.[13] Examples of CSI include, but are not limited to:

- CFPB examination reports and supervisory letters;

- All information contained in, derived from, or related to those documents, including an institution's supervisory Compliance rating;

- Communications between the CFPB and the supervised financial institution related to the CFPB's examination of the institution or other supervisory activities; and

- Other information created by the CFPB in the exercise of its supervisory authority.

Thus, CSI includes any workpapers or other documentation that CFPB examiners have prepared in the course of an examination. CSI also includes supervisory information requests from the CFPB to a supervised financial institution, along with the institution's responses. In addition, any CFPB supervisory actions, such as memoranda of understanding between the CFPB and an institution, and related submissions and correspondence, are CSI.

[11] 12 CFR 1070.2(i).
[12] 12 CFR 1070.2(i)(2).
[13] *See generally* 12 CFR Part 1070.

Disclosure of Confidential Information Generally Prohibited

Subject to limited exceptions, supervised financial institutions and other persons in possession of CSI of the CFPB may not disclose such information.[14]

Exceptions to General Prohibition on Disclosure of CSI

There are certain exceptions to the general prohibition against disclosing CSI to third parties. A supervised financial institution may disclose CSI of the CFPB lawfully in its possession to:

- Its affiliates;
- Its directors, officers, trustees, members, general partners, or employees, to the extent that the disclosure of such CSI is relevant to the performance of such individuals' assigned duties;
- The directors, officers, trustees, members, general partners, or employees of its affiliates, to the extent that the disclosure of such CSI is relevant to the performance of such individuals' assigned duties;
- Its certified public accountant, legal counsel, contractor, consultant, or service provider.[15]

Supervised financial institutions may also in certain instances disclose CSI to others with the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending, or his or her delegee (Associate Director).[16] The recipient of CSI shall not, without the prior written approval of the Associate Director, utilize, make, or retain copies of, or disclose CSI for any purpose, except as is necessary to provide advice or services to the supervised financial institution or its affiliate.[17] Moreover, any supervised financial institution or affiliate disclosing CSI shall take reasonable steps as specified in the regulations to ensure that the recipient complies with the rules governing CSI.[18]

[14] *See* 12 CFR 1070.41(a) (providing that "[e]xcept as required by law or as provided in this part, no . . . person in possession of confidential information[] shall disclose such confidential information by any means (including written or oral communications) or in any format (including paper and electronic formats), to: (1) [a]ny person who is not an employee, contractor, or consultant of the CFPB; or (2) [a]ny CFPB employee, contractor, or consultant when the disclosure of such confidential information . . . is not relevant to the performance of the employee's, contractor's, or consultant's assigned duties"); *see also* 12 CFR 1070.42(b) (setting forth exceptions relating to the disclosure of "confidential supervisory information of the CFPB" which is "lawfully in [the] possession" of any "supervised financial institution").
[15] 12 CFR 1070.42(b).
[16] 12 CFR 1070.42(b)(2)(ii).
[17] 12 CFR 1070.42(b)(3)(i).
[18] 12 CFR 1070.42(b)(3)(ii).

Confidential information made available by the CFPB pursuant to 12 CFR Part 1070 remains the property of the CFPB. There are other important requirements relating to the disclosure of confidential information, including disclosure pursuant to third-party legally enforceable demands, such as subpoenas or Freedom of Information Act requests. Among a number of other requirements, a recipient of a demand for confidential information must inform the CFPB's General Counsel of the demand.[19]

NDAs Do Not Supersede Federal Legal Requirements

The CFPB recognizes that some supervised financial institutions may have entered into third-party NDAs that, in part, purport to: (1) restrict the supervised financial institution from sharing certain information with a supervisory agency; and/or (2) require the supervised financial institution to advise the third party when the institution shares with a supervisory agency information subject to the NDA. However, such provisions in NDAs between supervised financial institutions and third parties do not alter or limit the CFPB's supervisory authority or the supervised financial institution's obligations relating to CSI.

A supervised financial institution should not attempt to use an NDA as the basis for failing to provide information sought pursuant to supervisory authority. The CFPB has the authority to require supervised financial institutions and certain other persons to provide it with reports and other information to conduct supervisory activities, pursuant to the Dodd-Frank Act.[20] Failure to provide information required by the CFPB is a violation of law for which the CFPB will pursue all available remedies.[21]

In addition, a supervised financial institution may risk violating the law if it relies upon provisions of an NDA to justify disclosing CSI in a manner not otherwise permitted. As noted above, any disclosure of CSI outside of the applicable exceptions would require the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending (or his or her delegee).[22]

Supervised financial institutions should contact appropriate CFPB supervisory personnel with any questions regarding this Bulletin.

Regulatory Requirements

This compliance bulletin provides nonbinding guidance on matters including limitations on disclosure of CSI under applicable law. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. § 553(b). Because no notice of proposed

[19] 12 CFR 1070.47.
[20] 12 U.S.C. §§ 5514, 5515.
[21] *See* 12 U.S.C. § 5536(a)(2) (making it unlawful for a supervised financial institution "to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the CFPB thereunder -- (A) to permit access to or copying of records; . . . or (C) to make reports or provide information to the Bureau.").
[22] *See* 12 CFR 1070.42(b)(2)(ii).

rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[23] In addition, the CFPB has determined that this bulletin summarizes existing requirements and does not establish any new nor revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[24]

[23] 5 U.S.C. §§ 603(a), 604(a).
[24] 44 U.S.C. § 3501 *et seq.*

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2014-03

Date: November 18, 2014

Subject: Social Security Disability Income Verification

The Consumer Financial Protection Bureau (Bureau) issues this compliance bulletin to remind creditors of (1) their obligations under the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, with respect to consideration of public assistance income; and (2) relevant standards and guidelines regarding verification of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) income (collectively, Social Security disability income) received by mortgage applicants.

In the past, Social Security disability income recipients have faced special challenges in providing proof that their disability payments are likely to continue. The Social Security Administration (SSA) provides these benefits for individuals with serious disabilities, but generally will not provide documentation regarding how long benefits will last. Some applicants have reported being asked by mortgage lenders or their agents for information about their disabilities or for statements from their physicians about the likely duration of their disabilities.

ECOA and Regulation B prohibit creditors from discriminating in any aspect of a credit transaction against an applicant because all or part of the applicant's income derives from a public assistance program.[1] Such income includes, but is not limited to, Social Security disability

[1] 15 U.S.C. § 1691(a)(2); 12 C.F.R. §§ 1002.2(z), 1002.4(a).

income.[2] Regulation B further provides that "[i]n a judgmental system of evaluating creditworthiness, a creditor may consider . . . whether an applicant's income derives from any public assistance program only for the purpose of determining a pertinent element of creditworthiness."[3] Thus, a creditor may take into account, for example, "[t]he length of time an applicant will likely remain eligible to receive [public assistance] income."[4]

Fair lending concerns may arise under ECOA and Regulation B when a creditor requires additional documentation beyond that required by lawful applicable agency or secondary market standards and guidelines to demonstrate that Social Security disability income is likely to continue, such as information about the nature of an applicant's disability or a letter from an applicant's physician. Disparate treatment prohibited under ECOA and Regulation B may exist when a creditor treats applicants differently on a prohibited basis, for example, when a creditor imposes additional documentation requirements on public assistance recipients not imposed on other applicants.[5] ECOA and Regulation B may also be violated if an income verification standard has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to

[2] *See* 12 C.F.R. pt. 1002, Supp. I, § 1002.2, ¶ 2(z)-3. Additionally, the Fair Housing Act, for which other federal agencies oversee compliance, prohibits discrimination because of disability in residential real estate-related transactions. *See* 42 U.S.C. § 3601 *et seq.*; 24 C.F.R. pt. 100, subpt. C. The Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and National Credit Union Administration have supervisory authority as to the Fair Housing Act.

[3] 12 C.F.R § 1002.6(b)(2)(iii).

[4] 12 C.F.R. pt. 1002, Supp. I, § 1002.6 ¶ 6(b)(2)-6(i); *see also* 15 U.S.C. § 1691(b)(2) ("It shall not constitute discrimination . . . for a creditor . . . to make an inquiry . . . of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels . . . or other pertinent element of credit-worthiness as provided in regulations of the Bureau[.]"); 12 C.F.R. § 1002.6(b)(5) ("[A] creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness.").

[5] *Cf. Wigginton v. Bank of Amer. Corp.*, __ F.3d __, 2014 WL 5285970, at *1 (7th Cir. Oct. 16, 2014) (affirming dismissal of a matter involving a Federal Housing Administration three-year-continuation standard then in effect because plaintiffs did not allege under the Fair Housing Act, Americans with Disabilities Act, or the Rehabilitation Act that they were treated differently than non-disabled mortgage applicants).

discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.[6]

The issue of verification of Social Security disability income has been addressed by the Bureau in determining Qualified Mortgage status:

- On July 24, 2013, the Bureau published a final rule that, among other things, clarifies the verification requirements for Social Security income used in the debt-to-income ratio that determines whether a loan is a Qualified Mortgage under the Ability-to-Repay and Qualified Mortgage Standards Rule (Ability-to-Repay Rule).[7] Specifically, Appendix Q of Regulation Z, 12 C.F.R. part 1026, was amended to provide for verification of Social Security income by means of "a Social Security Administration benefit verification letter (sometimes called a 'proof of income letter,' 'budget letter,' 'benefits letter,' or 'proof of award letter')." The Appendix explains that "[i]f the Social Security Administration benefit verification letter does not indicate a defined expiration date within three years of loan origination, the creditor shall consider the income effective and likely to continue." The Appendix further notes that "[p]ending or current re-evaluation of medical eligibility for benefit payments is not considered an indication that the benefit payments are not likely to continue."[8]

The Department of Housing and Urban Development (HUD) has taken a similar approach for loans insured by the Federal Housing Administration (FHA), as has the Department of Veterans Affairs (VA) for loans it guarantees.

[6] See 12 C.F.R. § 1002.6(a); 12 C.F.R. pt. 1002, Supp. I, § 1002.6, ¶ 6(a)-2. For more information about compliance with the fair lending requirements of ECOA and Regulation B, please refer to CFPB Bulletin 2012-04: Lending Discrimination (April 18, 2012), available at http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf.

[7] Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 44,686, 44,719-20 (July 24, 2013) (codified at 12 C.F.R. pt. 1026, Appendix Q).

[8] 12 C.F.R. pt. 1026, App. Q, Section I.B.11 & Note i.

- HUD standards provide that if the SSA Notice of Award or equivalent document "does not have a defined expiration date, the lender shall consider the income effective and likely to continue." HUD emphasizes that lenders "should not request additional documentation from the borrower to demonstrate continuance of Social Security Administration income" and "[u]nder no circumstance may lenders inquire into or request documentation concerning the nature of the disability or the medical condition of the borrower." HUD also notes that "[p]ending or current re-evaluation of medical eligibility for benefit payments is not considered an indication that the benefit payment is not likely to continue."[9]

- VA standards provide that "[t]he Social Security Administration has a program that pays benefits to individuals who cannot work because they have a medical condition that is expected to last at least [one] year" and that "[l]enders may use income from this source as qualifying income." The VA also emphasizes that "[i]t is not necessary to seek a statement from a physician about how long the medical condition will last."[10]

The National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) provide similar guidelines for loans that are eligible for their purchase.

- Fannie Mae's Selling Guide explains that "Social Security income for . . . long-term disability that the borrower is drawing from his or her own account/work record will not have a defined expiration date and must be expected to continue." The Selling Guide

[9] HUD Mortgagee Letter 12-15, available at http://portal.hud.gov/hudportal/documents/huddoc?id=12-15ml.pdf; *see also* http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/handbook_4000-1 (Single Family Housing Policy Handbook (Handbook 4000.1), generally effective for case numbers assigned on or after June 15, 2015, providing similar standards). Citations are provided to relevant agency and secondary market standards and guidelines available at the time of this compliance bulletin's publication. Financial institutions are encouraged to monitor any changes to these standards and guidelines.

[10] VA Circular 26-12-6, available at http://www.benefits.va.gov/HOMELOANS/circulars/26_12_6.pdf; *see also* VA Circular 26-12-6, Change 1, available at http://www.benefits.va.gov/homeloans/documents/circulars/26_12_6_change1.pdf (extending the circular's rescission date to October 1, 2016).

further provides that creditors must verify this income by obtaining either a copy of the Social Security Administration's award letter or proof of current receipt and, for SSI, by obtaining both forms of documentation.[11]

- Freddie Mac's Single-Family Seller/Servicer Guide provides that "[l]ong-term disability income," including "Social Security disability benefits," "may be considered qualifying income that has a reasonable expectation of continuance unless there is a pre-determined insurance and/or benefit expiration date that is less than three years." Further, the Guide provides that "[p]ending or current re-evaluation of medical eligibility for insurance and/or benefit payments is not considered an indication that the insurance and/or benefit payment will not continue."[12]

The standards and the guidelines provided by the Bureau, HUD, VA, Fannie Mae, and Freddie Mac described above may help creditors avoid unnecessary documentation requests and increase access to credit for persons receiving Social Security disability income. In addition, following these standards and guidelines may help creditors avoid policies and practices that may violate ECOA and Regulation B. A creditor's clear articulation of verification requirements for Social Security disability income, proper training of underwriters and mortgage loan originators, and others involved in mortgage-loan origination, and careful monitoring for compliance with underwriting policies can all help manage fair lending risk in this area.

[11] Fannie Mae's Selling Guide, available at https://www.fanniemae.com/singlefamily/originating-underwriting.

[12] Freddie Mac's Single-Family Seller/Servicer Guide, available at http://www.freddiemac.com/singlefamily/guide/.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB BULLETIN 2014-02

Date: September 3, 2014

Subject: Marketing of Credit Card Promotional APR Offers

The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this Bulletin to inform credit card issuers of the risk of engaging in deceptive and/or abusive acts and practices[1] in connection with solicitations that offer a promotional annual percentage rate (APR) on a particular transaction over a defined period of time. These transactions include, but are not limited to, convenience checks, deferred interest/promotional interest rate purchases, and balance transfers.

The Bureau has observed that certain solicitations for these types of offers risk being deceptive if the marketing materials do not clearly and prominently convey that a consumer who accepts such an offer and continues to use the credit card to make purchases will lose the grace period on the new purchases if the consumer does not pay the entire statement balance, including the amount subject to the promotional APR, by the payment due date. In addition, depending on all of the facts and circumstances, a credit card issuer may risk engaging in abusive conduct if it fails to adequately alert consumers to this relationship.

A. Background

Many credit card issuers offer consumers a grace period on new purchases. This means that a consumer who has paid his previous balance in full typically has a period of time after the close of each billing cycle to pay his full balance without incurring interest on the purchases made during the billing cycle. If the consumer fails to pay the entire balance for the billing cycle by the payment due date, the purchase amount that is not paid is subject to interest calculated from the date of purchase (or the first day of the current billing cycle, whichever is later), and the consumer will lose the grace period in the current and future billing cycles for all new purchases until the entire balance is paid in full.[2]

Credit card issuers may periodically offer consumers the opportunity to transfer a credit card balance or make a purchase that will be subject to a low or zero percent

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) prohibits covered persons and service providers from engaging in deceptive or abusive acts and practices. See 12 U.S.C. 5481, 5531 & 5536(a).

[2] Regulation Z permits this practice. See 12 CFR 1026.6(b)(2)(v).

APR for a stated period of time. These offers are often marketed as a way to save money by paying off higher-APR cards or to finance a large purchase over a period of time without incurring substantial interest charges. Issuers typically charge a transaction fee for accepting these offers; generally either a percentage of the transaction or a fixed dollar amount, whichever is higher.

CFPB supervisory experience has observed that some card issuers do not adequately convey in their marketing materials that a consumer who accepts such a promotional offer will lose his grace period on new purchases if he does not pay the entire statement balance, including the total amount subject to the promotional APR, by the payment due date. Affected consumers would be those who maintain a grace period on purchases by paying their full statement balance by the payment due date each month, accept the promotional offer, and then continue to make purchases using the credit card. Consumers may incur charges that they do not anticipate - and fail to save the money that they expect - if issuers fail to convey the effect of accepting the offer on the grace period.

B. Risk of deceptive advertising practices

Section 1036 of the Dodd-Frank Act prohibits covered persons or service providers from engaging in deceptive acts or practices.[3] As a general matter, a representation, omission, act, or practice is deceptive when:

1. The representation, omission, act, or practice misleads or is likely to mislead the consumer;
2. The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
3. The misleading representation, omission, act, or practice is material.[4]

Card issuers often market these promotional offers as a chance for the consumer to save money. Many solicitations emphasize the promotional rate associated with the offer, and that the promotional rate will last for a certain period of time – in some cases, well over a year. Depending on the facts and circumstances, the impression conveyed by these materials may be that the only cost of obtaining the promotional interest rate is the transaction fee set forth in the tabular disclosure required by Regulation Z,[5] or that the promotional rate is the only rate at which the consumer will incur interest charges.

The Bureau has found that one or more card issuers created and failed to cure such misimpressions. The card issuer or issuers did not adequately convey that

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[3] 12 USC 5563

[4] The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act. *See* CFPB Exam Manual at UDAAP 5, available at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

[5] See 12 CFR 1026.9(b)(3)(i)(C)

promotional rate offers come with an additional contingent cost that would be important to consumers who maintain a grace period on purchases. Specifically, a consumer who accepts the offer and continues to use the credit card to make new purchases in subsequent billing cycles will not be able to avoid paying interest charges on those new purchases unless he repays the entire balance (both the promotional balance and any new purchase balance) by the statement due date. As a result, the consumer will incur additional interest costs on later purchases until the grace period is restored after full payment. For such a consumer, those interest costs may represent a significant share of the total costs of accepting the offer.

The Bureau has observed that some issuers do not include any information about the loss of the grace period for affected consumers in promotional rate marketing materials. Other issuers may include information regarding the loss of the grace period, but the information is not prominently located in the marketing materials, or uses technical language that fails to clearly explain the full terms, risks, and potential costs of the offer. In the absence of clear language placed in a prominent location, a reasonable consumer's net impression of the solicitations could be that the only cost of obtaining the promotional APR is the disclosed transaction fee, and that the consumer would only incur interest charges at the promotional rate because the only unpaid balance on his credit card would be subject to the promotional APR. This misleading net impression would be presumptively material because it pertains to a central characteristic of the product – its cost.

C. Risk of abusive practices

Credit card issuers should also be aware of the possibility that, depending on all of the facts and circumstances, they may be at risk of engaging in an abusive practice if they fail to provide adequate information alerting consumers that they will be unable to maintain a grace period on new purchases if they do not repay their entire balance, including any promotional balance and any new purchase balance, by the statement due date.

Section 1031 of the Dodd-Frank Act defines an abusive act or practice as one that:

1. Materially interferes with the ability of the consumer to understand a term or condition of a consumer financial product or service; or
2. Takes unreasonable advantage of-
    a. A consumer's lack of understanding of the material risks, costs, or conditions of the product or service;
    b. A consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or

c. A consumer's reasonable reliance on a covered person to act in his or her interests.[6]

Some consumers may not understand certain material costs or conditions of many promotional offers – namely, that the grace period for new purchases is conditioned on full repayment of the promotional balance, and therefore that the consumer may incur additional interest charges on purchases due to the loss of the grace period. Depending on all of the facts and circumstances, an issuer may take unreasonable advantage of such consumers by failing to adequately inform them of these conditions and by exploiting their lack of understanding to impose additional costs. For instance, in some cases an issuer may risk engaging in abusive acts or practices if it fails to make reasonable efforts to alert consumers to the relationship between the grace period on new purchases and the acceptance of a promotional APR offer in the marketing materials for such an offer.

D. Disclosure requirements under Regulation Z

Regulation Z specifically requires the disclosure of information about grace periods at four points in a consumer's relationship with a credit card issuer: on or with solicitations or applications to open a credit card account,[7] at account opening,[8] on periodic statements,[9] and with checks that can be used to access a credit card account.[10] These disclosures generally inform consumers of the length of any grace period and the time at which finance charges will begin to accrue. Regulation Z includes model and required language for making many of these disclosures. In the case of solicitations, applications, account-opening materials, and convenience checks, it requires that certain disclosures be made in the form of a table.[11] The tabular disclosures included in offers for convenience checks that carry a promotional rate must also include information about applicable interest rates[12] and the amount of the transaction fee for using the checks, if any fee applies.[13]

Regulation Z does not require marketing materials to include additional disclosures alerting consumers to the effect of accepting a promotional offer on the loss of the grace period on purchases. However, as discussed above, the CFPB is concerned that

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[6] 12 USC 5531
[7] 12 CFR 1026.60(b)(5)
[8] 12 CFR 1026.6(b)(2)(v); 12 CFR 1026.6(b)(3)(i)
[9] 12 CFR 1026.7(b)(8)
[10] 12 CFR 1026.9(b)(3)(i)(D)
[11] See 12 CFR 1026.60(a)(2) (solicitations or applications to open a credit card account); 1026.6(b)(1) (account-opening materials); 1026.9(b)(3)(i) (convenience checks). This Bulletin does not alter the information that may or must be included in such tables.
[12] 12 CFR 1026.9(b)(3)(i)(A).
[13] See 12 CFR 1026.9(b)(3)(i)(C). See also 12 CFR 1026.16 for disclosure requirements that apply to advertisements for open-end plans, including 12 CFR 1026.16(g), which relates to the advertisement of promotional rates and fees.

the marketing materials accompanying some offers may risk being deceptive or abusive in violation of the Dodd-Frank Act, even if Regulation Z is not violated.

E. CFPB expectations

The Bureau expects credit card issuers to incorporate into their compliance management systems adequate measures to prevent violation of Federal consumer financial laws, including the Dodd-Frank Act's prohibitions on unfair, deceptive, or abusive acts or practices.[14] Consequently, credit card issuers are expected to implement internal controls sufficient to ensure that they market promotional APR offers in a manner that limits the risk of statutory or regulatory violations and related consumer harm. These steps should include, but are not limited to, ensuring that:

- All solicitations, applications, account-opening materials, and convenience checks comply with the requirements in Regulation Z;
- All marketing materials clearly, prominently, and accurately describe the material costs, conditions, and limitations associated with the offers; and
- All marketing materials clearly, prominently, and accurately describe the effect of promotional APR offers on the grace period for new purchases.[15]

[14] See CFPB Examination Manual V.2 (October 2012) *Compliance Management Review* at p. 1, *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

[15] See CFPB Examination Manual V.2 (October 2012) *UDAAP* at p. 1 for additional guidance on the CFPB's expectations regarding unfair, deceptive, or abusive marketing practices. http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB-2014-0016]

RIN 3170-ZA00

Application of Regulation Z's Ability-to-Repay Rule to Certain Situations Involving Successors-in-Interest

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this interpretive rule to clarify that the Bureau's Ability-to-Repay Rule incorporates the existing definition of "assumption" under Regulation Z.

DATES: July 11, 2014

FOR FURTHER INFORMATION CONTACT: William R. Corbett, Senior Counsel, Office of Regulations, Consumer Financial Protection Bureau, 1700 G Street, N.W., at (202) 435-7700.

SUPPLEMENTARY INFORMATION:

I. Background

The Bureau is issuing this interpretive rule to clarify that where a successor-in-interest (successor) who has previously acquired title to a dwelling agrees to be added as obligor or substituted for the existing obligor on a consumer credit transaction secured by that dwelling, the creditor's written acknowledgement of the successor as obligor is not subject to the Bureau's

Ability-to-Repay Rule (ATR Rule), § 1026.43, because such a transaction does not constitute an assumption as defined by Regulation Z § 1026.20(b).[1]

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), (Dodd-Frank Act), Congress established the Bureau and generally consolidated the rulemaking authority for Federal consumer financial laws, including the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act, in the Bureau, effective July 21, 2011.[2] Historically, Regulation Z, which was issued by the Board of Governors of the Federal Reserve System (Board), 12 CFR part 226, had implemented TILA. On December 22, 2011, pursuant to the Dodd-Frank Act and TILA, as amended by the Dodd-Frank Act, the Bureau published an interim final rule establishing a new Regulation Z (Truth in Lending), 12 CFR part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). The interim final rule substantially duplicated the Board's Regulation Z, as it existed at that time, making only non-substantive, technical, formatting, and stylistic changes.

Beginning January 10, 2013, the Bureau issued several final rules implementing amendments to TILA under the Dodd-Frank Act (the Title XIV Final Rules), including the ATR

[1] This interpretive rule refers generally to "creditors." Under Regulation Z the term "creditor" generally means the one to whom the obligation is initially payable. *See* § 1026.2(a)17. Where a mortgage has been sold after consummation, the original "creditor" may no longer be in position to agree to add an obligor. When evaluating whether acknowledging a new obligor triggers the requirements of § 1026.20(b) or § 1026. 43, servicers and assignees of the original obligation may rely on this interpretive rule.

[2] *See, e.g.*, sections 1011 and 1021 of the Dodd-Frank Act, 12 U.S.C. 5491 and 5511 (establishing and setting forth the purpose, objectives, and functions of the Bureau); section 1061 of the Dodd-Frank Act, 12 U.S.C. 5581 (consolidating certain rulemaking authority for Federal consumer financial laws in the Bureau); section 1100A of the Dodd-Frank Act (codified in scattered sections of 15 U.S.C.) (similarly consolidating certain rulemaking authority in the Bureau). *But see* section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519 (subject to certain exceptions, excluding from the Bureau's authority any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both).

Rule.[3] On February 13, 2013, the Bureau announced an initiative to support implementation of its new mortgage rules,[4] under which the Bureau would work with the mortgage industry and other stakeholders to ensure that the new rules could be implemented accurately and expeditiously.

Since the issuance of the Title XIV Final Rules, industry and consumer advocates have expressed uncertainty about the application of the ATR Rule in situations where a successor seeks to be added as an obligor or substituted for the current obligor on an existing mortgage. The Bureau has been asked whether the creditor is obligated under the ATR Rule to determine the successor's ability to repay the mortgage before formally adding the successor as an obligor. Often, this issue arises upon the death of the obligor, with the surviving spouse or children asserting rights under the mortgage, but it may also present itself in other settings, such as in separation or divorce, after a transfer from living parents to children, or a transfer to an inter vivos trust of which the consumer is the beneficiary. If the ATR Rule applies when a creditor adds a successor as an obligor, such transactions may be less likely to occur. There can be significant consequences for a successor that is not able to become an obligor on a mortgage. For instance, if the successor seeks a modification of the existing transaction as part of trying to retain the home, the creditor may refuse to modify the terms of the debt on the grounds that the

[3] On January 10, 2013, the Bureau issued the January 2013 ATR Final Rule. 78 FR 6407 (Jan. 30, 2013). That same day the Bureau issued the 2013 Escrows Final Rule, and the 2013 HOEPA Final Rule. 78 FR 4725 (Jan. 22, 2013); 78 FR 6855 (Jan. 31, 2013). On January 17, 2013, the Bureau issued the 2013 Mortgage Servicing Final Rules. 78 FR 10695 (Feb. 14, 2013); 78 FR 10901 (Feb. 14, 2013). On January 18, 2013, the Bureau issued the 2013 ECOA Valuations Final Rule and, jointly with other agencies, the 2013 Interagency Appraisals Final Rule. 78 FR 7215 (Jan. 31, 2013); 78 FR 10367 (Feb. 13, 2013). On January 20, 2013, the Bureau issued the 2013 Loan Originator Final Rule. 78 FR 11279 (Feb. 15, 2013). Pursuant to the Dodd-Frank Act, which permitted a maximum of one year for implementation, most of these rules became effective on January 10, 2014.

[4] Press Release, Consumer Financial Protection Bureau, *CFPB Lays Out Implementation Plan for New Mortgage Rules* (Feb. 13, 2013), *available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/.

successor is not a party to the existing obligation and therefore cannot enter into a modification agreement.[5]

In general, as discussed in part II below, in these situations, where the addition or substitution of the successor as the obligor is not an "assumption" under § 1026.20(b), such addition or substitution is not subject to the ATR Rule's requirements. A creditor may rely on this interpretation as a safe harbor under section 130(f) of TILA. The Bureau plans to incorporate this interpretation into Regulation Z's Official Interpretations at a later date.

The Bureau is aware of other questions related to a servicer's obligations under the 2013 Mortgage Servicing Final Rules with respect to successors. Under Regulation X § 1024.38(b)(1)(vi), servicers are required to maintain policies and procedures reasonably designed to ensure the servicer can promptly identify and facilitate communication with the successor-in-interest of a deceased borrower upon notification of the death of the borrower. On October 15, 2013, the Bureau issued a guidance bulletin providing examples of servicer practices the Bureau would consider to be components of the policies and procedures mortgage servicers must have in place to comply with these requirements regarding successors-in-interest.[6] The Bureau is monitoring these issues to determine whether they require further guidance or rulemaking.

II. Application of ATR to certain situations involving Successors-in-Interest

The Bureau has received many questions regarding the applicability of the ATR Rule where a successor acquires a home that is the collateral for an existing consumer credit

[5] As discussed in part II below, most workout agreements are not "refinancings" subject to the ATR Rule. However, creditors generally require a successor to enter into an assumption agreement prior to or simultaneous with the execution of the modification agreement in part because creditors are concerned about their ability to enforce the terms of the modified debt absent a written agreement, executed by an obligor with authority.

[6] CFPB Bulletin, 2013-12 (Oct. 15, 2013), http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.

transaction and seeks to become an obligor on that transaction. A successor is a person who receives legal interest in a property, typically by a transfer from a family member, by operation of law upon another's death, or under a divorce decree or separation agreement.[7] In all of these situations, where the successor acquires property that is subject to a mortgage, the successor is not personally liable for the associated debt, but may choose to assume the debt. The Garn-St Germain Depository Institutions Act of 1982 prohibits the creditor from exercising a due-on-sale clause based upon certain types of transfers, including the common situation of transfer upon death of a relative.[8] Even where a due-on-sale clause may be exercised, however, creditors may agree to add the successor as a named obligor under the loan contract.

A. Application of the ATR Rule to a change in obligors.

Under Regulation Z § 1026.43, the ATR Rule applies to any "covered transaction" defined, with certain enumerated exceptions, as "any consumer credit transaction that is secured by a dwelling … including any real property attached to a dwelling." Under § 1026.43(c), a creditor must make a reasonable and good faith determination that the consumer has the ability to repay at or before consummation of the covered transaction. Similarly, Regulation Z generally requires creditors to provide disclosures required under § 1026.18 or § 1026.19 to consumers before consummation of certain closed-end loans. In certain circumstances, however, creditors and consumers agree, *after* consummation, to changes to an existing transaction that are treated as a "new transaction" under Regulation Z, requiring new disclosures.

Section 1026.20(a) and (b) provide that if a creditor and consumer engage in activity that constitutes a "refinancing" or an "assumption," the creditor must make new disclosures.

[7] The term successor also may include an inter vivos trust, created by a borrower who transfers his or her property into the trust in which the obligor is or remains a beneficiary.
[8] *See* 12 U.S.C.1701j-3(d).

Comment 43(a)-1 is consistent with this approach in excluding from the scope of § 1026.43 changes to the loan that are not a refinancing under § 1026.20(a).

The terms "refinancing" and "assumption" are each assigned a specific meaning in § 1026.20(a) and (b). These terms generally define when a change in a closed-end loan's terms or obligors constitutes a new transaction under Regulation Z. For example, under § 1026.20(a), a refinancing occurs when an existing obligation is "satisfied and replaced by a new obligation undertaken by the same consumer." Certain changes to the loan's terms, including, generally, workout agreements for delinquent borrowers, do *not* meet the definition of a "refinancing," under § 1026.20(a). *See* § 1026.20(a)(4); comment 20(a)(4)-1. As comment 43(a)-1 makes explicit, such agreements are therefore not covered transactions and are not subject to § 1026.43.

Section 1026.20(a) and (b) address different types of events. Section 1026.20(a) addresses changes to a loan's terms—such as an increase in the interest rate in a transaction initially disclosed as a fixed-rate transaction. In contrast, § 1026.20(b) applies to changes in the loan's obligors. Under § 1026.20(b) an assumption occurs when—and only when—the creditor "expressly agrees in writing with a subsequent consumer to accept that consumer as a primary obligor on an existing residential mortgage transaction."

The Bureau believes that just as comment 43(a)-1 explicitly incorporates the definition of "refinancing" in § 1026.20(a)—and the limitations on that definition—into the scope of § 1026.43, so, too, the ATR requirement in § 1026.43 should be interpreted to incorporate the existing Regulation Z standard for transactions involving a change of obligors set forth in § 1026.20(b). Unless the change satisfies the definition of an "assumption" under § 1026.20(b), a change of obligors does not trigger the ATR requirements under § 1026.43.

The Bureau's interpretation is consistent with comment 43(a)-1 and consistent with the Bureau's purposes in issuing the Ability-to-Repay Rule. This interpretation applies a standard to transactions that involve new obligors that is consistent with the standard that exists in Regulation Z generally. The Bureau believes it would be potentially incongruous to interpret § 1026.43 as *never* applying to transactions involving a new obligor, which by definition are excluded from being refinancings under § 1026.20(a). The Bureau also believes that interpreting § 1026.43 as either never applying to transactions with new obligors or as applying to some transactions with new obligors based on a standard other than the familiar rule set forth in § 1026.20(b) would not be consistent with the policies underlying the ATR Rule, the Bureau's intent in promulgating the rule, or the public's understanding of Regulation Z.

B. The addition of a successor as named obligor generally does not constitute an "assumption."

As noted above, § 1026.43 should be interpreted to incorporate the existing standards under § 1026.20(b) for determining whether a transaction is an "assumption." An assumption under § 1026.20(b) occurs when the creditor agrees in writing to accept a subsequent consumer as a primary obligor on an existing "residential mortgage transaction." A "residential mortgage transaction" is a transaction in which a consumer finances the acquisition or initial construction of the consumer's principal dwelling. *See* § 1026.2(a)(24). For purposes of determining whether the transaction is an "assumption," the creditor must look to whether the new obligor is seeking to finance the acquisition of that subsequent consumer's principal dwelling.[9] Whether the existing extension of consumer credit was a residential mortgage transaction as to the existing primary obligor is immaterial.

[9] Comment 20(b)-2 states that creditors "must look to the *assuming consumer* in determining whether a residential mortgage transaction exists." (emphasis added.)

A residential mortgage transaction does not arise where a successor takes on the debt obligation that is secured by property the successor previously acquired.[10] In these situations, § 1026.20(b) does not apply when the successor agrees to be added as an obligor on an existing mortgage loan. Although these transactions are commonly referred to as assumptions, they are not assumptions under § 1026.20(b) because the transaction is not a residential mortgage transaction as to the successor. Accordingly, the ATR Rule in § 1026.43 does not apply to a transaction in which a successor seeks to take on the debt secured by property that the successor previously acquired.

In contrast to the successor situation described above, if a consumer without an existing interest takes on the obligation of the existing borrower in order to finance the acquisition of the consumer's principal dwelling, the transaction is a residential mortgage transaction. In such a case, where the creditor expressly agrees in writing to the new primary obligor, an assumption has occurred under § 1026.20(b), and it is subject to the ability-to-repay requirements in § 1026.43, in addition to other requirements of Regulation Z. Moreover, where a creditor adds a successor as the obligor, whether that event is subject to § 1026.43 or not, the extension of credit remains a consumer credit transaction under Regulation Z. The creditor, assignee, or servicer must comply with any ongoing obligations pertaining to the extension of consumer credit, such as the requirement to provide monthly statements in § 1026.41 and the requirement to notify the obligors of adjustments to the loan's interest rate in § 1026.20(c) and (d).

[10] As comment 2(a)(24)-5 states, the term residential mortgage transaction "does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling even through the consumer had not acquired full legal title."

III. Regulatory Requirements

This rule articulates the Bureau's interpretation of Regulation Z, and the Truth-in-Lending Act. It is therefore exempt from the APA's notice and comment rulemaking requirements pursuant to 5 U.S.C. 553(b).

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a).

The Bureau has determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

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[THIS SIGNATURE PAGE PERTAINS TO THE FINAL RULE TITLED "APPLICATION OF REGULATION Z's ABILITY-TO-REPAY RULE TO CERTAIN SITUATIONS INVOLVING SUCCESSORS-IN-INTEREST"]

Dated: July 1, 2014.

Richard Cordray

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-13

Date: November 8, 2013

Subject: Homeownership Counseling list requirements

The Consumer Financial Protection Bureau (CFPB) is issuing this bulletin to provide guidance to lenders regarding the homeownership counseling list requirement finalized in the High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (RESPA Housing Counselor Amendments) Final Rule (2013 HOEPA Final Rule)[1]. Pursuant to the Dodd-Frank Act, the CFPB issued the RESPA Homeownership Counselor Amendments in January 2013, effective on January 10, 2014.

The 2013 HOEPA Final Rule requires lenders to provide applicants for federally-related mortgages with a written list of HUD-approved housing counseling agencies. A lender may fulfill the requirement in one of two ways: the lender may obtain the lists through the Bureau's website, www.consumerfinance.gov/find-a-housing-counselor; or, in the alternative, the lender may generate lists by independently using the same HUD data that the Bureau uses on HUD-approved counseling agencies, in accordance with Bureau's list instructions.[2] The Bureau published an interpretative rule on November 8, 2013, which provides the list instructions and clarifies how lenders may generate their own lists.[3]

The Bureau's website is available for lenders who opt to use the first alternative means of providing the lists to consumers on the January 10, 2014 effective date. However, lenders who prefer to adopt the second alternative have informed the Bureau that they must undertake significant development of compliance systems to ensure that lists are generated in compliance with the RESPA Homeownership Counseling Amendments and the November interpretive rule. The Bureau understands that the systems development may take approximately six months. Thus, these lenders appear unable to provide the lists under the second alternative approach in time for the rule's January 10, 2014 effective date.

Accordingly, while lenders are incorporating § 1024.20(a)(1)(ii) list instructions into their systems, they may direct borrowers to the Bureau's housing counseling agency website to obtain a list of housing counselors, using the format and text suggested below, www.consumerfinance.gov/find-a-housing-counselor. These steps, if taken by lenders in good faith while they are building their systems or are working with vendors to build systems, would achieve the goals of the regulation and would not raise supervisory or enforcement concerns. Following is the suggested text to be used for this interim procedure:

[1] 78 FR 6856 (Jan. 31, 2013).
[2] § 1024.20(a)
[3] See interpretive rule, http://files.consumerfinance.gov/f/201311_cfpb_interpretive-rule_homeownership-counseling-organizations-lists.pdf

“Housing counseling agencies approved by the U.S. Department of Housing and Urban Development (HUD) can offer independent advice about whether a particular set of mortgage loan terms is a good fit based on your objectives and circumstances, often at little or no cost.

If you are interested in contacting a HUD-approved housing counseling agency in your area, you can visit the Consumer Financial Protection Bureau’s (CFPB) website, www.consumerfinance.gov/find-a-housing-counselor, and enter your zip code.

You can also access HUD’s housing counseling agency website via www.consumerfinance.gov/mortgagehelp.

For additional assistance with locating a housing counseling agency, call the CFPB at 1-855-411-CFPB (2372).”

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-12

Date: October 15, 2013

Subject: Implementation Guidance for Certain Mortgage Servicing Rules

The Consumer Financial Protection Bureau (CFPB) is issuing this bulletin to provide guidance in implementing certain of the 2013 Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA) Servicing Final Rules.[1] The CFPB issued the 2013 RESPA and TILA Final Rules in January 2013 and they take effect on January 10, 2014.

This bulletin provides guidance regarding:

1. Policies and procedures servicers must maintain regarding the identification of and communication with any successor in interest of a deceased borrower with respect to the property secured by the deceased borrower's mortgage loan.[2]

2. Communication with borrowers under the Early Intervention Rule.[3]

3. Servicers' obligation to provide certain notices/communications to borrowers who have exercised their right under the Fair Debt Collection Practices Act (FDCPA)[4] barring debt collectors from communicating with them.[5]

1. <u>Policies and Procedures Regarding Successors in Interest to the Property of a Deceased Borrower</u>

In response to inquiries it has received, the CFPB is issuing guidance regarding the policies and procedures servicers of mortgage loans must have in place to comply with requirements

[1] 78 FR 10695 (Feb. 14, 2013) (RESPA Servicing Final Rule); 78 FR 10901 (Feb. 14, 2013) (TILA Servicing Final Rule), collectively the 2013 RESPA and TILA Servicing Final Rules. Regulations X and Z implement RESPA and TILA, respectively. RESPA and Regulation X generally refer to "borrowers" and TILA and Regulation Z to "consumers;" for simplicity those terms are used interchangeably in this bulletin.
[2] 12 CFR 1024.38(b)(1)(vi), as published in 78 FR 10695 (Feb. 14, 2013).
[3] 12 CFR 1024.39, as published in 78 FR 10695 (Feb. 14, 2013).
[4] 15 U.S.C. 1692 *et seq.*
[5] Section 805(c) of the FDCPA prohibits a debt collector from most communications with a consumer regarding the debt at issue, if the consumer has sent a "cease communication" request. 15 U.S.C. 1692c(c).

in the Policies and Procedures Rule regarding successors in interest.[6] Starting on January 10, 2014, a servicer must have policies and procedures reasonably designed to ensure that, upon notification of the death of a borrower, the servicer promptly identifies and facilitates communication with a successor in interest[7] of the deceased borrower with respect to the property that secures the deceased borrower's mortgage loan. In issuing this guidance, the CFPB seeks both to assist servicers in implementing these policies and procedures and to promote home retention whenever possible for successors in interest faced with the loss of their homes due to the death of a borrower.

The CFPB adopted the successor in interest provision of the Policies and Procedures Rule after learning about difficulties that some surviving spouses, children, or other successors in interest experienced in attempting to communicate with servicers.[8] The CFPB has received reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either do not exist (*e.g.,* probate court documents for an estate that is not required to go through probate) or are not reasonably available. These practices often prevent a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options—potentially resulting in the avoidable loss of the home. In applying the Policies and Procedures Rule, the CFPB seeks to reduce the number of unnecessary defaults and foreclosures, including those following the death of a borrower.

The following are examples of servicer practices the CFPB would consider to be components of policies and procedures that are reasonably designed to achieve the objectives of the successor in interest provision:

- Promptly providing to any party claiming to be a successor in interest a list of all documents or other evidence the servicer requires, which should be reasonable in light of the laws of the relevant jurisdiction, for the party to establish (1) the death of the borrower and (2) the identity and legal interest of the successor in interest. Such documents might include, for example, a death certificate, an executed will, or a court order determining a succession to real property.

- Upon notification of the death of a borrower, promptly identifying and evaluating any issues that the servicer must consider in reviewing the rights and obligations of successors in interest with respect to the property and mortgage loan, including, for example:

    - Receipt of acceptable proof of the successor in interest's identity and legal interest in the property.[9]

[6] 12 CFR 1024.38(b)(1)(vi), as published in 78 FR 10695 (Feb. 14, 2013).
[7] A successor in interest is the spouse, child, or heir of a deceased borrower or other party with an interest in the property.
[8] While the CFPB recognizes that some of these experiences involved reverse mortgages, which are exempt from the requirements of the Policies and Procedures Rule, others involved mortgage loans that will be subject to the rule when it goes into effect. *See* 12 CFR 1024.30(b)(2), as published in 78 FR 10695 (Feb. 14, 2013).
[9] The servicer may be subject to specific investor requirements with respect to the successor in interest's rights and obligations. For example, a February 2013 bulletin from Freddie Mac requires servicers to refer to it any case "where the servicer is unsure as to whether a purported transferee has a legal or beneficial interest in the

- Standing of the mortgage loan as current or delinquent.
- Eligibility of the successor in interest to continue making payments on the mortgage loan.
- Whether a trial modification or other loss mitigation option was in place at the time of the borrower's death.
- Whether there is a pending or planned foreclosure proceeding.
- Eligibility of the successor in interest for loss mitigation options.
- Eligibility of the successor in interest to assume the mortgage loan, with or without a simultaneous loan modification or other loss mitigation option.

- Promptly providing successors in interest with information about the above issues, including any servicer prerequisites for the successor in interest to: continue payment on the mortgage loan, assume the mortgage loan, and, where appropriate, qualify for available loss mitigation options.

- Promptly providing successors in interest with any documents, forms, or other materials the servicer requires for the successor in interest to continue making payments and to apply and be evaluated for an assumption and, where appropriate, loss mitigation options.

- Upon receipt from the successor in interest of required documents, forms or other materials, promptly evaluating the successor in interest for and, where appropriate, implementing options set forth above.

- Providing employees with information and training regarding the effect of laws and investor and other requirements on the servicer's obligations following the death of a borrower, and complying with those laws and requirements, including:

    - Servicing guidelines, such as those published by Fannie Mae and Freddie Mac,[10]

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property, but that person is willing to assume the Mortgage obligation." Freddie Mac Bulletin No. 2013-3 (Feb. 15, 2013), *available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1303. pdf ("Freddie Mac Bulletin").

[10] For example, in February 2013, Fannie Mae published guidance requiring servicers to "to allow the new owner to continue making mortgage payments and pursue an assumption of the mortgage loan as well as a foreclosure prevention alternative, if applicable." Where a successor in interest cannot bring the loan current without a foreclosure prevention alternative, including a loan modification, the guidance states that "the servicer must collect a Borrower Response Package from the new property owner and evaluate the request as if they were a borrower." Fannie Mae, Lender Letter LL-2013-04 (Feb. 27, 2013), *available at* https://www.fanniemae.com/ content/announcement/ll1304.pdf. *See also* Fannie Mae, Servicing Guide Announcement SVC-2013-17 (Aug. 28, 2013) *available at* https://www.fanniemae.com/content/announcement/svc1317.pdf. Also in February 2013, Freddie Mac published guidance requiring servicers to follow similar procedures regarding assumptions and loss mitigation options for successors in interest. S*ee* n.27. Both Fannie Mae and Freddie Mac require servicers to submit recommendations to them for approval of a simultaneous mortgage assumption and loss mitigation option.

- The Garn-St. Germain Act of 1982,[11] which imposes certain limits on the application of due-on-sale clauses when real property is transferred as a result of the death of a borrower, and
- Federal or State law restricting the disclosure of the deceased borrower's non-public personal information.

In addition to the above, servicers should consider whether best practices with regard to their policies and procedures regarding successors in interest would include the following:

- Upon notification of the death of a borrower, promptly evaluating whether to postpone or withdraw any pending or planned foreclosure proceeding to provide a successor in interest with reasonable time to establish ownership rights and pursue assumption and, if applicable, loss mitigation options.

- Promptly providing a successor in interest with information about the possible consequences of assuming the mortgage loan, such as any costs and the fact that a later loss mitigation option is not guaranteed if the successor in interest assumes the loan without a loss mitigation option already in place or arranged to commence simultaneous with the assumption.

2. Communications with Borrowers under the Early Intervention Rule

The CFPB is issuing guidance to clarify how a servicer may comply with the requirements in the Early Intervention Rule to make good faith efforts to establish live contact with a borrower.[12] For purposes of the Early Intervention Rule, "[d]elinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid."[13] Thus, once the rule goes into effect, for each billing cycle for which a borrower is delinquent for at least 36 days, servicers are required to make good faith efforts to establish live contact with the borrower by the 36th day and, if appropriate, to inform the borrower about the availability of loss mitigation options.[14]

Commentary to the Early Intervention Rule states that good faith efforts to establish live contact consist of "reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer."[15] The CFPB emphasizes that the rule is specifically designed to give servicers significant flexibility in tailoring their contact methods to particular circumstances. For delinquencies that begin

[11] 12 U.S.C. 1701j-3(d)(3).
[12] 12 CFR 1024.39, as published in 78 FR 10695 (Feb. 14, 2013).
[13] 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-1, as published in 78 FR 10695 (Feb. 14, 2013). Note that this interpretation of delinquency is particular to the Early Intervention Rule and the Continuity of Contact Rule. *Id*. at 1024.40 and Comment 1024.40(a)-3.
[14] The Early Intervention Rule also requires that a written notice be sent to the borrower not later than the 45th day of delinquency, unless the borrower has submitted payment in the meantime. However, in contrast to the live contact rule, the written notice is required no more than once during any 180-day period. Thus, written notice provided to a borrower pursuant to the rule need not be provided again for 180 days, even if another delinquency occurs and the 45th day after that delinquency falls within the 180-day timeframe.
[15] 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-2, as published in 78 FR 10695 (Feb. 14, 2013).

on or after January 10, 2014,[16] the CFPB would consider the following communications reasonable steps under the circumstances to establish live contact:

> Borrower working with servicer to obtain loss mitigation: The live contact requirement is satisfied with regard to cases in which a borrower is delinquent in consecutive billing cycles if the servicer has established and is maintaining ongoing contact with the borrower with regard to the borrower's completion of a loss mitigation application and the servicer's evaluation of that borrower for loss mitigation options.
>
> Borrower stops paying under a loss mitigation plan or becomes delinquent after curing a prior default: As specified in the commentary to the final rule, a borrower is not delinquent under the rule if "performing as agreed under a loss mitigation option designed to bring the borrower current on a previously missed payment . . . ."[17] This includes forbearance plans and trial modifications. However, if the borrower fails to make a loss mitigation payment, a new delinquency begins and the servicer has an obligation to make good faith efforts to contact the borrower within 36 days of the start of the delinquency— and for each of any subsequent billing periods for which the borrower's obligation is due and unpaid. Similarly, if a borrower successfully cures a prior default but becomes delinquent again, the servicer has an obligation to make good faith efforts to contact the borrower within 36 days for each of the subsequent billing periods for which the borrower's obligation is due and unpaid.
>
> Communication in conjunction with other contact: A servicer may, but need not, rely on live contact established at the borrower's initiative to satisfy the live contact requirement. Servicers may also combine contacts made pursuant to the Early Intervention Rule with contacts made with borrowers for other reasons, for instance by adding a brief script to collection calls to inform consumers that loss mitigation options may be available in accordance with the rule.
>
> Unresponsive borrower: The CFPB believes that a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to the Early Intervention Rule is a relevant circumstance to consider. For example, "good faith efforts" to establish live contact with regard to delinquencies occurring after six or more consecutive delinquencies might require no more than making a single telephone call or including a sentence requesting the borrower to contact the servicer with regard to the delinquencies in the periodic statement[18] or in an electronic communication. Such

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[16] Servicers are not required to comply with the Early Intervention Rule and the Continuity of Contact Rule with regard to a billing period prior to January 10, 2014, for which a borrower is delinquent. For example, for a borrower whose payment is due and unpaid on January 9, 2014 for that particular billing cycle, compliance is not required under either rule unless and until the borrower is delinquent again for a later billing cycle.

[17] 12 CFR 1024.39, Supplement I to Part 1024—Official Bureau Interpretations, Comment 39(a)-1.ii, as published in 78 FR 10695 (Feb. 14, 2013).

[18] 12 CFR 1024.41, as published in 78 FR 10695 (Feb. 14, 2013) and amended by the final rule issued on September 13, 2013, available at http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf. For example, this statement could appear at the bottom of the delinquency box or in a section reserved for messages from the servicer. 12 CFR 1026.41(d)(8) and 1026.41(c)-2, respectively, as published in 78 FR 10901 (Feb. 14, 2013). Placement of the statement at the bottom of the delinquency box would not conflict with the "close proximity" requirement applicable to delinquency information." *Id*. at 1026.41(d)(8).

efforts might be appropriate where there is little or no hope of home retention, such as when all applicable loss mitigation possibilities have been exhausted (including a short sale or deed in lieu of foreclosure), as may occur in the later stages of foreclosure.

3. Servicing Rule Requirements with Regard to Borrowers Prohibiting Debt Collectors from Communicating with Them.

The CFPB is issuing guidance regarding the interplay between certain of the 2013 RESPA and TILA Servicing Final Rules and the Fair Debt Collection Practices Act (FDCPA).[19] The CFPB is providing this bulletin as an advisory opinion interpreting the FDCPA "cease communication" requirement in relation to the 2013 Mortgage Servicing Final Rules discussed below, under FDCPA section 813(e), 15 U.S.C. 1692k(e). As provided in that section, no liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the CFPB while that advisory opinion is in effect.

The FDCPA grants debtors the right generally to bar debt collectors from communicating with them.[20] To the extent the FDCPA applies to a servicer's activities regarding a borrower, the "cease communication" provision of the FDCPA may make such a servicer uncertain whether it will be liable under the FDCPA for carrying out certain communications required by the servicing rules. This bulletin addresses such a servicer's obligation with regard to certain provisions of the servicing rules requiring disclosures to and communications with borrowers who have defaulted on the payments of their mortgage loans when they have instructed the servicer to cease communicating with them.

The CFPB concludes that the FDCPA "cease communication" option does not generally make servicers that are debt collectors liable under the FDCPA if they comply with certain provisions of Regulation X (12 CFR 1024.35 (error resolution), 1024.36 (requests for information), 1024.37 (force-placed insurance), and 1024.41 (loss mitigation)) and Regulation Z (12 CFR 1026.20(d) (adjustable-rate mortgage (ARM) initial interest rate adjustment) and 1026.41 (periodic statement)). For the reasons discussed below, the CFPB concludes that a servicer that is considered a debt collector under the FDCPA with respect to a borrower that provides disclosures to and communicates with the borrower pursuant to the provisions listed above, notwithstanding a "cease communication" instruction sent by the borrower, is not liable under the FDCPA. This conclusion does not extend to the notices/communications required by 12 CFR 1024.39 (Early Intervention Rule) and 12 CFR 1026.20(c) (ARM Interest Rate Adjustment with Corresponding Payment Change Rule). *See* Interim Final Rule, *available at* http://www.consumerfinance.gov/regulations.

Error Resolution, Information Requests, and Loss Mitigation Rules[21]

[19] 15 U.S.C. 1692 *et seq.*

[20] Section 805(c) of the FDCPA generally prohibits debt collectors from communicating with consumers regarding a debt after having received a written "cease communication" request. 15 U.S.C. 1692c(c).

[21] 12 CFR 1024.35 and 1024.36, as published in 78 FR 10695 (Feb. 14, 2013), and 12 CFR 1024.41, as published in 78 FR 10695 (Feb. 14, 2013) and amended by the final rule issued on September 13, 2013, *available at* http://files.consumerfinance.gov/f/201309_cfpb_titlexiv_updates.pdf.

These servicing rule provisions, respectively, require servicers to (1) investigate and resolve certain borrower-reported errors relating to the servicing of the borrower's mortgage loan, (2) respond appropriately to borrower requests for information with respect to a borrower's mortgage loan, and (3) consider appropriately a borrower's loss mitigation application. The CFPB believes that a borrower's "cease communications" request pursuant to the FDCPA should ordinarily be understood to exclude these categories of communication, because the borrower has specifically requested the communication at issue. Even if the borrower sends a "cease communications" request while a specific action the borrower requested of the servicer is in process, the borrower usually should be understood to have excluded the specific action from the general request to cease communication. Thus, only if the borrower sends a communication to the servicer specifically withdrawing the request for such action may a servicer cease to carry out the requirements of these provisions.

Force-Placed Insurance, ARM Initial Interest Rate Adjustment, and Periodic Statement Rules[22]

These servicing rule provisions, respectively, require the servicer to provide borrowers with (1) disclosures regarding the forced placement of hazard insurance, (2) a disclosure regarding an ARM's initial interest rate adjustment, and (3) a periodic statement for each billing cycle. The CFPB has determined that a servicer acting as a debt collector would not be liable under the FDCPA for complying with these requirements despite a consumer's "cease communication" request. These disclosures are specifically mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[23] which makes no mention of their potential cessation under the FDCPA and presents a more recent and specific statement of legislative intent regarding these disclosures than does the FDCPA. Moreover, the CFPB believes that these notices provide useful information to consumers regardless of their collections status.

For more information about the implementation of the 2013 RESPA and TILA Servicing Final Rules and other new mortgage rules issued by the CFPB, visit http://www.consumerfinance.gov/regulatory-implementation. Guidance inquiries may be directed to CFPB_reginquiries@cfpb.gov or (202) 435-7700.

[22] 12 CFR 1024.37, as published in 78 FR 10695 (Feb. 14, 2013); 12 CFR 1026.20(d), as revised by 78 FR 10901 (Feb. 14, 2013) and 12 CFR 1026.41, as published in 78 FR 10901 (Feb. 14, 2013), respectively.
[23] Public Law 111-203, secs. 1418, 1420, 1463, 124 Stat. 1376 (2010). Dodd-Frank Act sections 1418 (ARM initial interest rate adjustment), 1420 (periodic statements), and 1463 (force-placed insurance). Servicers are not required to provide periodic statements to borrowers in bankruptcy. *See* Interim Final Rule, *available at* http://www.consumerfinance.gov/regulations.

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2013-11

Date: October 9, 2013

Subject: Home Mortgage Disclosure Act (HMDA) and Regulation C – Compliance Management; CFPB HMDA Resubmission Schedule and Guidelines; and HMDA Enforcement

In this bulletin, the Consumer Financial Protection Bureau (CFPB or Bureau) addresses mortgage lenders' compliance with the Home Mortgage Disclosure Act (HMDA)[1] and its implementing regulation, Regulation C.[2] Specifically, this bulletin:

1. Provides guidance on compliance with HMDA and Regulation C to depository and non-depository mortgage lenders subject to the CFPB's jurisdiction that must collect and accurately report data under HMDA, by highlighting how mortgage lenders may effectively structure HMDA compliance management systems;

2. Announces the CFPB's HMDA Resubmission Schedule and Guidelines, which will apply to the Bureau's HMDA data integrity reviews beginning on or after January 18, 2014; and

3. Discusses factors that the CFPB may consider when evaluating whether to pursue a public HMDA enforcement action.

HMDA and Regulation C

HMDA and Regulation C require certain lenders to collect and report information about most mortgage applications as well as most originated and purchased

[1] 12 U.S.C. §§ 2801–2810.
[2] 12 C.F.R. pt. 1003.

mortgage loans (HMDA data). Ensuring the accuracy of HMDA data is vital to carrying out the statute's purposes, which are to provide the public with loan data that can be used to:

1. Help determine whether financial institutions are serving the housing needs of their communities;
2. Assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and
3. Assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.[3]

In addition, the Bureau uses HMDA data extensively in discharging the rule-writing, research, supervisory, and enforcement responsibilities conferred upon it by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[4] Accordingly, the CFPB views the accuracy of HMDA data as an important element of its consumer protection mission.

HMDA Compliance Management

Given the importance of accurate HMDA data to fulfilling the statute's purposes, the CFPB is committed to ensuring that Bureau-supervised mortgage lenders, whether depository or non-depository institutions, develop and/or maintain appropriate HMDA compliance management systems designed to ensure the accuracy of HMDA data. The scope, complexity, and size of each CFPB-supervised institution's lending operations vary, and we expect that compliance management systems will be calibrated accordingly. Based on the CFPB's supervisory experience, effective HMDA compliance management systems frequently include:

- Comprehensive policies, procedures, and internal controls to ensure on-going compliance with the collection and reporting requirements set forth in HMDA and Regulation C;
- As appropriate to the size and complexity of the institution, comprehensive and regular internal, pre-submission HMDA audits, to test and evaluate data accuracy, and that include a reasonable amount of transactional analysis, written reports detailing findings, and recommendations for corrective actions;

[3] 12 C.F.R. § 1003.1(b)(1).
[4] *See* 12 U.S.C. § 5493(b)(1)(B); § 5511; § 5512(c)(1).

- Reviews of any regulatory changes that may have occurred since the prior examination and/or data collection and reporting cycle;
- Reporting systems that are appropriate given the volume of the institution's lending operations;
- One or more individuals assigned responsibility for oversight, data entry, and data updates, including the timely and accurate reporting of the institution's data;
- Appropriate, sufficient, and periodic employee training to ensure that responsible personnel understand HMDA and Regulation C standards and reporting requirements;
- Effective corrective action in response to previously identified deficiencies; and
- As appropriate, board and management oversight.

Each institution should ensure that its HMDA compliance management system is tailored appropriately to its operations. The CFPB also encourages institutions to apply the Bureau's HMDA Resubmission Schedule and Guidelines, which are discussed below, to manage HMDA compliance and facilitate effective corrective action on self-identified errors.

CFPB HMDA Resubmission Schedule and Guidelines

The CFPB's HMDA Resubmission Schedule and Guidelines[5] (Resubmission Schedule) take an approach that is similar to the approach taken by other federal regulators: examination teams should ask institutions to correct and resubmit the HMDA Loan Application Register (LAR) when the number of errors in a sample exceeds a resubmission threshold.[6] However, the Bureau's guidelines will apply different standards depending on whether or not the institution has 100,000 or more HMDA LAR entries.

Under the Resubmission Schedule, which sets forth guidance to CFPB examination teams, institutions reporting fewer than 100,000 HMDA LAR entries should correct and resubmit HMDA data when 10 percent or more of a sample of HMDA LAR entries contains errors. In certain cases, sample error rates below 10 percent

[5] The CFPB HMDA Resubmission Schedule and Guidelines are part of the CFPB's HMDA Examination Procedures, *available at* http://www.consumerfinance.gov/guidance/supervision/manual/

[6] The CFPB currently applies the Federal Reserve Board's resubmission thresholds, *available at* http://www.federalreserve.gov/boarddocs/caletters/2004/0404/CA04-4Attach3.pdf. For HMDA data integrity reviews that are scheduled to begin on or after January 18, 2014, the thresholds in the CFPB HMDA Resubmission Schedule and Guidelines will apply.

— or below five percent in an individual data field — may call for resubmission if the errors prevent an accurate analysis of the institution's lending.

Given the significance of their impact on access to mortgage credit, institutions reporting 100,000 or more HMDA LAR entries should correct and resubmit HMDA data when at least four percent or more of a sample of entries from the HMDA LAR contains errors. Resubmission thresholds are lower at institutions with 100,000 or more HMDA LAR entries because a lower sample error rate at these institutions could nonetheless reflect a larger number of HMDA LAR entries with errors than a comparable error rate at an institution with a smaller HMDA LAR. In certain cases, error rates below the four percent threshold — or below two percent in an individual field — may call for resubmission if the errors prevent an accurate analysis of the institution's lending.

The CFPB will take appropriate corrective action to ensure that the institution's HMDA data set is accurate, and that any compliance management weaknesses that led to the errors are corrected.

Enforcement of HMDA and Regulation C

In addition to requiring correction and resubmission of HMDA data by certain institutions based on the applicable resubmission thresholds, the CFPB may, in appropriate circumstances, also take public enforcement action. In determining whether to pursue a public enforcement action, the Bureau will consider relevant factors, including, for example:

- The size of an institution's HMDA LAR and the observed error rate;
- Whether an institution self-identified its HMDA errors outside the context of an active examination or examination-related activity, and independently took appropriate corrective action; and
- If the institution has previously been on notice regarding high HMDA LAR errors such that the institution should have known of on-going HMDA LAR error rates in excess of the resubmission threshold:
    - whether error rates observed during the current exam are sufficiently lower such that they should be viewed as a sign of substantial progress in improving HMDA compliance management; or
    - whether, despite notice, error rates have remained high or have increased.

Through a public enforcement action, the CFPB may seek civil money penalties and other corrective action as appropriate. In determining the appropriate size of any penalty it seeks, the Bureau will consider the factors set forth above as well as the following factors, as appropriate, which are set forth in the Consumer Financial Protection Act of 2010:

- The size of financial resources and good faith of the person charged;
- The gravity of the violation or failure to pay;
- The severity of risks to or losses of the consumer, which may take into account the number of products or services sold or provided;
- The history of previous violations; and
- Such other matters as justice may require.[7]

[7] 12 U.S.C. § 5565(c)(3).

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2013-10

Date: September 12, 2013

Subject: Payroll Card Accounts (Regulation E)

The Consumer Financial Protection Bureau (CFPB or the Bureau) is issuing this bulletin to reiterate the application of the Electronic Fund Transfer Act (EFTA) and Regulation E, which implements the EFTA, to payroll card accounts. Payroll card accounts are accounts that are established directly or indirectly through an employer, and to which transfers of the consumer's salary, wages, or other employee compensation are made on a recurring basis.[1]

The EFTA generally covers the electronic transfer of funds to and from consumers' accounts.[2] Since 2006, Regulation E,[3] which implements the EFTA, has defined the term "account" to include a "payroll card account" and covers such accounts "whether … operated or managed by the employer, a third party payroll processor, a depository institution or any other person."[4] Thus, employees whose wages are deposited onto a payroll card are entitled to the protections of the EFTA generally, and Regulation E's provisions applicable to payroll cards specifically.

The protections in Regulation E for consumers who receive wages on a payroll card mirror those available to consumers who make electronic fund transfers (EFTs) generally with some exceptions. These protections include the following:[5]

- **Disclosures**: Under Regulation E, payroll card holders are entitled to receive initial disclosures of any fees imposed by the financial institution for EFTs or for the right to make such transfers. The financial institution must also provide to cardholders initial

[1] 12 CFR 1005.02(b)(2).
[2] *See* EFTA §§ 901 *et seq.*, 15 USC 1693 *et seq.*
[3] 12 CFR part 1005.
[4] 12 CFR 1005.2(b)(2).
[5] *See* 12 CFR 1005.18(a).

disclosures containing, among other things, details regarding limitations on liability and the types of EFTs they may make with the card.[6]

Regulation E requires that these disclosures be made at account opening or before the first transfer occurs,[7] although some state laws dictate that certain information be provided before an employee elects to receive wages via payroll card. Regulation E also provides that the disclosures be "clear and readily understandable, in writing, and in a form the consumer may keep."[8]

- **Access to account history**: A payroll card issuer must either provide periodic statements as required by Regulation E generally, or alternatively must make available to the consumer (1) the consumer's account balance, by telephone; (2) an electronic history, such as through an Internet web site, of the consumer's account transactions covering at least 60 days preceding the date the consumer electronically accesses the account; and (3) upon the consumer's oral or written request, promptly provide a written history of the consumer's account transactions covering at least 60 days prior to the request. The history of account transactions provided electronically or upon request must set forth the same type of information required on periodic statements under Regulation E generally, including transaction information and the amount of any fees imposed during the 60 day period for EFTs, the right to make EFTs, or account maintenance.[9]

- **Limited liability for unauthorized transfers**: With limited exceptions regarding the period within which an unauthorized transfer must be reported, Regulation E's limited liability protections fully apply to payroll cards.[10]

- **Error resolution rights**: Financial institutions must respond to a consumer's report of errors regarding a payroll card account if the report is received within 60 days of the consumer either accessing account history or receiving a written account history on which the error appears, whichever is earlier, or within 120 days after the alleged error occurs.[11]

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[6] 12 CFR 1005.7 and 1005.18(c)(1).
[7] 12 CFR 1005.7(a).
[8] 12 CFR 1005.4(a)(1).
[9] 12 CFR 1005.9(b), 1005.18(b) and (c).
[10] 12 CFR 1005.6 and 1005.18(c)(3).
[11] 12 CFR 1005.11 and 1005.18(c)(4).

In addition to these protections for holders of payroll cards, Regulation E states clearly that no "financial institution *or other person*" can mandate that an employee receive direct deposit into an account at a particular institution.[12] Said another way, Regulation E prohibits employers from mandating that employees receive wages only on a payroll card of the employer's choosing.

Regulation E permits an employer to require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit.[13] Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[14] Thus, an employer may not require that its employees receive their wages by electronic transfer to a payroll card account at a particular institution. An employer may, however, offer employees the choice of receiving their wages on a payroll card or receiving it by some other means. Permissible alternative wage payment method(s) are governed by state law, but may include direct deposit to an account of the employee's choosing, a paper check, cash, or other evidence of indebtedness.

Most states' laws contain additional restrictions on the manner in which employers may make wages available to their employees, sometimes specifically addressing payment of wages via payroll card, or calling for particular alternatives to payroll cards. The Bureau notes that the EFTA and Regulation E preempt state laws "relating to" EFTs, among other things, only to the extent of any inconsistency between the state laws and the EFTA / Regulation E. A state law is not considered inconsistent with the EFTA and Regulation E if the state law affords consumers greater protections than afforded by the EFTA and Regulation E.[15]

Finally, the Bureau notes that it has supervisory authority over larger depository institutions engaged in, among other things, providing payroll cards.[16] That authority includes the ability to examine supervised entities' use of third-party service providers, to assess both the supervised

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[12] 12 CFR 1005.10(e)(2) and comment 10(e)(2)-1 (emphasis added). As the Federal Reserve Board explained in 2006, Regulation E's compulsory use provisions "apply to payroll card accounts because they are established as accounts for the receipt of EFTs of salary." 71 FR 1473, 1476 (Jan. 10, 2006).
[13] 12 CFR 1005.10(e)(2) and comment 10(e)(2)-1.
[14] *Id.*
[15] EFTA § 922, 15 USC 1693q, 12 CFR 1005.12(b).
[16] The Bureau also has supervisory authority over, among others, non-depository larger participants in consumer financial product or service markets, as defined by rule, and over non-depository covered persons engaging, or who have engaged, in conduct posing risks to consumers with regard to the offering or provision of consumer financial products or services. 12 USC 5514(a)(1)(B) and (C). *See also* 12 CFR parts 1090 and 1091.

entity's and service provider's compliance with federal consumer financial laws, including the EFTA and Regulation E.[17]

The Bureau is also authorized, subject to certain exceptions, to enforce the EFTA and Regulation E against any person subject to the Regulation, including financial institutions *and* employers.[18] In addition, subject to certain exceptions, the Bureau has enforcement authority over covered persons offering or providing certain consumer financial products or services – including payroll cards – under the Consumer Financial Protection Act.[19] In exercising our enforcement authority, our goals are to be proactive about identifying violations, stopping violations before they grow into systemic problems, maximizing remediation to consumers, and deterring future violations.

This bulletin and other information related to Regulation E are available on the CFPB's website at www.consumerfinance.gov.

[17] *See* CFPB Bulletin 2012-03, *available at* http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.
[18] EFTA § 918(a)(5), 15 USC 16930(a)(5).
[19] 12 USC 5515.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-09

Date: September 4, 2013

Subject: The FCRA's requirement to investigate disputes and review "all relevant" information provided by consumer reporting agencies (CRAs) about the dispute

The Fair Credit Reporting Act (FCRA) generally requires a consumer reporting agency (CRA) to notify a furnisher when a consumer disputes the accuracy or completeness of an item of information provided by the furnisher to the CRA.[1] The CRA must also promptly provide the furnisher "all relevant information" regarding the dispute that the CRA timely received from the consumer.[2] The furnisher, in turn, must "conduct an investigation with respect to the disputed information," "review all relevant information" provided by the CRA, and respond appropriately based on the result of the investigation.[3] The CFPB expects CRAs and furnishers to comply fully with these FCRA requirements, thereby promoting the accuracy and completeness of information in the consumer reporting system.

This bulletin specifically addresses furnishers' obligations to "review all relevant information" they receive in connection with disputes forwarded by CRAs.

The CFPB expects furnishers to have reasonable systems and technology in place to receive and process notices of disputes and information regarding disputes, including relevant documentation, forwarded to them by CRAs. The CFPB also expects every furnisher to review and consider "all relevant information" relating to the dispute, including documents that the CRA includes with the notice of dispute or transmits during the investigation, and the furnisher's own information with respect to the dispute.

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[1] 15 U.S.C. § 1681i(a)(2)(A).
[2] 15 U.S.C. § 1681i(a)(2)(A), (B).
[3] 15 U.S.C. § 1681s-2(b)(1).

The CFPB will continue to evaluate compliance with the requirement to review "all relevant information" by furnishers subject to its supervisory and enforcement authorities. In general, with respect to disputes received by furnishers from CRAs, the CFPB expects each furnisher to comply with the FCRA by:

(1) Maintaining a system reasonably capable of receiving from CRAs information regarding disputes, including supporting documentation;
(2) Conducting an investigation of the disputed information including reviewing:
    a. "all relevant information" forwarded by the CRA and;
    b. the furnisher's own information with respect to the dispute;
(3) Reporting the results of the investigation to the CRA that sent the dispute;
(4) Providing corrected information to every nationwide CRA that received the information if the information is inaccurate or incomplete; and
(5) Modifying or deleting the disputed information, or permanently blocking the reporting of the information if the information is incomplete or inaccurate, or cannot be verified.

Any furnisher not currently maintaining a process that meets these requirements should take immediate steps to comply with the requirements of the law.

The CFPB is monitoring complaints received from consumers and will prioritize examinations and other actions on the basis of risks posed to consumers. If the CFPB determines that a furnisher has engaged in any acts or practices that violate the FCRA or other Federal consumer financial laws and regulations, it will take appropriate supervisory and enforcement actions to address violations and seek all appropriate corrective measures, possibly including remediation of harm to consumers. The CFPB will continue to review furnisher compliance with these requirements during examinations and investigations.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-08 (Fair Debt Collection Practices Act and the Dodd-Frank Act)

Date: July 10, 2013

Subject: Representations Regarding Effect of Debt Payments on Credit Reports and Scores

In response to recent practices observed during supervisory examinations and enforcement investigations, the Consumer Financial Protection Bureau (CFPB or Bureau) issues this bulletin to provide guidance to creditors, debt buyers, and third-party collectors about compliance with the Fair Debt Collection Practices Act (FDCPA)[1] and sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)[2] when making representations about the impact that payments on debts in collection may have on credit reports and credit scores.

A. Legal Background

The Dodd-Frank Act granted the CFPB authority to issue regulations and guidance related to the FDCPA and Title X of the Dodd-Frank Act.[3] The FDCPA makes it illegal for a debt collector to "use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[4] In addition, it is illegal for any covered person or service provider of consumer financial products or services to engage in any deceptive act or practice in violation of the Dodd-Frank Act.[5] The FDCPA and the Dodd-Frank Act together prohibit covered persons or service providers, including debt collectors, from engaging in deception while collecting or attempting to collect on consumer debts.

B. Deceptive Claims Regarding Debt Payments and Credit Reports and Scores

While communicating with consumers, creditors and debt buyers (collectively "debt owners") and third-party debt collectors often make material representations intended to persuade consumers to pay debts in collection.[6] Such representations may include, but are not limited to, statements regarding the relationship between:

- Paying debts in collection and improvements in a consumer's credit report;
- Paying debts in collection and improvements in a consumer's credit score;
- Paying debts in collection and improvements in a consumer's creditworthiness; or

[1] 15 U.S.C. § 1692 *et seq.*
[2] 12 U.S.C. §§ 5531, 5536.
[3] 12 U.S.C. § 5512(b).
[4] 15 U.S.C. § 1692e.
[5] 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).
[6] For the purposes of this bulletin, "debts" refers to debts in collection.

- Paying debts in collection and the increased likelihood of a consumer receiving credit or more favorable credit terms from a lender.

Representations like those discussed in this bulletin are likely to be important to many consumers who view credit reporting as an important determinant of their future access to credit and other opportunities. Based on its supervision, enforcement, and other activities, the CFPB is aware that these types of representations are being made and is concerned that some of them may be deceptive under the FDCPA, the Dodd-Frank Act, or both.[7]

1. Effects on Credit Reports

One example of a potentially deceptive claim concerns representations that debt owners and third-party debt collectors may make about obsolete debt, which can be defined for the purposes of this bulletin as debt that the Fair Credit Reporting Act (FCRA) prohibits consumer reporting agencies from including on credit reports for most purposes due to the length of time that has passed since a consumer initially defaulted. The FCRA imposes time limits (usually seven years) on including information about debts in certain credit reports.[8] A debt owner or third-party debt collector representing that payments on obsolete debts will result in the removal of information about the debt from the consumer's credit report may well deceive consumers, because such information likely would not have appeared on reports for most purposes even if the debt had remained unpaid.

Another example of a potentially deceptive claim involves representations that debt owners and third-party debt collectors may make about non-obsolete debts. Payments on debts in collection will change credit reports only if debt owners or third-party debt collectors furnish information about the payments to credit reporting agencies and the agencies add the information to credit files and credit reports. If debt owners or third-party debt collectors do not furnish payment information to credit reporting agencies, then it may well be deceptive for them to make representations about how debt payments will be reflected on a consumer's credit report.[9]

2. Effects on Credit Scores

Another potentially deceptive claim involves representations that debt owners and third-party debt collectors may make about how paying debts in collection will improve credit scores. Even assuming that debt owners and third-party collectors report payments on debts in collection to consumer reporting agencies, in light of the numerous factors that influence an individual consumer's credit score, such payments may not improve the credit score of the consumer to whom the representation is being made. Consequently, debt owners or third-party debt collectors

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[7] Collectors who make claims are responsible for both the literal language of their representations and claims that reasonable consumers take away from those representations. *See FTC Policy Statement on Deception* (Oct. 14, 1983), *published at* 103 F.T.C. 110, 174 (1984). The CFPB is informed by the FTC's standard for deception. CFPB Supervision and Examination Manual, UDAAP 5 (Oct. 2012) (online at http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf).

[8] Section 605 of the FCRA, 15 U.S.C. § 1681c. We note that there are exceptions to the general rule and, as a result, information about debts that are more than seven years old may appear under some circumstances or in certain consumer reports.

[9] *See American Express Centurion Consent Order, American Express Bank, FSB Consent Order, and American Express Travel Related Services Company, Inc. Consent Order* (collectively "American Express Consent Orders"), October 1, 2012, http://www.consumerfinance.gov/pressreleases/cfpb-orders-american-express-to-pay-85-million-refund-to-consumers-harmed-by-illegal-credit-card-practices/.

may well deceive consumers if they make representations that paying debts in collection will improve a consumer's credit score.

3. Effect on Creditworthiness

A third example of a potentially deceptive claim involves representations that owners of debts and third-party debt collectors may make about how paying debts in collection will improve creditworthiness or enhance the likelihood that a consumer will subsequently receive credit from a lender. Potential lenders may use a variety of sources of information to assess the creditworthiness of prospective borrowers, including credit report or credit score information. Even where they use the same information, potential lenders may assign different weight to information in evaluating the creditworthiness of prospective borrowers. The nature and extent of the impact of a payment on a particular debt in collection to a prospective borrower's creditworthiness may depend on all of the information potential lenders consider and how they weigh that information, factors that debt owners or third-party debt collectors often will not know. Debt owners or third-party debt collectors may well deceive consumers if they make representations about the nature or extent of improved creditworthiness that result from paying debts in collection.

C. CFPB Expectations

The examples of potentially deceptive claims concerning the effect of paying debts in collection on credit reports, credit scores, and creditworthiness set forth in this bulletin are illustrative and non-exhaustive. The prevalence of these types of potentially deceptive claims is a matter of significant concern to the CFPB.

Debt owners and third-party debt collectors should take steps to ensure that any claims that they make about the effect of paying debts in collection on consumers' credit reports, credit scores, and creditworthiness are not deceptive. In the course of supervision activities or enforcement investigations, the CFPB may review communication materials, scripts, and training manuals and related documentation to assess whether owners of debts and third-party debt collectors are making these types of claims and the factual basis for them. In addition, the CFPB will assess whether additional supervisory, enforcement, or other actions may be necessary to ensure that the debt collection market functions in a fair, transparent, and competitive manner.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-07

Date: July 10, 2013
Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this bulletin to clarify the contours of that obligation in the context of collecting consumer debts.

This bulletin describes certain acts or practices related to the collection of consumer debt that could, depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act. Whether conduct like that described in this bulletin constitutes a UDAAP may depend on additional facts and analysis. The examples described in this bulletin are not exhaustive of all potential UDAAPs. The Bureau may closely review any covered person or service provider's consumer debt collection efforts for potential violations of Federal consumer financial laws.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.[1]

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a "debt collector" from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,"[2] to "use

[1] *See* Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of "unfair" and "deceptive" practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). *See* CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act's prohibition on UDAAPs.

[2] FDCPA § 806, 15 U.S.C. § 1692d.

any false, deceptive, or misleading representation or means in connection with the collection of any debt,"[3] or to "use any unfair or unconscionable means to collect or attempt to collect any debt."[4] The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.[5] All parties covered by the FDCPA must comply with any obligations they have under the FDCPA, in addition to any obligations to refrain from UDAAPs in violation of the Dodd-Frank Act.

Although the FDCPA's definition of "debt collector" does not include some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act. [6]

B. Summary of Applicable Standards for UDAAPs

1. Unfair Acts or Practices

The Dodd-Frank Act prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when:

(1) It causes or is likely to cause substantial injury to consumers;
(2) The injury is not reasonably avoidable by consumers; and
(3) The injury is not outweighed by countervailing benefits to consumers or to competition.[7]

A "substantial injury" typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. However, the injury does not have to be monetary.[8] Although emotional impact and other subjective types of harm will not ordinarily amount to substantial injury, in certain circumstances emotional impacts may amount to or contribute to substantial injury.[9] In addition, actual injury is not required; a significant risk of concrete harm is sufficient.[10]

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[3] FDCPA § 807, 15 U.S.C. § 1692e. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts.
[4] FDCPA § 808, 15 U.S.C. § 1692f. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts.
[5] *See* FDCPA § 803(6), 15 U.S.C. § 1692a(6). The FDCPA also covers, as a "debt collector," a creditor who, in collecting its own debts, uses any name other than its own which would indicate that a third person is attempting to collect the debts.
[6] The FDCPA also reaches any person who designs, compiles, or furnishes forms knowing such forms would be used to create the false belief in a consumer that a person other than the creditor is participating in collecting the creditor's debts. *See* FDCPA § 812, 15 U.S.C. § 1692j.
[7] Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536.
[8] CFPB Exam Manual at UDAAP 2; *see also FTC v. Accusearch, Inc.*, 06-cv-105-D, 2007 WL 4356786, at *7-8 (D. Wyo. Sept. 28, 2007); FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.
[9] CFPB Exam Manual at UDAAP 2.
[10] *Id.*

An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury.[11] Injury caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable.[12] Injuries that can only be avoided by spending large amounts of money or other significant resources also may not be reasonably avoidable.[13] Finally, an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits.[14]

Established public policy may be considered with all other evidence to determine whether an act or practice is unfair, but may not serve as the primary basis for such determination.[15]

2. *Deceptive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes a deceptive act or practice. An act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer;
(2) The consumer's interpretation is reasonable under the circumstances; and
(3) The misleading act or practice is material.[16]

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered.[17] Deceptive acts or practices can take the form of a representation or omission.[18] The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

To determine if the consumer's interpretation of the information was reasonable under the circumstances when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable member of the target audience.[19] A statement or information can be misleading even if not all consumers, or not all consumers in the targeted group, would be misled, so long as a significant minority

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[11] *Id.*
[12] *Id.*
[13] *See id.* at 2-3.
[14] Dodd-Frank Act § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B); *see also* CFPB Exam Manual at UDAAP 2.
[15] Dodd-Frank Act § 1031(c)(2), 12 U.S.C. § 5531(c)(2); *see also* CFPB Exam Manual at UDAAP 3.
[16] The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act. *See* CFPB Exam Manual at UDAAP 5.
[17] CFPB Exam Manual at UDAAP 5.
[18] *Id.*
[19] *See id.* at 6.

would be misled.[20] Likewise, if a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation.[21] Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service. Information that is likely important to consumers is material.[22]

Sometimes, a person may make a disclosure or other qualifying statement that might prevent consumers from being misled by a representation or omission that, on its own, would be deceptive. The Bureau looks to the following factors in assessing whether the disclosure or other qualifying statement is adequate to prevent the deception: whether the disclosure is prominent enough for a consumer to notice; whether the information is presented in a clear and easy to understand format; the placement of the information; and the proximity of the information to the other claims it qualifies.[23]

3. *Abusive Acts or Practices*

The Dodd-Frank Act also prohibits conduct that constitutes an abusive act or practice. An act or practice is abusive when it:

(1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
(2) Takes unreasonable advantage of –
  (A) a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;
  (B) a consumer's inability to protect his or her interests in selecting or using a consumer financial product or service; or
  (C) a consumer's reasonable reliance on a covered person to act in his or her interests.[24]

It is important to note that, although abusive acts or practices may also be unfair or deceptive, each of these prohibitions are separate and distinct, and are governed by separate legal standards.[25]

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*; *see also* CFPB Bulletin 12-06, Marketing of Credit Card Add-On Products (July 12, 2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf.
[24] Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d); *see also* CFPB Exam Manual at UDAAP 9; Stipulated Final Judgment and Order, Conclusions of Law ¶ 12, 9:13-cv-80548 and Compl. ¶¶ 55-63, *CFPB v. Am. Debt Settlement Solutions, Inc.*, 9:13-cv-80548 (S.D. Fla. May 30, 2013), *available at* http://files.consumerfinance.gov/f/201305_cfpb_proposed-order_adss.pdf and http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf. The Stipulated Final Judgment and Order was signed by U.S. District Judge Middlebrooks and entered on the court docket on June 6, 2013. *See* Stipulated Final J. & Order [ECF Docket Entry No. 5], 9:13-cv-80548 (S.D. Fla.).
[25] CFPB Exam Manual at UDAAP 9.

C. Examples of Unfair, Deceptive and/or Abusive Acts or Practices

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to the collection of consumer debt could constitute UDAAPs. Accordingly, the Bureau will be watching these practices closely.

- **Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.[26]**
- **Failing to post payments timely or properly or to credit a consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.[27]**
- **Taking possession of property without the legal right to do so.**
- **Revealing the consumer's debt, without the consumer's consent, to the consumer's employer and/or co-workers.[28]**
- **Falsely representing the character, amount, or legal status of the debt.**
- **Misrepresenting that a debt collection communication is from an attorney.**
- **Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.**
- **Misrepresenting whether information about a payment or non-payment would be furnished to a credit reporting agency.[29]**
- **Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.[30]**
- **Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including**

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[26] *See* Compl. ¶¶ 34-38 & 43-44, *FTC v. Fairbanks Capital Corp.*, 03-12219 (D. Mass. Nov. 12, 2003) (alleging that the charging of late fees and other associated charges was unfair practice under Section 5 of the FTC Act and a violation of §§ 807 and 808 of the FDCPA), *available at* http://www.ftc.gov/os/2003/11/0323014comp.pdf.

[27] *Id.* ¶¶ 22-25.

[28] *See, e.g.*, Compl. ¶¶ 24 & 30-31, *FTC v. Cash Today, Ltd*., 3:08-cv-590 (D. Nev. Nov. 12, 2008), *available at* http://www.ftc.gov/os/caselist/0723093/081112cmp0923093.pdf, (asserting that Cash Today engaged in unfair collection practices in violation of Section 5 of the FTC Act by, among other things, disclosing the existence of consumer's debt to employers, co-workers, and other third parties despite being told by consumers not to contact their workplaces); *FTC v. LoanPointe, LLC.*, 2:10 CV 00225-DAK, 2011 WL 4348304, at *5 -6 (D. Utah Sept. 16, 2011) (finding that disclosure of existence and amount of debt to consumer's employer without consumer's prior approval constitutes an unfair practice under the FTC Act).

[29] *See, e.g., In re Am. Express Centurion Bank*, Joint Consent Order at 3 (Oct. 1, 2012), *available at* http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf.

[30] *Id.*

false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

Again, the obligation to avoid UDAAPs under the Dodd-Frank Act is in addition to any obligations that may arise under the FDCPA. Original creditors and other covered persons and service providers involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act. The CFPB will continue to review closely the practices of those engaged in the collection of consumer debts for potential UDAAPs, including the practices described above. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other actions may be necessary.

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2013-06

Date: June 25, 2013

Subject: Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation

The Bureau considers many factors in the exercise of its enforcement discretion. These include, for example: (1) the nature, extent, and severity of the violations identified; (2) the actual or potential harm from those violations; (3) whether there is a history of past violations; and (4) a party's effectiveness in addressing violations. This guidance is being provided to inform those subject to the Bureau's enforcement authority that in addition to these and other factors, there are activities they can engage in both before and after the conduct in question has occurred that the Bureau may favorably consider in exercising its enforcement discretion. Specifically, a party may proactively self-police for potential violations, promptly self-report to the Bureau when it identifies potential violations, quickly and completely remediate the harm resulting from violations, and affirmatively cooperate with any Bureau investigation above and beyond what is required. If a party meaningfully engages in these activities, which this bulletin refers to collectively as "responsible conduct," it may favorably affect the ultimate resolution of a Bureau enforcement investigation.

The purpose of this guidance is to encourage activity that has concrete and substantial benefits for consumers and contributes significantly to the success of the Bureau's mission. Depending on its form and substance, responsible conduct can improve the Bureau's ability to promptly detect violations of the federal consumer protection laws, increase the effectiveness and efficiency of enforcement investigations, enable the Bureau to pursue a larger number of worthy investigations with its finite resources, provide important evidence in enforcement investigations and cases, and help more consumers in more matters promptly receive financial redress and additional meaningful remedies for any harm they experienced.

Depending on the nature and extent of a party's actions, the Bureau has a wide range of options available to properly account for responsible conduct in enforcement investigations. For example, the Bureau could resolve an investigation with no public enforcement action, treat the conduct as a less severe type of violation, reduce the number of violations pursued, or reduce the sanctions or penalties sought by the Bureau in an enforcement action. It must be emphasized, however, that in order for the Bureau to consider awarding affirmative credit in the context of an enforcement investigation, a party's conduct must substantially exceed the standard of what is required by law in its interactions with the Bureau.

In the Bureau's consideration of a party's conduct in these areas it must be stressed that what best protects consumers is ultimately central to the Bureau's exercise of its enforcement discretion. Self-policing, self-reporting, remediation, and cooperation with the Bureau's investigation are unquestionably important in promoting the best interests of consumers, but so

too are vigorous, consistent enforcement of the law and the imposition of appropriate sanctions where the law has been violated.

In addition, this guidance, and its description of activities that may warrant favorable consideration, is not adopting any rule or formula, or making a promise to any person about any specific case. The Bureau is not in any way limiting its discretion and responsibility to evaluate each case individually on its own facts and circumstances. There is no consistent formula that can be applied to all enforcement actions to accomplish the goal of protecting consumers. Similarly, there is no formula that can be applied to account for cooperation based on a party's actions related to the activities set forth above. Indeed, there may be circumstances where the misconduct is so egregious, or the harm inflicted so great, that no amount of cooperation or other mitigating conduct could justify a decision not to bring an enforcement action, or even to forgo seeking the imposition of a civil money penalty. In short, the fact that a party may argue it has satisfied some or even all of the elements set forth in this guidance will not foreclose the Bureau from bringing any enforcement action or seeking any remedy if it believes such a course is necessary and appropriate.

Factors Used to Evaluate and Acknowledge Responsible Conduct

As noted previously, the Bureau principally considers four categories of conduct when evaluating whether some form of credit is warranted in an enforcement investigation: self-policing, self-reporting, remediation, and cooperation during the Bureau's enforcement investigation. However, if a party engages in another type of activity particular to its situation that is both substantial and meaningful, the Bureau may take that activity into consideration.

Listed below are some of the factors the Bureau will consider in determining whether and how much to take into account self-policing, self-reporting, remediation, and cooperation. This list is not exhaustive, and some of the factors identified may relate to more than one category of responsible conduct. Finally, the importance of each factor in a given case, and the way in which the Bureau evaluates each factor, will depend on the circumstances.

Self-policing:

This concept, which can also be described as self-monitoring or self-auditing, reflects a proactive commitment by a party to use resources for the prevention and early detection of potential violations of consumer financial laws. The Bureau recognizes that a robust compliance management system appropriate for the size and complexity of a party's business will not always prevent violations, but it will often facilitate early detection of potential violations, which can limit the size and scope of consumer harm. Questions the Bureau will consider in determining whether to provide favorable consideration for self-policing activity that detects violations or potential violations of federal consumer financial laws include:

1. What is the nature of the violation or potential violation and how did it arise? Was the conduct pervasive or an isolated act? How long did it last? Was the conduct significant to the party's profitability or business model?

2. How was the violation or potential violation detected and who uncovered it? What compliance procedures or self-policing mechanisms were in place to prevent, identify, or limit the conduct that occurred and to preserve relevant information? In what ways, if any, were the party's self-policing mechanisms particularly noteworthy and effective?

3. If the party's self-policing functions have previously been the subject of supervisory examination by the Bureau or other regulators, what have been the results of such examination? How, if at all, has the party changed its self-policing following such examination? If the party's self-policing functions have not previously been the subject of supervisory examination, how do those functions measure up to customary supervisory expectations?

4. If the party is a business entity, what was the "tone at the top" of the business about compliance? Was there a culture of compliance? How high up in the chain of command did people know of or participate in the conduct at issue? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct or deficiencies in compliance procedures?

Self-reporting:

Each category of responsible conduct is important to the Bureau and can significantly affect the Bureau's decision about whether a party should receive favorable consideration. Of the four categories, however, prompt and complete self-reporting to the Bureau of significant violations and potential violations is worth special mention. While no substitute for effective self-policing, self-reporting substantially advances the Bureau's protection of consumers and enhances its enforcement mission by reducing the resources it must expend to identify potential or actual violations that are significant enough to warrant an enforcement investigation and making those resources available for other significant matters. Prompt self-reporting of serious violations also represents concrete evidence of a party's commitment to responsibly address the conduct at issue. For these reasons, the Bureau puts special emphasis on this category in its evaluation of a party's overall conduct. Questions the Bureau will examine in determining whether to provide favorable consideration for self-reporting of violations or potential violations of federal consumer financial laws include:

1. Did the party completely and effectively disclose the existence of the conduct to the Bureau, to other regulators, and, if applicable, to self-regulators? Did affected consumers receive appropriate information related to the violations or potential violations within a reasonable period of time?

2. Did the party report the conduct promptly to the Bureau? If it delayed, what justification, if any, existed for the delay? How did the delay affect the preservation of relevant information, the ability of the Bureau to conduct its investigation, or the interests of affected consumers?

3. Did the party proactively self-report, or wait until discovery or disclosure was likely to happen anyway, for example due to impending supervisory activity, public company reporting requirements, the emergence of a whistleblower, consumer complaints or actions, or the conduct of a Bureau investigation?

Remediation:

When violations of federal consumer financial laws have occurred, the Bureau's remedial priorities include obtaining full redress for those injured by the violations, ensuring that the party who violated the law implements measures designed to prevent the violations from recurring, and, when appropriate, effectuating changes in the party's future conduct for the protection and/or benefit of consumers. Remediation may be viewed positively even when the party believes that it may have identified a potential rather than an actual violation. Questions the Bureau will examine in determining whether to provide favorable consideration for remediation activity regarding violations of federal consumer financial laws include:

1. What steps did the party take upon learning of the misconduct? Did it immediately stop the misconduct? How long after the misconduct was uncovered did it take to implement an effective response?

2. If the party is a business, were there any consequences imposed on the individuals responsible for the misconduct?

3. Did the party take prompt and effective steps to preserve information, identify the extent of the harm to consumers, and appropriately recompense those adversely affected? In situations where the harm caused by the violation goes beyond the amounts the victims may have paid to the party, did the party identify and implement additional ways to completely redress the harm?

4. What assurances are there that the misconduct is unlikely to recur? By the time of the resolution of the Bureau matter, did the party improve internal controls and procedures designed to prevent and detect a recurrence of such violations? Similarly, have the party's business practices, policies and procedures changed to remove harmful incentives and encourage proper compliance?

Cooperation:

Unlike self-policing and remediation, which may occur with or without Bureau involvement, cooperation relates to the quality of a party's interactions with the Bureau after the Bureau becomes aware of a potential violation of federal consumer financial laws, either through a party's self-reporting or the Bureau's own discovery efforts. In order to receive credit for cooperation in this context, a party must take substantial and material steps above and beyond what the law requires in its interactions with the Bureau. Simply meeting those obligations will not be rewarded by any special consideration. Questions the Bureau will examine in determining whether to provide favorable consideration for cooperation in a Bureau investigation include:

1. Did the party cooperate promptly and completely with the Bureau and other appropriate regulatory and law enforcement bodies? Was that cooperation present throughout the course of the investigation? Did the actor identify any additional related misconduct likely to have occurred?

2. Did the party take proper steps to develop the truth quickly and completely and to fully share its findings with the Bureau? Did it undertake a thorough review of the nature, extent, origins, and consequences of the misconduct and related behavior? Who conducted the review and did they have a vested interest or bias in the outcome? Were scope limitations placed on the review? If so, why and what were they?

3. Did the party promptly make available to the Bureau the results of its review and provide sufficient documentation reflecting its response to the situation? Did it provide evidence with sufficient precision and completeness to facilitate, among other things, enforcement actions against others who violated the law? Did the party produce a complete and thorough written report detailing the findings of its review? Did it voluntarily disclose material information not directly requested by the Bureau or that otherwise might not have been uncovered? If the party is a business, did it direct its employees to cooperate with the Bureau and make reasonable efforts to secure such cooperation?

The Bureau intends and expects that this guidance will encourage parties subject to the Bureau's enforcement authority to engage in more self-policing. When potential violations of the consumer financial laws arise, the Bureau intends and expects that parties will engage in more self-reporting to the Bureau, more prompt and complete remediation of harm to victimized consumers, and more cooperation with the Bureau in its enforcement investigations. Such an outcome, the Bureau believes, would benefit both consumers and providers of consumer financial products and services.

Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-05
Date: May 20, 2013

Subject: SAFE Act – Uniform State Test for State-Licensed Mortgage Loan Originators

The Consumer Financial Protection Bureau (CFPB) is issuing this guidance in response to questions about whether states may use the Uniform State Test[1] (UST) developed by the Nationwide Mortgage Licensing System and Registry (NMLSR) as part of a qualified written test under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act).

Section 1505(d) of the SAFE Act requires that state-licensed mortgage loan originators pass a "qualified written test."[2] Under the SAFE Act, this qualified written test must be developed by the NMLSR.[3] A qualified written test must adequately measure the applicant's knowledge and comprehension in appropriate subject areas, including: "(A) ethics; (B) Federal law and regulation pertaining to mortgage origination; (C) State law and regulation pertaining to mortgage origination; [and] (D) Federal and State law and regulation, including instruction on fraud, consumer protection, the nontraditional mortgage marketplace, and fair lending issues."[4]

To be a qualified written test under the SAFE Act, the test developed by NMLSR must include questions covering all the required areas, including State laws and regulations. This requirement may be met through the use of a compliant UST, or a separate test for each State covering the particular laws and regulations of that State, and a National Test Component developed by the NMLSR. Presenting test questions through a UST rather than a separate State test component would not preclude the test from being a qualified test under the SAFE Act, so long as all the requirements for a qualified test are satisfied. Therefore, a State may use a UST if it adequately tests required laws and regulations.

For more information please contact: CFPB_SAFEAct_Inquiries@cfpb.gov

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[1] The Nationwide Mortgage Licensing System and Registry is defined as a mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the State licensing and registration of State-licensed loan originators and the registration of registered loan originators or any system established by the Director under [section 1509 of the SAFE Act]. 12 U.S.C. § 5102(6)

[2] 12 U.S.C. § 5104(d); see also 12 C.F.R. § 1008.105(e).

[3] Id.

[4] 12 U.S.C. § 5104(d).

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2013-02

Date: March 21, 2013

Subject: Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act

This bulletin provides guidance about compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, for indirect auto lenders that permit dealers to increase consumer interest rates and that compensate dealers with a share of the increased interest revenues. This guidance applies to all indirect auto lenders within the jurisdiction of the Consumer Financial Protection Bureau (CFPB), including both depository institutions and nonbank institutions.

Background

While consumers may seek financing for automobile purchases directly from a financial institution, many seek financing from the auto dealer. The auto dealer may provide that financing directly or it may facilitate indirect financing by a third party such as a depository institution, a nonbank affiliate of a depository institution, an independent nonbank, or a "captive" nonbank (an auto lender whose primary business is to finance the purchase of a specific manufacturer's automobiles).

In indirect auto financing, the dealer usually collects basic information regarding the applicant and uses an automated system to forward that information to several prospective indirect auto lenders. After evaluating the applicant, indirect auto lenders may choose not to become involved in the transaction or they may choose to provide the dealer with a risk-based "buy rate" that establishes a minimum interest rate at which the lender is willing to purchase the retail installment sales contract executed by the consumer for the purchase of the automobile. In some circumstances, the indirect auto lender may exercise discretion in adjusting the buy rate, making underwriting exceptions, or modifying other terms and conditions of the financing as a result of additional negotiation between the indirect auto lender and the dealer.

The indirect auto lender may also have a policy that allows the dealer to mark up the interest rate above the indirect auto lender's buy rate. In the event that the dealer charges the consumer an interest rate that is higher than the lender's buy rate, the lender may pay the dealer what is typically referred to as "reserve" (or "participation"), compensation based upon the difference in interest revenues between the buy rate and the actual note rate charged to the consumer in the retail installment contract executed with the dealer. Dealer reserve is one method lenders use to compensate dealers for the value they add by originating loans and finding financing sources. The exact computation of compensation based on dealer markup varies across lenders and may vary between programs at the same lender. After the deal is consummated with the consumer, the

retail installment contract may then be sold to the lender, which has already indicated its willingness to extend credit to the applicant.

The supervisory experience of the CFPB confirms that some indirect auto lenders have policies that allow auto dealers to mark up lender-established buy rates and that compensate dealers for those markups in the form of reserve (collectively, "markup and compensation policies"). Because of the incentives these policies create, and the discretion they permit, there is a significant risk that they will result in pricing disparities on the basis of race, national origin, and potentially other prohibited bases.

Indirect Auto Lenders as Creditors Under the ECOA

The ECOA makes it illegal for a "creditor" to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act.[1]

The ECOA defines a "creditor" to include not only "any person who regularly extends, renews, or continues credit," but also "any assignee of an original creditor who participates in the decision to extend, renew, or continue credit."[2] Regulation B further provides that "creditor" means "a person, who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit" and expressly includes an "assignee, transferee, or subrogee who so participates."[3]

The Commentary to Regulation B makes clear that an assignee is considered a "creditor" when the assignee participates in the credit decision. The Commentary provides that a "creditor" "includes all persons participating in the credit decision" and that "[t]his may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated."[4]

Even as assignees of the installment contract, indirect auto lenders are creditors under the ECOA and Regulation B if, in the ordinary course of business, they regularly participate in a credit decision. The CFPB recognizes that there is a continuum of indirect lender participation in credit decisions, ranging from no participation to being the sole decision maker with respect to a particular transaction, and that a lender's practices and conduct may place it at various points along this continuum. The CFPB also recognizes that credit transactions in indirect auto lending take many forms. However, information gathered by the CFPB suggests that the standard

[1] 15 U.S.C. § 1691(a).
[2] 15 U.S.C. § 1691a(e).
[3] 12 C.F.R. § 1002.2(*l*).
[4] 12 C.F.R. pt. 1002, Supp. I, § 1002.2, ¶ 2(*l*)-1.

practices of indirect auto lenders likely constitute participation in a credit decision under the ECOA and Regulation B.

For example, an indirect auto lender is likely a creditor under the ECOA when it evaluates an applicant's information, establishes a buy rate, and then communicates that buy rate to the dealer, indicating that it will purchase the obligation at the designated buy rate if the transaction is consummated. In addition, when a lender provides rate sheets to a dealer establishing buy rates and allows the dealer to mark up those buy rates, the lender may be a creditor under the ECOA when it later purchases a contract from such a dealer. These two examples are illustrative of common industry practices; indirect auto lenders may also be creditors under other circumstances.

The Liability of Indirect Auto Lenders for Discrimination Resulting from Markup and Compensation Policies

An additional consideration for auto lenders covered as creditors under the ECOA is whether and under what circumstances they are liable for pricing disparities on a prohibited basis. When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact.[5]

An indirect auto lender's markup and compensation policies may alone be sufficient to trigger liability under the ECOA if the lender regularly participates in a credit decision and its policies result in discrimination. The disparities triggering liability could arise either within a particular dealer's transactions or across different dealers within the lender's portfolio. Thus, an indirect auto lender that permits dealer markup and compensates dealers on that basis may be liable for these policies and practices if they result in disparities on a prohibited basis.

Some indirect auto lenders may be operating under the incorrect assumption that they are not liable under the ECOA for pricing disparities caused by markup and compensation policies because Regulation B provides that "[a] person is not a creditor regarding any violation of the [ECOA] or [Regulation B] committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction."[6] This provision limits a creditor's liability for another creditor's ECOA violations under certain circumstances. But it does not limit a creditor's liability for its own violations — including, for example, disparities on a prohibited basis that result from the creditor's own markup and compensation policies. Additionally, an indirect auto lender further may have known or had reasonable notice of a dealer's discriminatory conduct, depending on the facts and circumstances.

[5] *See* CFPB Bulletin 2012-14 (April 18, 2012) (reaffirming that the legal doctrine of disparate impact remains applicable as the CFPB exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B).
[6] 12 C.F.R. § 1002.2(*l*).

Limiting Fair Lending Risk in Indirect Auto Lending

Institutions subject to CFPB jurisdiction, including indirect auto lenders, should take steps to ensure that they are operating in compliance with the ECOA and Regulation B as applied to dealer markup and compensation policies. These steps may include, but are not limited to:

- imposing controls on dealer markup and compensation policies, or otherwise revising dealer markup and compensation policies, and also monitoring and addressing the effects of those policies in the manner described below, so as to address unexplained pricing disparities on prohibited bases; or
- eliminating dealer discretion to mark up buy rates and fairly compensating dealers using another mechanism, such as a flat fee per transaction, that does not result in discrimination.

Another important tool for limiting fair lending risk in indirect auto lending is developing a robust fair lending compliance management program. The CFPB recognizes that the appropriate program will vary among financial institutions. In our most recent Supervisory Highlights, we set out the following features of a strong fair lending compliance program, which are applicable in the indirect auto lending context:

- an up-to-date fair lending policy statement;
- regular fair lending training for all employees involved with any aspect of the institution's credit transactions, as well as all officers and Board members;
- ongoing monitoring for compliance with fair lending policies and procedures;
- ongoing monitoring for compliance with other policies and procedures that are intended to reduce fair lending risk (such as controls on dealer discretion);
- review of lending policies for potential fair lending violations, including potential disparate impact;
- depending on the size and complexity of the financial institution, regular analysis of loan data in all product areas for potential disparities on a prohibited basis in pricing, underwriting, or other aspects of the credit transaction;
- regular assessment of the marketing of loan products; and
- meaningful oversight of fair lending compliance by management and, where appropriate, the financial institution's board of directors.[7]

For some lenders, additional compliance-management components may be necessary to address significant fair lending risks. For example, indirect auto lenders that retain dealer markup and

[7] Consumer Financial Protection Bureau, *Supervisory Highlights: Fall 2012* (Oct. 31, 2012), *available at* http://www.consumerfinance.gov/reports/supervisory-highlights-fall-2012.

compensation policies may wish to address the fair lending risks of such policies by implementing systems for monitoring and corrective action by:

- sending communications to all participating dealers explaining the ECOA, stating the lender's expectations with respect to ECOA compliance, and articulating the dealer's obligation to mark up interest rates in a non-discriminatory manner in instances where such markups are permitted;
- conducting regular analyses of both dealer-specific and portfolio-wide loan pricing data for potential disparities on a prohibited basis resulting from dealer markup and compensation policies;
- commencing prompt corrective action against dealers, including restricting or eliminating their use of dealer markup and compensation policies or excluding dealers from future transactions, when analysis identifies unexplained disparities on a prohibited basis; and
- promptly remunerating affected consumers when unexplained disparities on a prohibited basis are identified either within an individual dealer's transactions or across the indirect lender's portfolio.

The CFPB will continue to closely review the operations of both depository and non-depository indirect auto lenders, utilizing all appropriate regulatory tools to assess whether supervisory, enforcement, or other actions may be necessary to ensure that the market for auto lending provides fair, equitable, and nondiscriminatory access to credit for consumers.

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2012-09

Date: November 29, 2012

Subject: The FCRA's "streamlined process" requirement for consumers to obtain free annual reports from nationwide specialty consumer reporting agencies

Background

The Fair Credit Reporting Act (FCRA) requires nationwide specialty consumer reporting agencies (NSCRAs) to provide, upon request of a consumer, a free annual disclosure of the consumer's file, commonly known as a consumer report. The FCRA's implementing Regulation (Regulation V) includes a rule mandated by the FCRA that requires each NSCRA to establish a "streamlined process for consumers to request [their free annual] consumer reports . . . which shall include, at a minimum, the establishment by each such agency of a toll-free telephone number for such requests." 15 U.S.C. § 1681j; 12 C.F.R. § 1022.137.

Pursuant to Regulation V, this streamlined process must permit consumers to request an annual file disclosure through a toll-free telephone number that is published "in any telephone directory in which any telephone number for the [NSCRA] is published" and is "clearly and prominently posted on any Web site owned or maintained by the [NSCRA] that is related to consumer reporting." 12 C.F.R. § 1022.137(a)(1)(ii)–(iii). The streamlined process must, among other things, have adequate capacity to accept requests from the reasonably anticipated volume of consumers requesting their annual file disclosures through the streamlined process and must provide clear and easily understandable information and instructions to consumers. 12 C.F.R. § 1022.137(a)(2).

It has come to the attention of the CFPB that some NSCRAs may not have established the required streamlined process for consumers to request copies of their annual file disclosures. The Bureau is issuing this Bulletin to remind the NSCRAs of their obligation to comply with the streamlined process requirement, which the Bureau views as an important consumer protection.

CFPB Expectations

NSCRAs are defined as consumer reporting agencies that compile and maintain files on consumers on a nationwide basis relating to (1) medical

records or payments; (2) residential or tenant history; (3) check writing history; (4) employment history; or (5) insurance claims. 15 U.S.C. § 1681a(x). In light of the range and frequency of decisions that rely on NSCRA reports, the accuracy of these reports is critical. Consumer access to NSCRA files enables consumers to detect and dispute inaccuracies contained in their files.

The CFPB will evaluate compliance with the streamlined process requirements by NSCRAs subject to its supervisory and enforcement authority. The CFPB expects each NSCRA to comply with the FCRA and Regulation V, including by:

(1) Enabling consumers to request annual file disclosures by a toll-free telephone number that;

   a. Is published, in conjunction with all other published numbers for the NSCRA, in any telephone directory in which any telephone number for the NSCRA is published; and
   b. Is clearly and prominently posted on any Website owned or maintained by the NSCRA that is related to consumer reporting, along with instructions for requesting disclosures by any additional available request methods, 12 C.F.R. § 1022.137(a)(1);

(2) Ensuring that its streamlined process for obtaining an annual file disclosure has adequate capacity to accept requests from a reasonably anticipated volume of consumers, 12 C.F.R. § 1022.137(a)(2)(i); 12 C.F.R. § 1022.137(b)-(c);

(3) Collecting only as much personal information from a consumer requesting a disclosure as is reasonably necessary to identify the consumer properly, 12 C.F.R. § 1022.137(a)(2)(ii);

(4) Providing clear and easily understandable information and instructions to consumers, including but not limited to: providing information on the status of a request, providing a "help" or "frequently asked questions" page for web-based requests, and providing a statement when the identity of the consumer requesting an annual file disclosure cannot properly be verified and directions on how to complete the request, 12 C.F.R. § 1022.137(a)(2)(iii);

(5) Using or disclosing personally identifiable information collected from a consumer because of the consumer's request for an annual or other disclosure required by the FCRA from the entity that the consumer made through the streamlined process only in ways permitted by Regulation V, 12 C.F.R. § 1022.137(d); and

(6) Accepting consumer requests for annual file disclosures from consumers who use methods other than the streamlined process or instructing such consumers on how to use the streamlined process. 12 C.F.R. § 1022.137(e).

Any NCSRA not currently providing a process that meets these requirements should take immediate steps to comply.

CFPB Bulletin 2012-08
Re: Remittance Rule Implementation (Subpart B of Regulation E)
Date: November 27, 2012

The Consumer Financial Protection Bureau (CFPB or the Bureau) expects to issue a proposal next month to refine three elements of its rule regarding foreign remittance transfers. The proposal will be narrowly targeted to address the rule's provisions on: (1) errors resulting from incorrect account numbers provided by senders of remittance transfers; (2) the disclosure of certain foreign taxes and third-party fees; and (3) the disclosure of sub-national, foreign taxes. The Bureau will proceed on a fast track with a notice of proposed rulemaking, which will propose these changes. This notice will propose to amend the final rule issued earlier this year, currently set to take effect on February 7, 2013. The notice will also propose a brief extension of the effective date of the rule until 90 days after the Bureau finalizes the proposal. The Bureau anticipates providing this extension in order to permit providers to adjust their systems in response to the proposed requirements. The Bureau expects that the proposed effective date will be sometime during the spring of 2013.

The CFPB's proposed adjustments will be designed to facilitate implementation and compliance with the rule's requirements while maintaining the rule's valuable new consumer protections and ensuring that they can be effectively delivered to consumers.

The Bureau expects the proposal to address the following three topics:

- *Situations in which a sender provides an incorrect account number to a remittance transfer provider.* As the Bureau announced during its webinar on the remittance rule on October 16, 2012, the CFPB plans to propose revisions to the rule's error resolution provisions. Specifically, the proposal will address the way the rule applies to situations in which a sender provides an incorrect account number to a remittance transfer provider resulting in a remittance transfer being deposited into the wrong account. The CFPB intends to propose that where the provider can demonstrate that the consumer provided the incorrect information, the provider would be required to attempt to recover the funds but would not be liable for the funds if those efforts are unsuccessful.

- *Disclosure of third party fees and foreign taxes.* The CFPB plans to propose revisions to the rule's disclosure provisions concerning foreign taxes and fees assessed by the financial institution receiving the transfer. The proposal would provide additional flexibility around these requirements, including by permitting providers to base fee disclosures on published bank fee schedules and by providing further guidance on foreign tax disclosures where certain variables may affect tax rates.

- *Disclosure of regional and local taxes assessed in foreign countries.* The CFPB also plans to propose that the obligation for providers to disclose foreign taxes imposed on remittance transfers is limited to taxes imposed at the national level, and does not encompass taxes that may be imposed by foreign, sub-national jurisdictions.

The CFPB expects to issue a notice of proposed rulemaking next month to explain the changes in detail and to seek public comment. After considering the public comments, the Bureau will issue a final rule as quickly as possible. The Bureau anticipates proposing to extend the effective date on the original rule until 90 days after it finalizes the proposal. Based on current expectations, this would mean that the effective date for the remittance transfer rule will be during the spring.

The Bureau will continue to work with industry and others to facilitate preparations for implementation during the intervening period. The Bureau expects to move quickly once the proposal is issued to ensure that the new consumer protections afforded by the rule can be effectively implemented and delivered to consumers as soon as possible.

This bulletin and other information related to the remittance transfer rule are available on the CFPB's website at http://www.consumerfinance.gov/regulations/final-remittance-rule-amendment-regulation-e/.

CFPB Bulletin 2012-06

Date: July 18, 2012

Subject: Marketing of Credit Card Add-on Products

A. Background

Credit card issuers market various "add-on" products to card users, including debt protection, identity theft protection, credit score tracking, and other products that are supplementary to the credit provided by the card itself. This bulletin outlines the Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") expectation that institutions under its supervision and their service providers offer such products in compliance with Federal consumer financial law. The CFPB will take all necessary steps to ensure that consumers are protected from deceptive sales and marketing practices, including those resulting from failures to adequately disclose important product terms and conditions, or other violations of Federal consumer financial law.[1]

CFPB supervisory experience indicates that some credit card issuers have employed deceptive promotional practices when marketing the products, including failing to adequately disclose important product terms and conditions. In addition, some consumers have been enrolled in programs without their affirmative consent, or without realizing that they have been enrolled or are required to pay for the programs. Others have been billed for services that were not performed or activated. Consumer complaints received by the CFPB also indicate that consumers have been misled by the marketing and sales practices associated with credit card add-on products.

[1] Although this bulletin focuses on credit card add- on products, institutions should take the guidance that it provides into consideration when they offer similar products in connection with other forms of credit or deposit services.

B. Applicable Consumer Protections

Institutions that engage in the practices described above risk violating Federal consumer financial laws, including their implementing regulations. Such laws and regulations include, but are not limited to, the following:

1. THE DODD-FRANK ACT PROHIBITION AGAINST DECEPTIVE PRACTICES

Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any deceptive act or practice.[2] It is also unlawful for "any person to knowingly or recklessly provide substantial assistance to a covered person or service provider" in violation of the prohibitions against deceptive practices.[3] As a general matter, a representation, omission, act, or practice is deceptive if:

- The representation, omission, act, or practice misleads or is likely to mislead the consumer;
- The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
- The misleading representation, omission, act, or practice is material.[4]

The CFPB considers the following factors in evaluating the effectiveness of disclosures at preventing consumers from being misled, including where disclosures relate to add-on products:

- Is the statement prominent enough for the consumer to notice?
- Is the information presented in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?

[2] 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).
[3] 12 U.S.C. § 5536(a)(3).
[4] *FTC Policy Statement on Deception* (Oct. 14, 1983), *published at* 103 F.T.C. 110, 174 (1984). The CFPB is informed by the FTC's standard for deception. CFPB Supervision and Examination Manual (Oct. 2011) (online at http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/).

- Is the information in a location where consumers can be expected to look or hear?
- Is the information in close proximity to the claim it qualifies?[5]

2. TRUTH IN LENDING ACT/REGULATION Z

Regulation Z implements the Truth in Lending Act ("TILA"). With respect to open end credit, Regulation Z contains rules on account-opening disclosures and periodic statements, and also sets forth special rules that apply to credit card transactions, treatment of payments and credit balances, procedures for resolving credit billing errors, annual percentage rate calculations, and advertising.[6] Regulation Z also includes rules that apply to credit and charge card application and solicitation disclosures.[7] Institutions must comply with all requirements of Regulation Z, including when disclosing any fees or charges for debt cancellation and debt suspension plans.[8]

3. EQUAL CREDIT OPPORTUNITY ACT/REGULATION B

Under the Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B, creditors may not discriminate against an applicant in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract). ECOA and Regulation B also provide that a creditor may not discriminate based on the fact that all or part of an applicant's income derives from a public assistance program, or the fact that an applicant has in good faith exercised any right under the Consumer Credit Protection Act.[9]

ECOA and Regulation B apply to credit-card applicants. As such, fair lending concerns may arise based on differential treatment on a prohibited basis in connection with add-on products—including, for example, requiring applicants

[5] *See* CFPB Supervision and Examination Manual (Oct. 2011) Examination Manual, (online at http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/). These factors track FTC guidance. *See* "**FTC Advertising Enforcement: Disclosures in Advertising," (online at** http://www.ftc.gov/bcp/workshops/disclosures/cases/index.html).
[6] *See* 12 C.F.R. §§ 1026.5 through 1026.16; *see also* 12 C.F.R. § 1026.4(d).
[7] *See* 12 C.F.R. §§ 1026.51-1026.60.
[8] *See, e.g.*, 12 C.F.R. §§ 1026.6(b) and 1026.60(b).
[9] *See* 12 C.F.R. § 1002.4.

based on their race or age to purchase credit card add-on products as a condition of obtaining credit.

C. CFPB Expectations

Institutions supervised by the CFPB should take steps to ensure that they market and sell credit card add-on products in a manner that limits the potential for statutory or regulatory violations and related consumer harm. These steps should include, but are not limited to, ensuring that:

- Marketing materials, including direct mail promotions, telemarketing scripts, internet and print ads, radio recordings, and television commercials, reflect the actual terms and conditions of the product and are not deceptive or misleading to consumers;

- Employee incentive or compensation programs tied to the sale and marketing of add-on products require adherence to institution-specific program guidelines and do not create incentives for employees to provide inaccurate information about the products;

- Scripts and manuals used by the institution's telemarketing and customer service centers:

    - Direct the telemarketers and customer service representatives to accurately state the terms and conditions of the various products, including material limitations on eligibility for benefits;
    - Prohibit enrolling consumers in programs without clear affirmative consent to purchase the add-on product, obtained after the consumer has been informed of the terms and conditions;
    - Provide clear guidance as to the wording and appropriate use of rebuttal language and any limits on the number of times that the telemarketer or customer service representative may attempt to rebut the consumer's request for additional information or to decline the product; and
    - Where applicable, make clear to consumers that the purchase of add-on products is not required as a condition of obtaining credit, unless there is such a requirement.

- To the maximum extent practicable, telemarketers and customer service representatives do not deviate from approved scripts;

- Applicants are not required on a prohibited basis to purchase add-on products as a condition of obtaining credit; and

- Cancellation requests are handled in a manner that is consistent with the product's actual terms and conditions and that does not mislead the consumer.

In addition, institutions that offer credit card add-on products should employ compliance management programs that include:

- Written policies and procedures governing credit card add-on products designed to ensure compliance with prohibitions against deceptive acts and practices, TILA, ECOA, and any other applicable Federal and state consumer financial protection laws and regulations;

- A system of periodic Quality Assurance reviews, the scope of which includes, but is not limited to, reviews of training materials and scripts, as well as real-time monitoring and recording of telemarketing and customer service calls in their entirety, consistent with applicable laws;

- Independent audits of the credit card add-on programs, which address the items listed above and consider whether these programs present elevated risk of harming consumers;

- Oversight of any affiliates or third-party service providers that perform marketing or other functions related to credit card add-on product so that these third-parties are held to the same standard, including audits, quality assurance reviews, training, and compensation structure;

- An appropriate channel for receiving, investigating, and properly resolving consumer complaints related to add-on products; and

- A comprehensive training program for employees involved in the marketing, sale, and operation of credit card add-on products.

The CFPB will continue to closely review the operations of the credit card issuers and service providers that it supervises with respect to add-on products, and to assess whether additional supervisory, enforcement, or other actions may be necessary to ensure that the market for add-on products functions in a fair, transparent, and competitive manner.

For more information about the responsibilities of a supervised credit card issuer that offers credit card add-on products, please refer to the following sections of the CFPB *Supervision and Examination Manual : Compliance Management Review*,[10] *Unfair, Deceptive, and Abusive Acts or Practices*,[11] *Truth in Lending Act,*[12] as well as *CFPB Bulletin 2012-03: Service Providers*[13].

[10] CFPB, *Supervision and Examination Manual* (Oct. 2011) (online at http://www.consumerfinance.gov/guidance/supervision/manual/compliance-management-review/).
[11] CFPB, *Supervision and Examination Manual* (Oct. 2011) (online at http://www.consumerfinance.gov/guidance/supervision/manual/udaap-narrative/).
[12] CFPB, *Supervision and Examination Manual* (Oct. 2011) (online at http://www.consumerfinance.gov/guidance/supervision/manual/tila-narrative/).
[13] *CFPB Bulletin 2012-03* (April 13, 2012) (online at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf).

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Bulletin 2012-05

Date: April 19, 2012

Subject: SAFE Act – Transitional Loan Originator Licensing

This Bulletin is being issued in response to several inquiries the Consumer Financial Protection Bureau (CFPB or Bureau) has received regarding whether states may, consistent with the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), permit transitional licensing of mortgage loan originators.

Transitions from one state to another

The SAFE Act generally prohibits an individual from engaging in the business of a loan originator without first obtaining, and maintaining annually, a unique identifier from the Nationwide Mortgage Licensing System and Registry (NMLSR) and either:

- a registration as a registered loan originator, or
- a license and registration as a State-licensed loan originator.[1]

Several state regulators have asked whether they may rely on another state's license in considering an application for a transitional license. Regulation H, which transferred to the CFPB from the Department of Housing and Urban Development (HUD), provides that, for an individual to be eligible for a loan originator license, "a state must require and find, at a minimum, that an individual" has met certain standards.[2] The SAFE Act and Regulation H allow a state, if it chooses, to provide a transitional loan originator license to an individual who holds a valid loan originator license from another state. In its preamble to the final SAFE Act rule, HUD stated that the final rule "does not limit the extent to which a state may take into consideration or rely upon the findings made by

1 12 U.S.C. § 5103(a).
2 12 C.F.R. § 1008.105.

another state in determining whether an individual is eligible under its own laws."[3] To receive a transitional loan originator license from the second state, an individual must meet either a net worth or surety bond requirement, or pay into a state fund, as required by the second state's loan originator supervisory authority, consistent with Regulation H and the SAFE Act. In this respect, the SAFE Act and Regulation H do permit state reciprocity with respect to transitional loan originator licensing.

Transitions of Registered Loan Originators

Several state regulators also have asked whether states may allow transitional loan originator licenses for registered loan originators who are changing employment and are no longer employees of depository institutions or certain other federally regulated institutions (collectively, federally regulated institutions). Transitional licenses for these individuals would allow them to act as loan originators while pursuing SAFE Act-compliant state loan originator licenses. Regulation H, however, requires that states prohibit an individual from engaging in the business of a loan originator with respect to any dwelling or residential real estate in the state unless the individual first:

- registers as a loan originator through, and obtains a unique identifier from, the NMLSR, and
- obtains and maintains a valid loan originator license from the state, except as otherwise permitted.[4]

For employees of federally regulated institutions who are registered with and maintain a unique identifier with NMLSR, Regulation H does not require them to meet this licensing requirement. However, when such an individual is no longer employed by a federally regulated institution, this exception no longer applies and their status reverts to being simply an unlicensed individual who is a registered loan originator. In those circumstances, Regulation H on its face prohibits states from allowing that unlicensed individual to engage in the business of a loan originator with respect to any dwelling or residential real estate in the state. Accordingly, Regulation H does not allow states to provide for a transitional

[3] 76 FR 38464, 38482 (2011).
[4] 12 C.F.R. § 1008.103(a).

license for a registered loan originator who leaves a federally regulated institution to act as a loan originator while pursuing a SAFE Act-compliant state license.[5]

The Bureau recognizes that this can create impediments to job changes and is committed to working with the states, industry, and the NMLSR to minimize these impediments going forward, consistent with the statutory language of the SAFE Act.

[5] Other exceptions may apply for the employee.

CFPB Bulletin 2012-04 (Fair Lending)

Date: April 18, 2012

Subject: Lending Discrimination

In response to recent inquiries, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") issues this bulletin to provide guidance about compliance with the fair lending requirements of the Equal Credit Opportunity Act ("ECOA"),[1] and its implementing regulation, Regulation B.[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act" or "Act") granted CFPB authority to supervise and enforce compliance with the ECOA for entities within CFPB's jurisdiction and to issue regulations and guidance to interpret the ECOA.[3]

The ECOA makes it illegal for a creditor to discriminate in any credit transaction against any applicant because of race, color, religion, national origin, sex, marital status, age (if the applicant is old enough to enter into a contract), receipt of income from any public assistance program; or the exercise in good faith of a right under the Consumer Credit Protection Act.[4] As the legislative history of the ECOA emphasizes, "[t]he availability of credit often determines an individual's effective range of social choice and influences such basic life matters as selection of occupation and housing."[5] Without nondiscriminatory access to credit, consumers face obstacles in obtaining equal access to housing.

In response to recent inquiries, the CFPB states that it will continue to adhere to the fair lending principles outlined in Regulation B. Consistent with other federal supervisory and law enforcement agencies, the CFPB reaffirms that the legal doctrine of disparate impact remains applicable as the Bureau exercises its supervision and enforcement authority to enforce compliance with the ECOA and Regulation B.

[1] 15 U.S.C. § 1691 *et seq.*
[2] 12 C.F.R. pt. 1002 *et seq.*
[3] Sections 1022, 1024 -1026, 1053, 1054, 1061, and 1085 of the Dodd-Frank Act.
[4] 15 U.S.C. § 1691(a)(1).
[5] House Report that accompanied H.R. 6516, No. 94-210, p. 3.

In 1994, the Interagency Task Force on Fair Lending – which was composed of ten federal agencies, including the Department of Justice, each of the federal prudential agencies with regulatory authority over financial institutions, and the Federal Trade Commission – released the Policy Statement on Discrimination in Lending ("Policy Statement").[6] The Policy Statement notes that the courts have recognized the following methods of proving lending discrimination under the ECOA:

- Overt evidence of discrimination;
- Evidence of disparate treatment; and
- Evidence of disparate impact.

The CFPB, which did not yet exist at that time, concurs with the Policy Statement. In addition, the Bureau's ECOA Examination Procedures, Mortgage Origination Examination Procedures, and Mortgage Servicing Examination Procedures also adopt and reference the Interagency Fair Lending Examination Procedures, including those designed to identify evidence of disparate impact.[7]

The applicability of disparate impact doctrine, also known as the "effects test," to credit transactions is reflected in the legislative history of the ECOA. Regulation B, which the Federal Reserve Board adopted to implement the ECOA, provides that:

> The legislative history of the Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness.[8]

[6] Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,266 (Apr. 15, 1994) (online at www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf).
[7] CFPB, *Supervision and Examination Manual* (Oct. 2011) (online at www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf).
[8] 12 C.F.R. § 1002.6.

The Commentary explicating Regulation B further elaborates:

> The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact.[9]

In accordance with the foregoing authorities, as the CFPB exercises its supervisory and enforcement authority, it will consider evidence of the disparate impact doctrine as one method of proving lending discrimination under the ECOA and Regulation B.

[9] 12 C.F.R. pt. 1002, Supp. I, § 1002.6, ¶ 6(a)-2.

cfpb Consumer Financial Protection Bureau

1801 L Street NW, Washington, DC 20036

CFPB Bulletin 2012-03

Date: April 13, 2012

Subject: Service Providers

The Consumer Financial Protection Bureau ("CFPB") expects supervised banks and nonbanks to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer financial law, which is designed to protect the interests of consumers and avoid consumer harm. The CFPB's exercise of its supervisory and enforcement authority will closely reflect this orientation and emphasis.

This Bulletin uses the following terms:

Supervised banks and nonbanks refers to the following entities supervised by the CFPB:

- Large insured depository institutions, large insured credit unions, and their affiliates (12 U.S.C. § 5515); and
- Certain non-depository consumer financial services companies (12 U.S.C. § 5514).

Supervised service providers refers to the following entities supervised by the CFPB:

- Service providers to supervised banks and nonbanks (12 U.S.C. §§ 5515, 5514); and
- Service providers to a substantial number of small insured depository institutions or small insured credit unions (12 U.S.C. § 5516).

Service provider is generally defined in section 1002(26) of the Dodd-Frank Act as "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service." (12 U.S.C. § 5481(26)). A service provider may or may not be affiliated with the person to which it provides services.

Federal consumer financial law is defined in section 1002(14) of the Dodd-Frank Act (12 U.S.C. § 5481(14)).

A. Service Provider Relationships

The CFPB recognizes that the use of service providers is often an appropriate business decision for supervised banks and nonbanks. Supervised banks and nonbanks may outsource certain functions to service providers due to resource constraints, use service providers to develop and market additional products or services, or rely on expertise from service providers that would not otherwise be available without significant investment.

However, the mere fact that a supervised bank or nonbank enters into a business relationship with a service provider does not absolve the supervised bank or nonbank of responsibility for complying with Federal consumer financial law to avoid consumer harm. A service provider that is unfamiliar with the legal requirements applicable to the products or services being offered, or that does not make efforts to implement those requirements carefully and effectively, or that exhibits weak internal controls, can harm consumers and create potential liabilities for both the service provider and the entity with which it has a business relationship. Depending on the circumstances, legal responsibility may lie with the supervised bank or nonbank as well as with the supervised service provider.

B. The CFPB's Supervisory Authority Over Service Providers

Title X authorizes the CFPB to examine and obtain reports from supervised banks and nonbanks for compliance with Federal consumer financial law and for other related purposes and also to exercise its enforcement authority when violations of the law are identified. Title X also grants the CFPB supervisory and enforcement authority over supervised service providers, which includes the authority to examine the operations of service providers on site.[1] The CFPB will exercise the full extent of its supervision authority over supervised service providers, including its authority to examine for compliance with Title X's prohibition on unfair, deceptive, or abusive acts or practices. The CFPB will also exercise its enforcement authority against supervised service providers as appropriate.[2]

C. The CFPB's Expectations

The CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships. The CFPB will apply these expectations consistently, regardless of whether it is a supervised bank or nonbank that has the relationship with a service provider.

To limit the potential for statutory or regulatory violations and related consumer harm, supervised banks and nonbanks should take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers. These steps should include, but are not limited to:

- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;

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[1] *See*, *e.g.*, subsections 1024(e), 1025(d), and 1026(e), and sections 1053 and 1054 of the Dodd-Frank Act, 12 U.S.C. §§ 5514(e), 5515(d), 5516(e), 5563, and 5564.
[2] *See* 12 U.S.C. §§ 5531(a), 5536.

- Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- Including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;
- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law; and
- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.

For more information pertaining to the responsibilities of a supervised bank or nonbank that has business arrangements with service providers, please review the CFPB's *Supervision and Examination Manual: Compliance Management Review* and *Unfair, Deceptive, and Abusive Acts or Practices*.[3]

[3] http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf at 32 (CMR 1), 37 (CMR 6), 44 (UDAAP 1), and 59 (UDAAP 6).

CFPB Bulletin 2012-02

Date: April 2, 2012

Subject: Payments to Loan Originators Based on Mortgage Transaction Terms or Conditions under Regulation Z, 12 C.F.R. § 1026.36.

This Bulletin is being issued in response to several inquiries the Consumer Financial Protection Bureau ("Bureau") has received regarding the payment of compensation to loan originators under Regulation Z, 12 C.F.R. § 1026.36 ("Compensation Rules").

Loan originator compensation rules were originally adopted by the Federal Reserve Board in September 2010 (75 Fed. Reg. 58,509 (Sept. 24, 2010)), and covered institutions were required to comply with the provisions on April 6, 2011. Pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), rulemaking authority for Regulation Z transferred to the Bureau. In December 2011, the Bureau issued interim final rules recodifying the provisions of Regulation Z (76 Fed. Reg. 79,768 (Dec. 22, 2011)).

Subject to certain narrow exceptions, the Compensation Rules provide that no loan originator may receive (and no person may pay to a loan originator), directly or indirectly, compensation that is based on any terms or conditions of a mortgage transaction. The Commentary to the Regulation clarifies that compensation includes salaries, commissions, and annual or periodic bonuses. The Commentary also states that the terms or conditions of a transaction include the interest rate, loan-to-value ratio, or prepayment penalty. Furthermore, the Commentary provides that compensation may not be based on a factor that is a proxy for a term or condition, such as a credit score, when the factor is based on a term or condition such as the interest rate on the loan. Finally, examples are also provided in the Commentary of when compensation is not based on a transaction's term or condition, such as basing compensation on the long-term performance of the loan and whether the consumer is an existing customer of the creditor or a new customer.

The Bureau has received several questions about whether and how the Compensation Rules apply to qualified profit sharing, 401(k), and employee stock ownership plans (collectively, "Qualified Plans"). Specifically, Bureau staff has been asked whether a financial institution can, consistent with the Compensation Rules, contribute to Qualified Plans for employees, including loan originators, if employer contributions to such plans are derived from profits generated by mortgage loan originations.

The Compensation Rules (including the Commentary) do not expressly address whether the loan origination provisions apply to contributions made to Qualified Plans. The Bureau recognizes that there has been some confusion on the applicability of the Compensation Rules to Qualified Plans.

Section 1403 of the Dodd-Frank Act contains provisions that also address loan originator compensation. Under the Dodd-Frank Act, the Bureau must adopt final loan originator compensation rules by January 21, 2013, or the provisions are self-effectuating on that date. The Bureau anticipates issuing a proposed rule for public comment in the near future on the loan origination provisions in the Dodd-Frank Act.

Until final rules are adopted by the Bureau, the Bureau believes it is important to clarify how the Compensation Rules apply to Qualified Plans. To provide clarity at this juncture, the Bureau's view is that the Compensation Rules permit employers to contribute to Qualified Plans out of a profit pool derived from loan originations. That is, financial institutions may make contributions to Qualified Plans for loan originators out of a pool of profits derived from loans originated by employees under the Compensation Rules.

The Bureau has also received questions about how the Compensation Rules apply to profit-sharing arrangements/plans that are not in the nature of Qualified Plans. Many of the questions have been fact-specific and the Bureau does not believe it is practical to provide guidance in this Bulletin about such plans. We anticipate providing greater clarity on these arrangements in connection with a proposed rule on the loan origination provisions in the Dodd-Frank Act.

Any questions regarding the subject matter of this Bulletin should be directed to Catherine Henderson or Colgate Selden, in the Office of Regulations, at (202) 435-7700, or at Catherine.Henderson@cfpb.gov or Colgate.Selden@cfpb.gov.

cfpb Consumer Financial Protection Bureau

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CFPB Bulletin 12-01

To: Chief Executive Officers of Depository Institutions, Credit Unions, and their Affiliates Subject to the Bureau's Supervision Authority

Re: The Bureau's Supervision Authority and Treatment of Confidential Supervisory Information

Date: January 4, 2012

The Consumer Financial Protection Bureau ("Bureau") is issuing this letter to provide guidance regarding its collection of information through the supervisory process and the confidentiality protections that this process provides to supervised institutions. The Bureau will work closely with supervised institutions to ensure an effective and cooperative supervisory process.

A. The Bureau's Supervision Authority

On July 21, 2011, the Bureau assumed the authority to supervise insured depository institutions and credit unions with total assets of more than $10 billion and their affiliates (collectively, "supervised institutions") for compliance with Federal consumer financial law and other related purposes. This supervisory authority transferred to the Bureau from the prudential regulators.[1] *See* 12 U.S.C. § 5581. Like the prudential regulators, the Bureau has broad authority to require reports and conduct examinations of its supervised institutions.[2] The Bureau exercises this authority for certain purposes, including assessing compliance with the requirements of Federal consumer financial law; obtaining information about the activities subject to such laws and the associated compliance systems or procedures of supervised entities; and detecting and assessing associated risks to consumers and markets for consumer financial products and services. *See* 12 U.S.C. § 5515(b)(1).

Once the Bureau has issued a request for information that it has determined serves one or more of these purposes, supervised institutions are required to provide all

[1] The prudential regulators are the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), the National Credit Union Administration ("NCUA"), and the former Office of Thrift Supervision ("OTS"). *See* 12 U.S.C. § 5481(24).

[2] *See* 12 U.S.C. § 5515(b)(1) (authorizing the Bureau to "require reports and conduct examinations" of large depository institutions and credit unions and their affiliates). The Bureau also has certain supervisory authorities with respect to other depository institutions and credit unions. *See* 12 U.S.C. § 5516(b).

documents and other information responsive to the request. Supervised institutions may not selectively withhold responsive documents based on their judgment that such materials are not necessary to the Bureau's execution of its responsibilities or that other materials would be sufficient to suit the Bureau's needs. The supervisory process is based on the supervisor's full and unfettered access to information, and the supervisor is entitled—indeed, duty bound—to ensure that it thoroughly understands the institution in question and has access to all information that, in its independent judgment, may bear on its supervisory responsibilities. Failure to provide information required by the Bureau is a violation of law for which the Bureau will pursue all available remedies. *See* 12 U.S.C. §§ 5536(a)(2), 5565.

B. Provision of Privileged Information to the Bureau

Certain supervised institutions have expressed concern that providing privileged information, such as documents protected by the attorney-client privilege, to Bureau examiners could waive the institutions' privilege with respect to third parties. The Bureau recognizes the importance of this issue. As explained below, the provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information. Further, if a supervised institution were ever faced with a claim of waiver, the Bureau would take all reasonable and appropriate actions to rebut such a claim.

First, because entities must comply with the Bureau's supervisory requests for information, the provision of privileged information to the Bureau would not be considered voluntary and would thus not waive any privilege that attached to such information. *See*, *e.g.*, *Boston Auction Co., Ltd. v. Western Farm Credit Bank*, 925 F. Supp. 1478, 1482 (D. Hawaii 1996) (holding that the disclosure of privileged documents to the Farm Credit Administration requested pursuant to its examination authority was not voluntary and therefore did not waive the attorney-client privilege). The OCC articulated this view at greater length in a 1991 interpretative letter.[3] Consistent with the policy articulated by the OCC in that letter, the Bureau would not object if supervised institutions take steps to memorialize privilege claims when conveying privileged documents or information to the Bureau.

Second, and independently, Congress intended the Bureau's examination authority to be equivalent to that of the prudential regulators. As noted, the prudential regulators' "examination authority" with respect to certain institutions' compliance with Federal consumer financial law transferred to the Bureau on July 21, 2011, and, as of that date, the Bureau was also granted "all powers and duties" that had been vested in the prudential regulators "relating" to such examination authority. *See* 12 U.S.C. § 5581. Under section 607 of the Financial Services Regulatory Relief Act of 2006, the prudential

[3] *See* OCC Interpretative Letter, 1991 WL 338409 (Dec. 3, 1991).

regulators have the power to receive privileged information from supervised entities (whether or not deemed voluntarily provided) without effecting a waiver of privilege.[4] Accordingly, the examination authority and all related "powers and duties" assigned by statute to the Bureau encompass the ability to receive privileged information from supervised entities without effecting a waiver. The Bureau's authority in this regard is consistent with the scheme of coordinated supervision established by Congress,[5] and, by promoting parity in the supervision of large and small depository institutions, furthers Congress's goal of consistent enforcement of Federal consumer financial law.[6]

For these reasons, the Bureau will not consider waiver concerns to be a valid basis for the withholding of privileged information responsive to a supervisory request. Review of a supervised institution's privileged materials may often be the most efficient means for a supervisor to understand and assess an issue, and the Bureau will request such material as appropriate. At the same time, the Bureau recognizes the importance of the attorney-client privilege and other privileges to our legal system. Accordingly, the Bureau will give due consideration to supervised institutions' requests to limit the form and scope of any supervisory request for privileged information. The Bureau's policy is to request privileged information only when the Bureau determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources. Further, upon request, the Bureau will provide a demand identifying the privileged information sought and confirming that the materials will be treated confidentially in accordance with this letter and applicable Bureau rules. Finally, as noted, the Bureau is prepared to take all reasonable and appropriate steps to assist supervised institutions in rebutting any claim that they have waived privileges by providing information to the Bureau.

C. The Bureau's Treatment of Confidential Supervisory Information

The Bureau's supervision program depends upon the full and frank exchange of information concerning supervised institutions' operations and compliance with Federal

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[4] *See* 12 U.S.C. § 1828(x) (submission of privileged information to a Federal banking agency, a state bank regulator, or a foreign banking authority would not result in a waiver as to any other person or entity); *see also* 12 U.S.C. § 1785(j) (same with respect to disclosure of information to the NCUA, State credit union supervisors, or foreign banking authorities).

[5] For example, a prudential regulator and the Bureau are required to each have access to the other's reports of examination; coordinate their examinations of large depository institutions and credit unions and their affiliates; and share draft reports of examination for comment, and take any comments into consideration, before issuing a final report or taking supervisory action. *See* 12 U.S.C. §§ 5512(c)(6)(B), (C); 5515(b), (e).

[6] *See* 12 U.S.C. § 5511(a), (b)(4).

consumer financial law. Consistent with the policies of the prudential regulators,[7] the Bureau's policy is to treat information obtained in the supervisory process as confidential and privileged.[8] For example, the Bureau will treat all such information as exempt from disclosure under Exemption 8 of the Freedom of Information Act.[9] Also consistent with the policies of the prudential regulators,[10] the Bureau recognizes that the sharing of such information with other government agencies may in some circumstances be

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[7] *See*, *e.g.*, 12 C.F.R. § 4.36(b) ("It is the OCC's policy regarding non-public OCC information that such information is confidential and privileged. Accordingly, the OCC will not normally disclose this information to third parties."); 12 C.F.R. § 261.22(a) ("It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged" and the Board "will not authorize disclosure [of confidential supervisory information] unless the person requesting disclosure is able to show a substantial need for such information that outweighs the need to maintain confidentiality."); 12 C.F.R. § 309.6(b)(10) (Under FDIC policy, "[a]ll steps practicable shall be taken to protect the confidentiality of exempt records and information."); 12 C.F.R. § 792.30 (NCUA policy prohibiting the disclosure of confidential supervisory information except in limited circumstances).

[8] *See* 12 C.F.R. § 1070.41.

[9] *See* 5 U.S.C. § 552(b)(8). Such information may be protected from disclosure by other FOIA exemptions as well. *See*, *e.g.*, 5 U.S.C. § 552(b)(4).

[10] *See*, *e.g.*, 12 C.F.R. §§ 4.36(a) ("The OCC may make non-public OCC information available to a supervised entity and to other persons, that in the sole discretion of the Comptroller may be necessary or appropriate, without a request for records or testimony."); 4.37(c) ("When not prohibited by law, the Comptroller may make available to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and, in the Comptroller's sole discretion, to certain other government agencies of the United States and foreign governments, state agencies with authority to investigate violations of criminal law, and state bank and state savings association regulatory agencies, a copy of a report of examination, testimony, or other non-public OCC information for their use, when necessary, in the performance of their official duties."); 12 C.F.R. § 261.21(a) ("Upon written request, the Board may make available to appropriate law enforcement agencies and to other nonfinancial institution supervisory agencies for use where necessary in the performance of official duties, reports of examination and inspection, confidential supervisory information, and other confidential documents and information of the Board concerning banks, bank holding companies and their subsidiaries, U.S. branches and agencies of foreign banks, savings and loan holding companies and their subsidiaries, and other examined institutions."); 12 C.F.R. § 309.6(b)(4)(ii) (permitting the FDIC to "disclose to the proper federal or state prosecuting or investigatory authorities, or to any authorized officer or employee of such authority, copies of exempt records pertaining to irregularities discovered in depository institutions which are believed to constitute violations of any federal or state civil or criminal law, or unsafe or unsound banking practices."); 12 C.F.R. § 792.32 ("The NCUA Board, or any other person designated in writing, in its discretion and in appropriate circumstances, may disclose to proper federal or state authorities copies of exempt records pertaining to irregularities discovered in credit unions which may constitute either unsafe or unsound practices or violations of federal or state, civil or criminal law.").

appropriate,[11] and, in some instances, required.[12] For example, in accordance with the scheme of coordinated supervision established by Congress, the Bureau's policy is to exchange confidential supervisory information with the prudential regulators and state regulators that share supervisory jurisdiction over an institution supervised by the Bureau.

By contrast, the Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision. Except where required by law, the Bureau's policy is to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations.[13] The significance of the law enforcement interest at stake will be an important consideration in any such review. However, even the furtherance of a significant law enforcement interest will not always be sufficient, and the Bureau may still decline to share confidential supervisory information based on other considerations, including the integrity of the supervisory process and the importance of preserving the confidentiality of the information.[14] In these circumstances, the decision whether to provide confidential supervisory information to another agency will be made by the General Counsel, in consultation with appropriate Bureau personnel. *See* 12 C.F.R. § 1070.43(b).

By articulating its policy regarding its treatment of confidential supervisory information, the Bureau does not intend to limit its use of such information in administrative or judicial proceedings, subject to appropriate protective orders. Any

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[11] *See* 12 C.F.R. §§ 1070.43(b) (permitting the Bureau to disclose confidential supervisory information to a federal or state agency with jurisdiction over the supervised institution that is the subject of the information). The Bureau's rules do not permit it to disclose confidential information obtained from other agencies without their permission. *See* 12 C.F.R. § 1070.41(d).

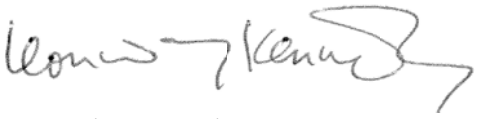
[12] For example, upon receiving reasonable assurances of confidentiality, the Bureau is required to share a report of examination, and any revisions to such a report, with a prudential regulator, State regulator, or other Federal agency with jurisdiction over the institution that is the subject of the report. 12 U.S.C. § 5512(c)(6)(C)(i). The Bureau is required to provide to the Attorney General evidence of a potential violation of Federal criminal law, 12 U.S.C. § 5566, and to provide to the Commissioner of Internal Revenue certain information related to possible tax law noncompliance. 12 U.S.C. § 5515(b)(5).

[13] This review will include, among other things, the information requesting agencies are required to provide pursuant to 12 C.F.R. § 1070.43(b)(2), including the purpose for which the information is sought, the legal authority of the requesting agency, and the requesting agency's commitment to maintain the confidentiality of the information in accordance with the Bureau's regulations and any other conditions the Bureau may impose.

[14] Any confidential supervisory information provided to another Federal or state agency remains the property of the Bureau, may not be disclosed without the Bureau's permission, and retains any applicable privilege. *See* 12 C.F.R. § 1070.47.

questions regarding the subject matter of this letter should be directed to the Office of General Counsel (202-435-7770).

Sincerely,



Leonard J. Kennedy
General Counsel
Consumer Financial Protection Bureau

CFPB Bulletin 2011-05 (Enforcement and Fair Lending)

Date: December 15, 2011

Subject: Bureau Invites Whistleblower Information and Law Enforcement Tips, and Highlights Anti-Retaliation Protections.

The Consumer Financial Protection Bureau issues this bulletin to solicit information from knowledgeable sources about potential violations of Federal consumer financial laws. The Bureau welcomes information from current or former employees of potential violators, contractors, vendors, and competitor companies. Certain employees and their representatives who provide such information are protected against retaliation from their employers under Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act.

Knowledgeable sources with information about potential violations of Federal consumer financial laws may email their information to whistleblower@cfpb.gov. Informants also have the option of calling toll free to (855) 695-7974 and following the instructions to speak to a CFPB employee. You may elect to provide information anonymously. However, providing your name and contact information may facilitate any subsequent investigation and successful remediation of illegal conduct. If you choose to disclose your identity and contact information to the Bureau, you may still request confidentiality. To the extent consistent with law enforcement needs, the Bureau will not disclose your identifying information and will maintain your confidentiality as permitted by federal laws such as the Privacy Act, the Freedom of Information Act and any applicable Bureau regulations.

Law Enforcement Tips vs. Consumer Complaints

Whistleblower information and law enforcement tips are distinct from consumer complaints. The Bureau's consumer complaint process is for individuals who have personally encountered problems as parties to specific transactions with financial services companies. Customers or clients of financial services companies who wish to submit complaints about such issues should complete the Consumer Complaint Form on the Bureau's website: www.consumerfinance.gov

Summary of Protections

The Dodd-Frank Act provides anti-retaliation protections for certain employees and their representatives who provide information regarding potential violations. Specifically, section 1057 provides that no covered employer shall terminate or otherwise discriminate against any covered employee for: (1) providing information to the employer, the Bureau, or any other state, local, or federal government authority or law enforcement agency relating to a violation of Federal consumer financial law; (2) testifying about a potential violation; (3) filing any lawsuit or other proceeding under any Federal consumer financial law; or (4) objecting to or refusing to participate in violations of Federal consumer financial laws. Individuals should consult section 1057 for more detail regarding which employees and employers are covered by these provisions.

Relief is available to certain employees or their representatives who suffer discrimination and/or termination for taking the above actions. The Secretary of Labor may order the employer to take affirmative action to abate the violation; to reinstate the complainant to his or her former position, together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and to provide compensatory damages to the complainant. The Secretary may also award costs and expenses reasonably incurred by the complainant in connection with bringing the complaint. The statute also provides penalties for complaints that are frivolous or brought in bad faith.

If you believe that your employer has retaliated against you in violation of these rights, you may, within 180 days of such violation, file a complaint with the Secretary of Labor. Information about filing such a complaint is available at: http://www.dol.gov/compliance/topics/whistleblower-protections.htm

This bulletin is not intended to nor should it be construed to: (1) restrict or limit in any way the CFPB's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

CFPB Bulletin 2011-04 (Enforcement)

Date: November 7, 2011 (updated January 18, 2012)[1]

Subject: Notice and Opportunity to Respond and Advise (NORA)

This is the first in a series of periodic bulletins that the Consumer Financial Protection Bureau (CFPB) intends to issue in order to provide information about the policies and priorities of the Bureau's Office of Enforcement. These bulletins are intended to inform the public in a transparent manner about some of the types of legal violations that the Office intends to investigate for potential enforcement action, and the procedures and methods that it will use to do so.

Before the Office of Enforcement recommends that the Bureau commence enforcement proceedings, the Office of Enforcement may give the subject of such recommendation notice of the nature of the subject's potential violations and may offer the subject the opportunity to submit a written statement in response (view a sample NORA letter). The decision whether to give such notice is discretionary, and a notice may not be appropriate in some situations, such as in cases of ongoing fraud or when the Office of Enforcement needs to act quickly. The objective of the notice is to ensure that potential subjects of enforcement actions have the opportunity to present their positions to the Bureau before an enforcement action is recommended or commenced.

The primary focus of the written statement in response should be legal and policy matters relevant to the potential enforcement proceedings. Any factual assertions relied upon or presented in the written statement must be made under oath by someone with personal knowledge of such facts. Submissions may be discoverable by third parties in accordance with applicable law.

Unless otherwise specified in the Office of Enforcement's notice, the written statement shall be submitted on 8.5 by 11 inch paper, double spaced, in at least 12-point type, and no longer than 40 pages; and must be received by the Bureau no more than 14 calendar days after the notice. The written statement should be sent to the Bureau staff conducting the investigation, and shall clearly reference the specific investigation to which it relates. If the Office of Enforcement ultimately recommends the commencement of an enforcement proceeding, the written statement will be included with that recommendation.

Persons involved in an investigation who wish to submit a written statement on their own initiative at any point during an investigation should follow the relevant procedures described above.

[1] Note: This Bulletin was updated on January 18, 2012 to reflect that this process will be known as Notice and Opportunity to Respond and Advise (NORA).

The CFPB created the Notice and Opportunity to Respond and Advise process solely for the administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the CFPB's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

CFPB Bulletin 11-3
Re: Policy on Ex Parte Presentations in Rulemaking Proceedings
Date: August 16, 2011

The Consumer Financial Protection Bureau (CFPB) has adopted the following policy on ex parte presentations in rulemaking proceedings:

CFPB POLICY ON EX PARTE PRESENTATIONS IN RULEMAKING PROCEEDINGS

(a) SCOPE.—This policy applies to communications with persons outside the Consumer Financial Protection Bureau ("CFPB") during informal rulemaking proceedings conducted in accordance with section 553 of the Administrative Procedure Act, including rulemaking proceedings in which public comment is sought as a matter of discretion.

(b) DEFINITIONS—For purposes of this policy, the following definitions apply:

(1) EX PARTE PRESENTATION.—

(A) Except as provided in subparagraph (b)(1)(B), the term "ex parte presentation" means any written or oral communication by any person outside the CFPB that imparts information or argument directed to the merits or outcome of a rulemaking proceeding.

(B) Ex parte presentations do not include the following:

(i) Statements by any person made in a public meeting, hearing, conference, or similar event, or public medium such as a newspaper, magazine, or blog;

(ii) Communications that are inadvertently or casually made;

(iii) Inquiries limited to the status of a rulemaking or concerning compliance with procedural requirements; or

(iv) Communications that occur as part of the CFPB's regular supervisory, monitoring, research, and/or other statutory responsibilities, which communications are only incidentally relevant to, and not intended to influence the outcome of, a rulemaking proceeding.

(2) DECISION-MAKING PERSONNEL.—The term "decision-making personnel" means any employee of the CFPB who is or may reasonably be expected to be involved in formulating a CFPB rule.

(c) POLICY.—It is the CFPB's policy to provide for open development of rules and to encourage full public participation in rulemaking actions. The CFPB encourages decision-making personnel to contact the public directly when factual information is needed to resolve questions of substance and to be receptive, consistent with the limitations on CFPB staff time, to communications from persons affected by or interested in a CFPB rulemaking. However, to promote fairness and reasoned decision-making, the CFPB's policy is to require public disclosure of ex parte presentations according to CFPB guidelines. The CFPB expects that the primary means of communicating a person's views in the course of a rulemaking will be through the submission of written comments to the rulemaking docket. Ex parte communications should supplement and not substitute for those submissions.

(d) DISCLOSURE.—Except as provided in paragraph (e), the following disclosure requirements apply from the date of publication in the *Federal Register* (or on the CFPB's website, whichever is earlier) of a notice of proposed rulemaking or interim final rule for public comment until the date of publication in the *Federal Register* of the final rule or final disposition of the notice of proposed rulemaking or interim final rule:

(1) ORAL EX PARTE PRESENTATIONS.—A person who makes an oral ex parte presentation to decision-making personnel shall, not later than three business days after the presentation, file to the rulemaking docket for the proceeding and submit to the CFPB's Executive Secretary and all CFPB employees to whom the presentation was made, a memorandum summarizing the presentation. Memoranda must contain a list of all persons attending or otherwise participating in the presentation, the date of the presentation, and a summary of data presented and arguments made during the presentation. If the oral ex parte presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's prior written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. If a summary of an oral ex parte presentation is incomplete or inaccurate, CFPB staff may require the filer to correct any inaccuracies or missing information.

(2) WRITTEN EX PARTE PRESENTATIONS.—A person who makes a written ex parte presentation to decision-making personnel (including documents shown or given to decision-making personnel during oral ex parte presentations) shall, not later than three business days after the presentation, file to the rulemaking docket for the proceeding and submit to the CFPB's Executive Secretary and all CFPB employees to whom the presentation was made a copy of

the presentation.

(3) SUBMISSION REQUIREMENTS.—

(i) A written ex parte presentation and a memorandum summarizing an oral ex parte presentation (and cover letter, if any) shall identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an ex parte presentation.

(ii) All filings and submissions under paragraphs (d)(1) and (2) shall be performed electronically, by filing the required materials using www.regulations.gov and emailing the required materials to the Executive Secretary (at expartedisclosures@cfpb.gov) and all CFPB employees to whom the ex parte presentation was made. If electronic filing would present an undue hardship, the person filing must request an exemption from the electronic filing requirement, stating the nature of the hardship, and submit by mail or email to the Executive Secretary an original and one copy of the written ex parte presentation or memorandum summarizing an oral ex parte presentation, with a copy by mail or email to all CFPB employees to whom the ex parte presentation was made. (Mail may be sent to the Office of the Executive Secretary, Consumer Financial Protection Bureau, 1801 L Street, N.W., Washington, DC 20036.)

(iii) In cases where a filer believes that one or more of the documents or portions thereof to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be made available for public inspection. Simultaneously with any such request, the filer shall file with the Executive Secretary a paper copy of the document(s) containing the confidential information and marked prominently as "Confidential," and also shall file electronically a copy of the same document(s) with the confidential information redacted and marked "Public Copy."

(iv) CFPB staff may in their discretion elect to prepare written summaries of oral ex parte presentations and place them in the record and also place any written ex parte presentations in the record in lieu of requiring the person who made the ex parte presentation to prepare such summaries.

(e) EXEMPTIONS.—

(1) The disclosure requirements in section (d) do not apply to ex parte presentations (i) to the General Counsel and his or her staff that concern judicial review of a matter that has been decided by the CFPB; (ii) by other Federal government agencies, offices, or their staff; or (iii) by members of Congress or their staff unless such presentations are of major significance, contain information or argument not already reflected in the rulemaking docket, and plainly intended to affect the ultimate outcome of the rulemaking. Federal government agencies and members of Congress are welcome to post written comments to the rulemaking docket.

(2) The CFPB may properly withhold from the rulemaking docket information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

(f) DISCRETION TO MODIFY.—Where the public interest so requires in particular rulemaking proceedings, the CFPB and its staff retain the discretion to modify the applicable ex parte rules or practices.

(g) VIOLATIONS.—Persons who fail to adhere to this policy are subject to such sanctions as may be appropriate. Any person who becomes aware of a possible violation of any of the requirements of this policy may advise the Office of General Counsel of all the facts and circumstances that are known to him or her.

CFPB Bulletin 11-2

Re: Interstate Land Sales Full Disclosure Act – Communications with CFPB

Date: July 21, 2011

The Bureau of Consumer Financial Protection (CFPB) issues this bulletin (Interim ILS Guidance) to address certain administrative issues relating to the Interstate Land Sales Full Disclosure Act (ILS).

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act"), on the designated transfer date, July 21, 2011, all of the consumer protection functions of the Department of Housing and Urban Development (HUD) relating to the ILS transfer to the CFPB, and the CFPB has all powers and duties that were vested in the Secretary of HUD relating to the ILS. The Act also amends the ILS to conform to the transfer of these authorities to the CFPB. The CFPB is authorized to administer and enforce requirements under the ILS, subject to the limitations and other provisions of the Act.

Later this year, the CFPB intends to publish in chapter X of title 12 of the Code of Federal Regulations the rules, including HUD's ILS rules, for which rulemaking authority transfers to the CFPB, including conforming amendments to reflect both the transfer of authority to the CFPB under the Act and certain other changes made by the Act to the underlying statutes. In the interim, the existing rules will continue in effect and the changes made by the Act to transfer authority to the CFPB will be effective as of the designated transfer date by operation of law.

The CFPB is issuing this Interim ILS Guidance, effective July 21, 2011, for clarification and convenience pending the issuance of revised ILS regulations in order to facilitate compliance with and administration of the ILS, as amended. HUD's regulations implementing ILS have provided, among other things, for entities subject to the ILS to provide certain documents and payments to HUD. This guidance clarifies that such materials should be submitted to the CFPB. An entity that acts in accordance with this guidance will be considered to be in compliance with the ILS and its implementing

regulations and would not be subject to CFPB enforcement for lack of compliance with the regulations referring to HUD and its contact information.[1]

1. All initial and consolidated statements of record, amendments, exemption order requests, annual reports of activity, and annual financial statements should be mailed to:

   CFPB Interstate Land Sales
   C/O: Armedia LLC
   8221 Old Courthouse Road
   Suite 206
   Vienna, VA 22182

2. All requests for an advisory opinion should be mailed to:

   Consumer Financial Protection Bureau
   Interstate Land Sales Program
   1700 G St., NW
   Attn: 1625 Eye St., 4th Floor
   Washington, DC 20552

3. All payments for initial and consolidated statements of record, reactivation amendments, exemption order requests, annual reports of activity, and advisory opinions may be sent either by:

   a. Certified check, cashier's check, or postal money order made payable to the Treasurer of the United States, which must include the registration number, when known, and the name of the subdivision on the face of the check, and mailed to:

[1] Until the amendments to the rules implementing ILS become effective, HUD will provide applicable materials it receives from entities subject to the ILS regulations to the CFPB.

Consumer Financial Protection Bureau
Interstate Land Sales Program
1700 G St., NW
Attn: 1625 Eye St., 4th Floor
Washington, DC 20552; or

b. Electronic payment (www.pay.gov). Follow all the same procedures. Although you are selecting HUD as the receiving agency, the fee will be directed to CFPB. In the near future, CFPB will appear as an option, and at that time, please select CFPB as the receiving agency.

The amount of each required payment remains as prescribed in 24 CFR 1710.35(b) through (d).

If you have any further questions, please contact Dennis Weipert at (202) 435-7567 or send an email to CFPB_ILS_Inquiries@cfpb.gov.

CFPB Bulletin 11-1
Re: Amendments to the Alternative Mortgage Transaction Parity Act
Date: June 27, 2011

On July 21, 2011, amendments to the Alternative Mortgage Transaction Parity Act ("AMTPA") take effect pursuant to section 1083 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The amendments will affect what laws apply to mortgage loans issued by state chartered or licensed lenders after that effective date.

AMTPA was enacted in 1982 to authorize state-chartered or -licensed "housing creditors" to make variable rate loans and other alternative mortgage transactions that would otherwise have been prohibited by state law, so long as the creditors complied with certain federal regulations. Implementation of AMTPA has historically been assigned to three federal banking regulators – the Office of the Comptroller of the Currency (OCC) for all state-chartered banks, the National Credit Union Administration (NCUA) for state-chartered credit unions, and the Office of Thrift Supervision (OTS) for both state-chartered thrifts and state-chartered or -licensed nondepository housing creditors.

The Dodd-Frank Act makes three amendments to AMTPA:

- AMTPA's definition of "alternative mortgage transaction" is altered to remove language that specifically referenced: (1) certain balloon loans, (2) shared equity or appreciation transactions, and (3) mortgage loans involving other features not common to traditional fixed rate, fixed term transactions. The Dodd-Frank Act retains language defining alternative mortgage transactions as loans "in which the interest rate or finance charge may be adjusted or renegotiated."
- Section 1083 of the Dodd-Frank Act adds language to describe what state laws affecting alternative mortgage transactions may be preempted by AMPTA. As of July 21, 2011, the effective date of the statutory amendments, AMTPA will no longer operate to preempt certain general state restrictions on mortgage transactions, including restrictions on prepayment penalties or late charges.
- As of July 21, 2011, authority for issuing regulations to implement AMTPA will transfer from the OCC, NCUA, and OTS to the Consumer Financial Protection Bureau. The Dodd-Frank Act directs the Bureau to analyze the agencies' existing regulations in conducting its own rulemaking.

The Dodd-Frank Act provides that the amendments do not affect any alternative mortgage transaction made on or before July 21, 2011. Existing loans will therefore be grandfathered under the existing OCC, NCUA, or OTS standards, as applicable. The Bureau anticipates providing further guidance as soon as possible concerning the applicability of AMTPA to alternative mortgage transaction loans made after July 21, 2011. The Bureau's goal is to provide for an orderly transition process for consumers, lenders, state legislatures, and other interested parties.