

CONSUMER COMPLIANCE OUTLOOK®

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A FEDERAL RESERVE SYSTEM
PUBLICATION WITH A
FOCUS ON CONSUMER
COMPLIANCE ISSUES

IMPROVING AND USING HMDA DATA IN YOUR COMPLIANCE PROGRAM

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The deadline for covered institutions to submit their 2009 Home Mortgage Disclosure Act (HMDA) data is March 1, 2010. Given the importance of HMDA data to a number of supervisory processes, including examinations and applications, as well as for public policy purposes, it is essential that HMDA data be submitted accurately and on time.

This article outlines four steps institutions can take to help ensure that their HMDA data are accurate. It also discusses various ways in which institutions can use their HMDA data in assessing fair lending compliance and CRA performance. The steps can be adapted according to the size of the institution and the formality of its compliance program.

IMPROVING HMDA DATA

Step 1: Controlling the Input

The compliance officer should periodically evaluate HMDA data to ensure that all relevant product lines are included and that the data include all loan applications that are originated, denied, or withdrawn. Examiners often identify product lines inadvertently omitted from the loan application register (LAR). For example, residential loans secured by multi-family dwellings are often underwritten and serviced by an institution's commercial lending area and must be included on the LAR. Staff in the commercial lending area may not be familiar with or aware of HMDA reporting requirements. As a result, commercial multi-family loans can inadvertently be omitted from the bank's HMDA LAR.

The compliance officer should also identify data that have been subject to a quality control or self-monitoring effort. Those product or business lines that have not been subject to self-monitoring should receive enhanced scrutiny during the data review. (See Step 2.)

It is important to note that effective October 1, 2009, the Board amended Regulation C, the implementing regulation for HMDA, to define a rate-spread loan as a HMDA loan subject to Regulation Z whose annual percentage rate exceeds the average prime offer rate for comparable transactions by 1.5 percent for first-lien loans or 3.5 percent for second-lien

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MOVING FROM PAPER TO ELECTRONICS: CONSUMER COMPLIANCE UNDER THE E-SIGN ACT

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The world of electronic banking (e-banking) has been evolving for the past 40 years. It started in the 1970s with the introduction of automated teller machines (ATMs), which provided basic services, including access to cash and balance information. In the 1980s, as customers demanded remote services, we witnessed the development of in-home banking using a terminal, keyboard, television, and telephone lines for accessing deposit account information and transferring funds between accounts. In the 1990s, the emergence of the Internet had a significant impact on e-banking because of the widespread adoption of personal computers with Internet capabilities.

To facilitate and encourage electronic commerce, Congress enacted the Electronic Signatures in Global and National Commerce Act¹ (E-Sign Act) on June 30, 2000.² The E-Sign Act states that the validity or enforceability of a contract, electronic record, or signature for a transaction affecting interstate commerce cannot be challenged solely because it is in electronic form or because an electronic signature or record was used in the formation of the contract.³ This article provides an overview of the E-Sign Act's consumer compliance requirements.

E-SIGN ACT COMPLIANCE REQUIREMENTS

When businesses are legally required to make information available to a consumer in writing, the information can be delivered electronically as long as there is prior compliance with the E-Sign Act's consumer consent requirements. The requirements, which are discussed below, are fairly detailed to ensure that consumers receive the necessary protections in the electronic information (e.g., Truth in Lending disclosures).

Six-Step Consumer Consent Process

Step 1 - Availability of Paper Delivery or Paper Copies

Before seeking a consumer's consent to use electronic records, institutions must inform the consumer in a clear and conspicuous statement of any

¹ 15 U.S.C. §7001 et seq.

² This law affects only the writing or signature requirements of other laws. It does not affect the consumer protections provided by other laws such as the Truth in Lending Act (other than a requirement that a contract or other document be in nonelectronic form). 15 U.S.C. §7001(b)(1)

³ 15 U.S.C. §7001(a). Note, however, that the E-Sign Act does not apply to matters involving family law, probate, or the Uniform Commercial Code, with the exceptions of article 2 (sales) and 2a (leases). 15 U.S.C. §7003(a).

right or option to have the record provided in non-electronic form, the right to withdraw that consent, the consequences of withdrawing consent (including terminating the relationship), and any fees imposed in the event of withdrawal. Institutions must also inform consumers of their right to request a paper copy of an electronic record and whether any fees apply.

Step 2 – Consent Choices

Before seeking a consumer's consent to the use of electronic records, a financial institution must inform the consumer in a clear and conspicuous statement whether consent relates to a particular transaction only or whether consent relates to broader categories of information. Most financial institutions choose a product-by-product consent process.

Step 3 - Consumer Actions

Financial institutions must disclose to consumers the procedures to withdraw consent at a later date and to update the consumer's contact information, such as notifying the financial institution when the consumer's e-mail address changes.

Step 4 - Hardware/Software Requirements

Financial institutions must provide consumers with a statement detailing the hardware and software requirements to access and retain electronic records.

Step 5 - Affirmatively Consent

To ensure a consumer can communicate electronically with the financial institution to which consent has been provided, the E-Sign Act requires that the consumer provide consent electronically "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."⁴

Step 6 - "After Consent" Disclosure

To ensure continued electronic access, financial institutions must provide consumers with a statement detailing any revised hardware and software requirements for access to and retention of electronic records, and

the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed. After providing this statement, institutions must again obtain consumers' affirmative consent as in Step 5. The procedures in Step 6 must be followed when the changes in hardware and software requirements create a material risk that consumers will not be able to access or retain electronic records.

The most difficult part of the E-Sign Act's rules involves the correct method for consumers to "demonstrate" that they can access the required information electronically (Step 5). To ensure compliance with this requirement, financial institutions are encouraged to develop procedures to ensure they maintain records of the consumer's consent process. A financial institution's failure to obtain consumer consent properly can significantly affect its compliance with consumer laws and regulations such as Regulation E's error resolution procedure. Under Regulation E, the customer generally has 60 days from receiving a periodic statement to claim an error.⁵ If the statements are sent only electronically and the e-sign consent requirement was not obtained properly, the error period could be extended until a paper statement that includes the error is provided.

RELATIONSHIP OF E-SIGN ACT AND BOARD'S REGULATIONS

In 2007, the Board of Governors of the Federal Reserve System (Board) adopted amendments to five of its regulations (Regulations B, E, M, Z, and DD) providing that certain disclosures may be provided to consumers in electronic form, rather than on paper, without obtaining consent under the E-Sign Act.⁶ The amendments apply to the situation in which, for example, a consumer accesses an application or advertisement for credit or other financial services on the Internet. The Board stated that it believed that applying the consumer consent provisions in such situations could impose substantial burdens on electronic commerce and make it more difficult for consumers to gather information and shop for credit.

⁴ 15 U.S.C. §7001(c)(1)(C)(ii)

⁵ 12 C.F.R. 205.11 (b)(1)(i)

⁶ 72 Fed. Reg. 63445 (Regulation B), 63452 (Regulation E), 63456 (Regulation M), 63462 (Regulation Z), and 63477 (Regulation DD) (November 9, 2007)

It is important to emphasize that these special provisions apply only to the specific sections of the regulations affected by the amendments (i.e., primarily disclosures affecting applications, solicitations, and advertising). For other disclosures – for example, under Regulation Z, account-opening disclosures, periodic statements, and change-in-terms notices – creditors are required to obtain the consumer’s consent, in accordance with the E-Sign Act, to provide such disclosures in electronic form, or else provide disclosures in paper form. Also, the E-Sign Act does not affect the regulatory requirements for the timing, content, and format of consumer notices and disclosures. For example, §226.5a of Regulation Z requires that credit card solicitation and application disclosures

of the annual percentage rate for credit card purchase transactions must appear in a tabular format and be in a specified minimum font size. Creditors providing credit card solicitation and application disclosures electronically would still be required to adhere to these requirements.

RECORD RETENTION ISSUES

Retention by Financial Institutions. Under the E-Sign Act, if a financial institution is legally required to maintain copies of a contract or other records of a transaction, the institution may rely on an electronic record of the information that accurately reflects the information in the contract or other record, and that remains accessible to all persons who are legally entitled to access the information in a form that can later be reproduced.⁷

Retainable Form for Consumers. The Board stated in the *Federal Register* preamble to the November 2007 final rule that financial institutions satisfy the requirement to provide electronic disclosures in a form that the consumer can retain if the disclosures are provid-

ed in a standard electronic format that can be downloaded and saved or printed on a typical home personal computer.⁸

OTHER CONSUMER LAWS AND REGULATIONS

This article discussed certain E-Sign Act compliance issues in relation to Federal Reserve consumer protection regulations. However, other consumer laws and regulations are also subject to the E-Sign Act and may

AS E-BANKING BECOMES INCREASINGLY MORE POPULAR, IT IS IMPORTANT FOR FINANCIAL INSTITUTIONS TO BECOME FAMILIAR WITH THE REQUIREMENTS OF THE E-SIGN ACT.

be silent about electronic communications or may address E-Sign Act compliance through a general reference to the E-Sign Act. It is not necessary for a specific law or regulation to address compliance with the E-Sign Act because the act states that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures, notwithstanding any statute, regulation, or other rule of law generally. Therefore, documents such as the Department of Housing and Urban Development’s HUD-1 and the good faith estimate forms required by the Real Estate Settlement Procedures Act can be provided in electronic formats.

CONCLUSION

As e-banking becomes increasingly more popular, it is important for financial institutions to become familiar with the requirements of the E-Sign Act. This article provided an overview of the E-Sign Act’s general compliance requirements. Specific issues and questions should be raised with the consumer compliance contact at your Reserve Bank or with your primary regulator. ©

⁷ 15 U.S.C. §7001(d)(1)

⁸ 72 Fed. Reg. 63471. The Board stated, however, that it would monitor financial institutions’ practices to evaluate whether further guidance is needed in this area.

CURRENT ISSUES IN PAYROLL CARDS

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In July 2007, payroll cards became subject to the consumer protections of Regulation E, the implementing regulation for the Electronic Fund Transfer Act. Since then, as the functionality of payroll cards has expanded to include services provided by traditional deposit accounts, the number of consumer protection regulations with which payroll card issuers must comply has also increased. This article recaps the requirements of the 2007 rule, reviews the consumer compliance implications of payroll cards, summarizes consumer complaints related to payroll cards received at the Federal Reserve's consumer complaint center, and discusses the favorable implications under the Community Reinvestment Act (CRA) for issuing payroll cards.

A payroll card is a type of stored-value card that provides employers with an alternative to traditional paper checks or direct deposit to pay employees. Unlike gift cards and other stored-value cards, which are typically closed-end cards accepted only at the issuer's locations, payroll cards are designed to transfer compensation on a recurring basis and are typically open loop, meaning they are accepted beyond the issuer's locations because the issuer participates in a wide network such as STAR for pin-based transactions or Visa for signature-based transactions. The popularity of payroll cards has increased in recent years as a cost-effective alternative to paying workers with cash and payroll checks, particularly for employees who lack traditional deposit accounts. Benefits of payroll cards include enabling employees to avoid or minimize check cashing fees, lowering employers' payroll costs, and providing access to banking services to in-

dividuals who historically have maintained few or no established banking relationships.

RECAP OF FINAL RULE

In August 2006, the Board of Governors of the Federal Reserve System (Board) amended Regulation E's definition of "account" in 12 C.F.R. §205.2(b) to include a "payroll card account."¹ As a result, the regulation's substantive and disclosure protections apply to payroll cards, with one significant modification. The final rule extends the regulation's unauthorized use and error resolution protections to payroll cardholders and requires financial institutions offering payroll cards to provide all initial and subsequent disclosures.² However, the rule allows financial institutions, as an alternative to complying with the regulation's periodic statement requirement, to provide specific account information such as account balance and transaction history by telephone, electronically, or in writing upon the cardholder's request.³ The final rule also clarified that for banks using this alternative method, the 60-day notice period for unauthorized use begins the earlier of the date the cardholder accesses the account information electronically or the date on which the bank sends a written account history, as requested by the consumer.⁴

The Board, after conducting detailed focus group testing with payroll card users in the fall of 2005, permitted the alternative provision of periodic statement information because of the specific needs and behaviors of typical users. Although most focus group participants retained periodic statements for their re-

¹ Section 205.2(b)(2) of Regulation E defines "payroll card account" as "an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation (such as commissions) are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person."

² The commentary to §205.18(a)-2 of Regulation E states that "typically, employers and third-party service providers do not meet the definition of a financial institution subject to the regulation because they neither hold payroll card accounts nor issue payroll cards and agree with consumers to provide EFT services in connection with payroll card accounts. However, to the extent an employer or a service provider undertakes either of these functions, it would be deemed a financial institution under the regulation."

³ 12 C.F.R. §205.18(b)

⁴ 12 C.F.R. §205.18(c)(3)

cords, the majority monitored their payroll cards by telephone or through the website of the payroll card provider. In the preamble to the final rule, the Board stated that information provided electronically and via telephone was timelier and could assist consumers in avoiding overdrawing their accounts.⁵

COMPLIANCE IMPLICATIONS

The compliance requirements for payroll cards are expanding. For example, on November 12, 2009, the Board announced a final rule under Regulation E to provide consumer protections for overdrafts.⁶ Because payroll cards are now subject to Regulation E, as discussed earlier, the new rule will apply to payroll cards with an overdraft feature. Under the final rule, financial institutions can only enroll consumers in a program covering overdrafts for automated teller machine (ATM) and one-time point-of-sale transactions

consumer with a reasonable opportunity to consent to the service; (3) obtain the consumer's affirmative consent to the service; and (4) provide the consumer with written confirmation of the consent⁷ and a statement of the right to revoke it.

Financial institutions may not assess overdraft fees for existing accounts on consumers who have not opted in by August 15, 2010. For accounts opened on or after July 1, 2010, financial institutions must provide notices to their customers and obtain their opt-in before fees may be assessed.

In addition, the recent final Red Flags regulations jointly issued by the Federal Trade Commission (FTC) and the five federal banking agencies (Agencies) to implement the Fair and Accurate Credit Transactions Act of 2003 contain rules that apply to payroll card issuers.

The final rule specifies that financial institutions offering "covered accounts" must develop and implement a written identity theft prevention program to combat identity theft for new and existing covered accounts. The FTC and the Agencies recently issued a "frequently asked questions" specifically stating that a payroll card is a "covered account."⁸ The identity theft program must satisfy four requirements: (1) identify forms of activity that are red flags for possible identity theft and include those red flags in the program;

(2) detect red flags incorporated in the program; (3) respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and (4) ensure that the program is updated periodically to reflect changes in risks from identity theft.⁹

The final rule also specifies that if a debit or credit card issuer receives an address change notification and subsequently receives a request for an additional or replacement card within 30 days, the issuer cannot

UNDER THE FINAL RULE, FINANCIAL INSTITUTIONS CAN ONLY ENROLL CONSUMERS IN A PROGRAM COVERING OVERDRAFTS FOR AUTOMATED TELLER MACHINE AND ONE-TIME POINT-OF-SALE TRANSACTIONS IF THE CONSUMERS HAVE OPTED IN TO THE PROGRAM.

if the consumers have opted in to the program. The rule does not apply to checks, recurring transactions, or automated clearinghouse transactions. Financial institutions must complete four steps for the opt-in procedure before they may assess any fees for an ATM or one-time debit card overdraft: (1) provide the consumer with an opt-in notice explaining the overdraft service for ATM withdrawals and one-time debit card transactions segregated from all other information, including other account disclosures; (2) provide the

⁵ 71 Fed. Reg. 51437, 51443 (August 30, 2006)

⁶ 74 Fed. Reg. 59033 (November 17, 2009)

⁷ Electronic documentation is permissible if the consumer consents.

⁸ <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090611a1.pdf> at question 4, page 6

⁹ 12 C.F.R. §222.90 (d)(2)

send the additional or replacement card until it has notified the cardholder or otherwise assessed the validity of the change of address in accordance with the rule's requirements.

CRA CREDIT

Under the "Interagency Questions and Answers Regarding Community Reinvestment," financial institutions offering payroll cards may be eligible for credit under CRA if the cards are free or low cost and increase access to financial services for low- and moderate-income individuals.¹⁰ A review of CRA public evaluations identified numerous examinations in which financial institutions received CRA credit for offering payroll cards. Large institutions (assets greater than \$1.1 billion) received credit for offering payroll cards under the retail services component of the services test, while banks evaluated under the intermediate small bank procedures (assets between \$277 million and \$1.1 billion) received credit under the community development test for their payroll cards.

CONSUMER COMPLAINT ACTIVITY

Federal Reserve Consumer Help (FRCH) is the Federal Reserve System's central office for consumer complaints. Analyzing consumer complaint data is an important tool the Federal Reserve System uses to identify emerging consumer protection issues with financial products and services. An analysis of FRCH's consumer complaint data revealed a low level of complaints or inquiries involving payroll cards, especially when compared with the volume of complaints received regarding payroll checks.

Some of the payroll card complaints received at FRCH concerned whether employers could require employees to accept wages via payroll cards. Regulation E prohibits employers (and banks) from requiring employees to establish an account to receive electronic fund transfers as a condition of employment; however, employers can avoid this compulsory-use protection by giving employees the option of having their

salary deposited at a bank or by another means such as check or cash. Several states have also addressed the degree to which employers can require the use of payroll cards.¹¹ Financial institutions should review state law regarding employee compensation to ensure compliance.

FRCH has also received inquiries about which entity is responsible for investigating and resolving alleged errors. Regulation E requires financial institutions that provide electronic fund services to investigate whether an error occurred, report the results to the consumer, and correct any error within established time frames.¹² Consequently, banks that offer and service payroll cards are responsible for investigating and resolving any errors alleged by payroll card holders.

Other consumers complained that banks were either unwilling to cash payroll checks unless the consumer had an account with the institution or that banks charged a fee for cashing noncustomer payroll checks. Payroll card holders are not required to maintain a deposit account to access their compensation. Some states have restrictions on the levels and types of fees that may be imposed to access wages,¹³ which should also be reviewed by compliance staff.

CONCLUSION

As the functionality of payroll cards continues to increase, the number of consumer protection regulations with which financial institutions must comply increases, too. Banks should conduct appropriate reviews of federal and state laws, including those related to customer identification, state employee compensation restrictions, and federal consumer financial protection laws, before implementing a payroll card product. Compliance professionals should also monitor the evolving marketplace and regulatory environment to ensure payroll cards' continued compliance. Specific issues and questions should be raised with the consumer compliance contact at your Reserve Bank or with your primary regulator. ©

¹⁰ See Interagency Questions and Answers Regarding Community Reinvestment, §228.12(i)-3 ("Examples of community development services include... providing other financial services with the primary purpose of community development, such as... free or low-cost... payroll, or other check cashing services, that increase access to financial services for low- or moderate-income individuals.")

¹¹ Beth S. DeSimone, Jeremy W. Hochberg, and Olayemi Y. Abayomi. "State Law Developments in the Regulation of Payroll Cards." *Review of Banking and Financial Services*, 24:8, August 2008, pp. 96-97.

¹² 12 C.F.R. §205.11

¹³ "State Law Developments in the Regulation of Payroll Cards," pp. 98-100.

ON THE DOCKET: RECENT FEDERAL COURT OPINIONS*

REGULATION Z - TRUTH IN LENDING ACT (TILA)

Court rules on timing for open-end disclosures. *Muro v. Target Corp.*, 580 F.3d 485 (7th Cir. 2009). The Seventh Circuit affirmed the dismissal of a class action suit alleging that Target violated §1637 of TILA when it mailed the plaintiff an unsolicited credit card along with the initial account disclosures. The plaintiff alleged that §1637(a) requires that disclosures be provided before the account is opened and that Target had already opened the account when it mailed the disclosures. The Seventh Circuit analyzed this claim under §226.5(b)(1) of Regulation Z, which requires creditors to provide initial disclosures for open-end credit plans “before the first transaction is made under the plan.” The court interpreted this to mean that if a creditor provides disclosures “before the card is activated, before any fees are incurred and before any charges are made to the new account,” the creditor has provided disclosures before an account is open. Because it was undisputed that the plaintiff never activated the card, never incurred any fees, and never made any charges, the court held that §1637(a) was not violated. The plaintiff also argued that Target violated §1637(c), which identifies the information that must appear in credit card solicitation and application disclosures. To establish liability under §1637(c) for omitting required disclosures, a plaintiff must have paid a card fee or used the card. Because the plaintiff did not satisfy these requirements, this claim was also dismissed.

Court rules on finance charge disclosures. *Escher v. Decision One Mortgage Company, LLC*, 2009 U.S. Dist. LEXIS 89646 (E.D. Pa. Sept. 29, 2009). This case is an appeal of a bankruptcy court’s ruling that a lender did not violate TILA by failing to disclose as prepaid finance charges a mortgage broker’s yield spread premium (YSP) and title insurance overcharges. The court affirmed the YSP ruling based on prior court decisions and §226.4(a)(3)-3 of the Official Staff Commentary for Regulation Z, which states that “[c]ompensation paid by a creditor to a mortgage broker under an agreement is not included as a separate component of a consumer’s total finance charge.” The court reversed the ruling on the title insurance overcharge, however. Under §1605(e) of TILA and §226.4(c)(7) of Regulation Z, reasonable and bona fide title insurance fees are excluded from the finance charge. The Pennsylvania Department of Insurance sets the rate for title insurance in Pennsylvania, including a basic rate and a lower rate for refinanced mortgages. The borrowers were charged the basic rate, even though they qualified for the refinance rate. The borrowers argued that the overcharge was not reasonable and bona fide and therefore should have been disclosed as a finance charge. The court determined that the lower court incorrectly placed the burden on the borrower to demonstrate eligibility for the lower rate policy and therefore reversed the ruling and remanded the case to the bankruptcy court for further proceedings.

FAIR CREDIT REPORTING ACT (FCRA)

Willful FCRA violation does not require proof of actual damages. *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009). The plaintiff filed this class action suit under the FCRA against several businesses that provide check-verification services. She alleged that when the state of Tennessee changed its driver’s license numbering system, the defendants failed to link drivers’ prior license numbers with the new ones. As a result, the plaintiff was classified as a first-time check writer in the defendant’s consumer reports. The plaintiff alleged that this conduct constituted a willful violation of §1681e(b) of the FCRA, which requires businesses that prepare consumer reports to follow “reasonable procedures to assure maximum possible accuracy of the information” in the reports. The trial court granted the defendants’ motion to dismiss the case because the plaintiff did not allege that she sustained any injuries as a result of the alleged violation. The Sixth Circuit reversed, holding that a willful violation of the FCRA does not require actual proof of damages because the damage provision in



§1681n(a) of the FCRA allows a plaintiff to recover either actual damages or statutory damages between \$100 and \$1,000 for willful violations.

Firm offers of credit do not require value. *Gelman v. State Farm Mutual Auto. Ins. Co.*, 583 F.3d 187 (3d Cir. 2009). The Third Circuit affirmed the dismissal of a class action suit alleging that a prescreened, unsolicited insurance offer from State Farm did not constitute a firm offer of insurance under FCRA requirements because it did not have value. Section §1681b of the FCRA outlines the limited circumstances under which a consumer reporting agency (CRA) may furnish a consumer's credit report without the consumer's consent. Under §1681b(c) (1), insurance and credit providers may obtain from the CRAs prescreened mailing lists of consumers who meet certain eligibility criteria, provided they make a firm offer of credit or insurance to the people on the list and honor the offer if the consumer meets the prescreening eligibility criteria. State Farm relied on this provision in sending the plaintiff a letter stating that he could save up to \$356 on auto insurance with State Farm. The plaintiff alleged that the offer violated the FCRA because it had no value. The Third Circuit rejected this argument, holding that §1681b requires only that offers be firm, not that they have value. The court found that State Farm's insurance offer, while it contained substantial puffery and promotional statements, satisfied §1681b(c)(1) because it would be honored if the plaintiff met certain criteria.

Court affirms FCRA's preemption of state laws. *Premium Mortgage Corporation v. Equifax, Inc.*, 583 F.3d 103 (2d Cir. 2009). The Second Circuit affirmed the dismissal of a mortgage broker's class action suit against several consumer reporting agencies. The lawsuit alleged that the defendants' practice of allowing lenders to purchase prescreened consumer reports with trigger leads violated various state laws. A trigger lead results from the mortgage loan application process, with a lead indicating that a consumer has expressed an interest in obtaining a loan. The plaintiff alleged that the trigger leads were its proprietary customer information. The Second Circuit found that most of the plaintiff's state law claims were preempted by the broad preemption provision in §1681t(b)(1)(A) of the FCRA. The court affirmed the dismissal of the remaining, nonpreempted state law claims because they were inadequately pleaded.

REGULATION X – REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)

Court rejects RESPA title insurance mark-up claim. *Arthur v. Ticor Title Ins. Co. of Florida*, 569 F.3d 154 (4th Cir. 2009). The Fourth Circuit rejected the plaintiffs' claim in this class action suit that a title insurer who charges more for a title insurance policy than the insurer's filed rates violates §8(b) of RESPA. Section 8 of RESPA prohibits kickbacks, referral fees, and unearned fees in connection with real estate settlement services. The Maryland insurance commissioner approved three rates for the insurer's title policies: an original issue rate, a reissue rate, and an extended coverage rate. The rate for an extended coverage policy was twice the rate for a reissue policy. The insurer charged the plaintiffs an extended coverage policy rate but should have charged the lower rate for a reissue policy. Relying on its previous ruling in *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002), and RESPA's statutory language, the court held that RESPA is not a price control statute and does not impose liability for overcharges as long as services are provided. Because it was undisputed that both the title insurer and its agents performed title insurance services, the court affirmed the dismissal of the RESPA §8(b) claim.

* Links to the court opinions are available in the online version of *Outlook* at <http://www.consumercomplianceoutlook.org>.

NEWS FROM WASHINGTON: REGULATORY UPDATES

Agencies extend compliance date for final rule to implement Unlawful Internet Gambling Enforcement Act. On November 27, 2009, the Board of Governors of the Federal Reserve System (Board) and the Treasury Department announced a joint final rule to extend the compliance date for their joint regulation implementing certain provisions of the Unlawful Internet Gambling Enforcement Act by six months to June 1, 2010. The Board's announcement and the *Federal Register* notice are available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20091127a.htm>.

The Board approves interim final rule to implement Helping Families Save Their Homes Act (HFSTHA). On November 16, 2009, the Board announced an interim final rule under Regulation Z (Truth in Lending) to implement HFSTHA's requirement that a purchaser or assignee that acquires a consumer's mortgage loan must provide notice to the consumer within 30 days of the sale or transfer. To provide compliance guidance and greater certainty on the new requirements, the interim final rule is effective upon publication. However, to allow time for any necessary operational changes, compliance with the interim final rule is optional for 60 days. During the 60-day period, parties that acquire a mortgage loan continue to be subject to the statute's requirements. The Board is also soliciting comment on the interim rule for 60 days before considering the adoption of a permanent rule. The comment period closes on January 19, 2010. The Board's announcement and the *Federal Register* notice are available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20091116b.htm>.

The Board announces proposed rules to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009's restrictions on the fees and expiration dates that may apply to gift cards. On November 16, 2009, the Board announced proposed rules under Regulation E (Electronic Fund Transfer Act) that would protect consumers from certain unexpected costs and would require that gift card terms and conditions be clearly stated. The proposed rules would prohibit dormancy, inactivity, and service fees on gift cards unless: (1) there has been at least one

year of inactivity on the certificate or card; (2) no more than one such fee is charged per month; and (3) the consumer is given clear and conspicuous disclosures about the fees. Expiration dates for funds underlying gift cards must be at least five years after the date of issuance or five years after the date when funds were last loaded. The comment period closed on December 21, 2009. The Board's announcement and the *Federal Register* notice are available at: <http://www.federalreserve.gov/newsevents/press/bcreg/20091116a.htm>.

The Department of Housing and Urban Development (HUD) revises its frequently asked questions (FAQs) on the new Real Estate Settlement Procedures Act (RESPA) rules. On November 19, 2009, HUD released a revised version of its FAQs for the new RESPA rules that become effective on January 1, 2010. HUD periodically updates the FAQs to provide more guidance on questions it has received from the real estate industry. The latest version of the FAQs is available at <http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf>.

HUD announces changes and comprehensive guidance regarding the HOPE for Homeowners program. On October 20, 2009, HUD announced amendments to the HOPE for Homeowners (H4H) program via Mortgagee Letter 2009-43, which supersedes Mortgagee Letters 2008-29, 2008-30, and 2009-03 and is effective for endorsements on or after January 1, 2010. Key changes to the H4H program include but are not limited to:

- Borrowers are ineligible if their net worth exceeds \$1,000,000;
- Borrowers must not have defaulted on any substantial debt in the last five years;
- The age of appraisal now follows standard FHA guidance;
- Mortgage insurance premiums were reduced;
- Loan-to-value and debt-to-income ratios were revised; and
- The maximum loan-to-value ratio excludes the up-front mortgage insurance premium.

HUD's Mortgagee Letter 2009-43 is available at <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-43ml.doc>.



The Task Force on Consumer Compliance of the Federal Financial Institutions Examination Council (FFIEC) issues revised interagency examination procedures for the Home Mortgage Disclosure Act (HMDA). On October 1, 2009, the Task Force on Consumer Compliance of the FFIEC approved examination procedures for Regulation C (HMDA). The updated procedures incorporate the amendments to Regulation C for reporting pricing information on higher-priced loans as published by the Federal Reserve Board in October 2008 (*73 Federal Register* 63329). The changes to Regulation C conform the threshold for rate spread reporting to the definition of “higher-priced mortgage loans” included in amendments to Regulation Z (Truth in Lending) published in July 2008 (*73 Federal Register* 44522). Lenders will use the new rate-spread reporting test on loans for applications that are taken on or after October 1, 2009, and for all loans consummated on or after January 1, 2010, regardless of their application date. Additional information is available at <http://www.ffiiec.gov/hmda/faq.htm>.

FFIEC releases 2008 HMDA data. On September 30, 2009, the FFIEC released the 2008 data under the Home Mortgage Disclosure Act of mortgage lending transactions at 8,388 institutions, including information on applications, denials, originations, and loan purchases. The data include 14.2 million applications and originations and 2.9 million purchases, for a total of 17.1 million actions. The 2008 data reflect a 31 percent drop in reported originations from 2007 to 2008. The data also indicate that higher-priced lending (i.e., rate-spread loans) declined from 2007 to 2008. In 2008, about 12 percent of HMDA loans were higher-priced, compared to 29 percent in 2006 and 18 percent in 2007. Additionally, the amount of higher-priced lending in the 2008 data for all racial and ethnic groups was significantly lower than that reported in 2007. The FFIEC news release is available at <http://www.ffiiec.gov/hmcrpr/hm093009.htm>.

The Board of Governors of the Federal Reserve System (Board) will implement a consumer compliance supervision program of nonbank subsidiaries of bank holding companies (BHCs) and foreign banking organizations (FBOs). On September 15, 2009, the Board announced that it

will implement a consumer compliance supervision program in nonbank subsidiaries of BHCs and FBOs with activities covered by the consumer protection laws and regulations that the Federal Reserve has the authority to enforce. The policy, which will take effect immediately, also provides for the investigation of consumer complaints against these nonbank entities. The Board’s press release is available at <http://www.federalreserve.gov/newsevents/press/bcreg/20090915a.htm>.

The Board publishes “5 Tips for Shopping for a Mortgage.” On July 29, 2009, the Board issued its new publication “5 Tips for Shopping for a Mortgage,” which will help consumers avoid potential pitfalls and make well-informed decisions when choosing a home loan. The guide advises consumers to take advantage of additional information from other Federal Reserve publications, resources, and websites. It suggests that consumers also seek financial education materials from other trusted sources, such as HUD and NeighborWorks. English and Spanish versions of “5 Tips for Shopping for a Mortgage” are available both in print and online at <http://www.federalreserve.gov/pubs/mortgage-tips>.

HUD withdraws its amendment to Regulation X to change the definition of “required use.” In November 2008, HUD published a final rule that made significant changes to Regulation X, its implementing regulation for RESPA. The rule included an amendment to the definition of “required use” that would prohibit home builders from offering incentives and disincentives to home buyers if they used or failed to use an affiliated company’s services. The amended definition was scheduled to become effective in January 2009. However, HUD later sought additional public comment on the amended definition and delayed its effective date until July 2009. After reviewing the additional comments, HUD announced in May 2009 that it was withdrawing the amended definition. Accordingly, the definition of “required use” at 24 C.F.R. §3500.2(b) pre-dating the November 2008 rule remains in effect. HUD’s *Federal Register* notice announcing the withdrawal of the amendment is available at <http://www.hud.gov/offices/hsg/ramh/res/fr509.pdf>.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (BOARD) ANNOUNCES A FINAL RULE TO PROTECT CONSUMERS AGAINST OVERDRAFT FEES

On November 12, 2009, the Board issued a final rule under Regulation E prohibiting institutions from charging fees for overdrafts on ATM and one-time debit card transactions, unless the institution:

- provides the consumer with a notice, substantially similar to the Board's Model Form A9, segregated from other information;
- provides a reasonable opportunity to affirmatively consent or opt in to the service;
- obtains the consumer's affirmative consent or opt-in; and
- provides the consumer with written confirmation of the consent.

The opt-in and notice requirements do not apply if an institution has a policy and practice of declining ATM or one-time debit card transactions when the institution has a reasonable belief that the consumer has insufficient funds to cover the transaction when authorization is requested. However, the institution still must obtain the consumer's opt-in if it wishes to impose a fee when an overdraft occurred despite the institution's policy and procedures.

The mandatory compliance deadline is July 1, 2010. For accounts opened before July 1, 2010, financial institutions cannot assess overdraft fees on or after August 15, 2010 for paying an ATM or one-time debit card transaction under an overdraft service unless the institution has complied with the opt-in and notice requirements and obtained the consumer's affirmative consent. For accounts opened on or after July 1, 2010, the financial institution must comply with the opt-in and notice requirements and obtain the consumer's affirmative consent before it can impose overdraft fees for paying an ATM or one-time debit card transaction under an overdraft service. The final rule also prohibits institutions from discriminating against consumers who do not opt in for an overdraft service.

The Board's December 2008 proposal also included a provision prohibiting financial institutions from imposing overdraft fees resulting solely from a hold

placed on a debit card. This rule was not adopted because a more comprehensive approach involving financial institutions, card networks, and merchants may be needed to address this issue. The Board will continue to monitor this issue and determine whether additional action is necessary.

The Board's announcement and the final rule are available on the Board's website at: <http://www.federalreserve.gov/newsevents/press/bcreg/20091112a.htm>.

SHORT-TERM BALLOON LOANS AND REGULATION Z REPAYMENT ABILITY REQUIREMENT FOR HIGHER-PRICED MORTGAGE LOANS

On November 9, 2009, the Board issued Consumer Affairs Letter* 09-12: Short-Term Balloon Loans and Regulation Z Repayment Ability Requirement for Higher-Priced Mortgage Loans (CA 09-12). The letter provides answers to frequently asked questions about Regulation Z's repayment ability rule for balloon mortgage loans with terms of less than seven years that qualify as higher-priced mortgage loans (HPML). The repayment ability rule became effective for mortgage loan applications received on or after October 1, 2009, and is part of the Board's final Regulation Z rule for home mortgage loans.

A creditor has a presumption of compliance with the repayment ability rule if the creditor follows certain procedures. However, the presumption does not apply when the "term of the loan is less than seven years and the regular periodic payments when aggregated do not fully amortize the outstanding principal balance." For example, balloon loans with terms of less than seven years (short-term balloon loans) would be excluded from the compliance presumption. Creditors making short-term balloon loans have sought guidance on this issue, and the Board has responded with a "Questions and Answers."

Q: Does the rule prohibit short-term balloon loans that are higher-priced mortgage loans?

* Consumer Affairs letters address significant policy and procedural matters related to the Board's consumer compliance supervisory responsibilities. The letters are numbered sequentially by year. For example, the first letter issued in 2009 is numbered CA 09-1.

A: No. However, the creditor must use prudent underwriting standards and, after considering consumers' income, employment, obligations, and assets other than the collateral, the creditor should determine that the value of the collateral (the home) is not the basis for repaying the obligation (including the balloon payment).

Q: Does that mean the creditor must verify that the consumer has assets and/or income at the time of consummation that would be sufficient to pay the balloon payment when it comes due?

A: No. Such a requirement would effectively ban short-term balloon loans. If the Board had intended to ban these products, it would have done so explicitly.

Q: What must the creditor do, then, to verify the borrower's ability to repay a short-term balloon loan?

A: In addition to verifying the consumer's ability to make regular monthly payments, a creditor should verify that the consumer would likely be able to satisfy the balloon payment obligation by refinancing the loan or through income or assets other than the collateral.

Q: How does the creditor verify, when it originates a short-term balloon loan, whether the consumer could qualify for a refinancing before the balloon payment is due?

A: The creditor has an affirmative duty to engage in prudent underwriting. Thus, the creditor should consider factors such as the loan-to-value ratio and the borrower's debt-to-income ratio or residual income — all as of the time of consummation. A borrower with a high debt-to-income ratio and/or with little or no equity in the property will be less likely to be able to refinance the loan before the balloon payment comes due than a borrower with lower debt-to-income and loan-to-value ratios. The creditor is not required to predict the consumer's future financial circumstances, interest rate environment, and home value.

CA 09-12 is available on the Board's website at: <http://www.federalreserve.gov/boarddocs/CALETTERS/2009/0912/caltr0912.htm>.

THE BOARD PROPOSES RULES TO AMEND REGULATION Z TO IMPLEMENT THE CREDIT CARD ACCOUNTABILITY RESPONSIBILITY AND DISCLOSURE ACT OF 2009 (CARD ACT)

On September 29, 2009, the Board proposed rules amending Regulation Z to implement the second phase of the CARD Act, which becomes effective on February 22, 2010. The rulemaking also includes changes to the Board's January 2009 final regulations under Regulations AA and Z to prohibit unfair and deceptive credit card practices and to improve consumer disclosures for open-end (not home-secured) credit, respectively. Amendments were necessary to the January 2009 regulations to conform them to the CARD Act.

The consumer protections under the implementing rules for the CARD Act proposal include:

- **Consideration of repayment ability:** prohibits card issuers from opening a credit card account or increasing the credit limit unless the consumer's ability to make the required payments under the terms of the account is considered, and prohibits card issuers from issuing cards to consumers under the age of 21 who do not have income or assets unless certain requirements are satisfied, including a co-signer who is over the age of 21 and has the ability to repay the debts of the underage consumer.
- **Limitations on fees:** prohibits card issuers from charging a card account with fees (excluding late fees, over-the-limit fees, and returned payment fees) during the first year after account opening that constitute more than 25 percent of the credit line at account opening, and prohibits creditors from imposing fees for making payment, except for expedited service with a service representative of the creditor.
- **Payment allocation rules:** prohibits card issuers from using payment allocation methods that maximize interest charges by generally requiring that payments above the minimum be applied first to the balance with the highest rate.

- **Special rules for marketing open-end credit to college students:** prohibits card issuers and creditors from offering tangible items to students on or near campus or at an event sponsored by an institution of higher learning to induce the student to open an open-end credit plan. While most of the rules in the CARD Act apply only to credit cards, this restriction applies to all open-end credit.
- **Limitations on increasing annual percentage rates, fees, and charges:** prohibits card issuers from increasing rates, charges, and fees during the first year an account is opened and on existing credit card balances. The rule provides exceptions for temporary rates, variable rates, increases that apply only to new transactions, serious delinquencies, workouts, and increases when protections under the Servicemember Civil Relief Act expire.
- **Requirements for over-the-limit transactions:** requires card issuers to obtain a consumer's consent before charging fees for exceeding the credit limit.
- **Limitations on the imposition of finance charges:** prohibits card issuers from using the double-cycle billing method to impose interest charges. Also prohibits interest charges on amounts paid during a grace period.
- **Requirement to post credit card agreements on the Internet:** requires card issuers to post their card agreements on their websites.

One important issue on which the Board is soliciting comment is whether to change the effective date of the January 2009 final rules for Regulations AA and Z from July 1, 2010 to February 22, 2010 to coincide with the effective date for the new implementing regulations for the CARD Act. In the alternative, the Board is considering retaining the July 1, 2010 date for certain disclosures requiring a tabular format because of operational burdens on card issuers.

Comments on this latest proposal were due by November 20, 2009. The Board's press release and the rulemaking proposal can be found at <http://www.federalreserve.gov/newsevents/press/bcreg/20090929a.htm>.

The Board will issue another rulemaking proposal at a later date to implement the final phase of the CARD Act that becomes effective on August 22, 2010.

CONGRESS AMENDS THE CARD ACT TO LIMIT SCOPE OF 21-DAY RULE FOR PERIODIC STATEMENTS TO CREDIT CARDS

On November 6, 2009, President Obama signed into law H.R. 3606, the Credit CARD Technical Corrections Act of 2009, which amends §106(b) of the CARD Act. The original version of §106(b) required financial institutions offering open-end consumer credit plans, including home equity lines of credit (HELOCs), to establish procedures to ensure that periodic statements are mailed not later than 21 days before the payment due date. This requirement created operational challenges for financial institutions offering HELOCs and other non-credit-card open-end products. Congress responded by amending §106(b) to limit the rule to credit card accounts and not open-end credit in general. However, Congress left intact §106(b)'s requirement that periodic statements generally be mailed at least 21 days before the expiration of any time period within which the consumer may repay credit extended without incurring additional finance charges.

The change is not retroactive and became effective on November 6, 2009. The Board will be issuing a rulemaking proposal to amend §226.5(b)(2)(ii) of Regulation Z, where the 21-day rule is implemented, to conform to the CARD Act amendment. A copy of H.R. 3606 is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3606enr.txt.pdf.

OUTLOOK LIVE

The Federal Reserve System's audio conference series on consumer compliance issues

The Federal Reserve System is pleased to announce *Outlook Live*, an audio conference series on consumer compliance issues. This new series is produced in conjunction with the System's quarterly newsletter *Consumer Compliance Outlook* and will highlight timely consumer compliance regulatory matters.

The inaugural *Outlook Live* audio conference was held on December 10, 2009 and was hosted by the Federal Reserve Bank of San Francisco. During this call, two attorneys from the Board's Division of Con-

sumer and Community Affairs discussed the new rules under Regulation E for overdraft protection services.

If you are a current electronic subscriber to *Consumer Compliance Outlook*, you will automatically receive announcements for the *Outlook Live* series. You can follow *Outlook Live* announcements, register for future conference calls or download transcripts of prior calls on the *Outlook Live* web page: <http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/outlook-live/>

WOULD YOU LIKE TO SUBSCRIBE TO CONSUMER COMPLIANCE OUTLOOK?

Consumer Compliance Outlook is a Federal Reserve System publication that focuses on consumer compliance issues. A subscription to *Consumer Compliance Outlook* is a valuable financial services industry resource that will keep you informed of consumer regulatory matters. To order *Consumer Compliance Outlook*, please visit the Philadelphia Fed's website at www.philadelphiafed.org/src/consumer-compliance-outlook. There, you can choose to receive future editions of the publication in electronic or paper format.



REVISION NOTICE

We made a slight revision to the article about the Mortgage Disclosure Improvement Act (MDIA) that appeared in the Third Quarter 2009 issue of *Outlook*. The article briefly discussed the MDIA's early Truth in Lending Act disclosure requirements for rescindable mortgage transactions. Because the Board of Governors of the Federal Reserve System has not provided formal guidance on that issue since the MDIA's enactment, we removed that discussion from the article. If the Board addresses this issue in the future, we will promptly notify *Outlook* subscribers.

The revised article can be found at http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2009-third-quarter/q3_03.cfm. We apologize for any confusion this may have caused, and we appreciate your continued support of our publication.

CONSUMER COMPLIANCE RESOURCES

The *Outlook* website maintains a comprehensive list of compliance links, which is available at: <http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/resources.cfm>. The following is a sample of some of these resources.

RESOURCE	DESCRIPTION
<i>Overall Consumer Compliance</i>	
Federal Reserve's Consumer Compliance Handbook (Updated Nov. 2009)	Manual used to conduct compliance examinations of state member banks
Federal Reserve Board's Regulations	The Board's regulations, including recent amendments
Federal Reserve Board's Consumer Affairs Letters	Letters implementing the Board's consumer compliance supervisory responsibilities
<i>Fair Lending and Equal Credit Opportunity Act (ECOA) — Regulation B</i>	
Justice Department's Fair Lending and Fair Housing Site	Collection of fair housing and fair lending resources from the Justice Department
Banker's Guide to Risk-Based Fair Lending Examinations	Overview of the interagency fair lending examination procedures from the Federal Reserve Bank of Chicago
<i>Home Mortgage Disclosure Act (HMDA) — Regulation C</i>	
FFIEC HMDA Resource Page	Collection of HMDA resources
HMDA Getting It Right	Guide to recording and reporting HMDA data
FFIEC Rate Spread Calculator	Online calculator to determine if a loan must be reported as a rate-spread loan. Reflects recent amendment to Regulation C, effective Oct. 1, 2009, changing definition of a rate-spread loan
<i>Flood Insurance — Regulation H</i>	
FEMA's Flood Insurance Purchase Guidelines (Sept. 2007)	FEMA requirements when purchasing flood insurance
FEMA's Flood Manual	FEMA's in-depth guidance for flood insurance
FEMA's Flood Regulation	FEMA's regulation about flood insurance coverage and rates
FEMA's Flood Insurance Purchase Page	Information about FEMA's flood insurance program
FEMA Map Service Center	Resource for FEMA flood maps
<i>Real Estate Settlement Procedures Act (RESPA) — Regulation X</i>	
HUD's RESPA Page	Collection of RESPA resources
HUD's RESPA FAQ	HUD's FAQ for its amended HUD-1 and GFE
<i>Community Reinvestment Act (CRA) — Regulation BB</i>	
FFIEC CRA Resource Page	Collection of CRA resources
CRA Interagency Questions & Answers	Frequently asked questions about the Community Reinvestment Act
CRA Examinations	Collection of resources for CRA examinations from the FFIEC
Banker's Quick Reference Guide to CRA	A guide to CRA regulation and examination procedures from the Federal Reserve Bank of Dallas
<i>Fair Credit Reporting Act (FCRA)</i>	
FTC Fair Credit Reporting Act Page	Collection of FCRA resources

IMPROVING AND USING HMDA DATA IN YOUR COMPLIANCE PROGRAM

loans.* This revised rate-spread reporting test applies to loans for which applications are taken on or after October 1, 2009 and for all loans consummated on or after January 1, 2010 (regardless of their application dates). This new, lower benchmark will likely increase the number of rate-spread loans that institutions report on their HMDA LAR. The revised rules do not apply to loans for which applications were taken before October 1, 2009 and that were consummated in 2009. For those loans, HMDA reporters are required to identify first- and second-mortgage liens that exceeded the yield on comparable Treasury securities by 3 percent for first-lien loans and 5 percent for second-lien loans, respectively.

Step 2: Minimizing Errors

As institutions focus on improving the accuracy of their HMDA data, they should be aware of common errors with the following data fields: (1) borrower's income, (2) rate spread, (3) loan purpose, (4) property location, and (5) loan amount. With the exception of the borrower's income field and the rate-spread field, these issues typically arise because of errors recording data in the field rather than omitting them.

For the borrower's income field, §203.4(a)(10) of Regulation C requires that the borrower's *gross* income relied on in making the credit decision be reported. However, institutions frequently report the borrower's *net* income in this field. For the rate-spread field, some institutions fail to report data because the loan administration employee does not have a good understanding of the definition of a rate-spread loan. Institutions must be careful to employ the new definition of a rate-spread loan, as discussed in Step 1, which will likely increase the number of rate-spread loans banks report on their HMDA LAR.

Internal controls are an important tool for identifying

and correcting errors in HMDA data. The scope of the controls depends on the bank's risk assessment of the HMDA data submission. For less complex programs, or for well-developed programs, institutions may be comfortable with their data collecting and reporting methods and may not require additional review. On the other hand, larger, more complex institutions, or institutions with a history of reporting errors, are at greater risk of HMDA errors and should ensure that data not subject to self-monitoring are comprehensively reviewed prior to the annual March submission. Even data subject to self-monitoring should be spot checked, as an internal control, to verify that the self-monitoring is working.

Step 3: Submitting the Data

Compliance officers should allow themselves sufficient time to prepare the HMDA LAR before the March 1 submission date. Starting the process of reviewing the HMDA data in January should ensure sufficient time to correct any noted errors before submitting the data on March 1.

After the LAR is submitted, Federal Reserve Board staff review the data in late March through early April and may identify possible reporting errors. Institutions that fail the quality edit tests are contacted to resolve reporting issues. Board staff inquiries about HMDA data issues require immediate attention, and the HMDA LAR is not complete until all edits have been verified and/or resolved by the institution. The compliance officer should identify the business units or product lines from which the submission errors originated because this affects the risk analysis, training, and self-monitoring program for these respective areas.

Step 4: Training Staff

The compliance officer should identify training gaps

* The new definition of a reportable rate-spread loan appears in 12 C.F.R. §203.4(a)(12)(i), which also defines "average prime offer rate." The new definition is based on the definition of a higher-priced mortgage loan under §226.35(a) of Regulation Z. The Federal Financial Institutions Examination Council maintains a rate-spread calculator on its website to help institutions determine if a loan qualifies as a rate-spread loan: <http://www.ffiec.gov/ratespread/newcalc.aspx>. The website also lists current prime offer rates and is updated weekly. See page 19.

based on the results of data review activity. For example, if geocoding or reasons for declination pose data-quality problems, training should focus on these problem areas. Training should also be used to update employees about regulatory changes related to the filing of HMDA data, such as the recent Regulation C amendment to the definition of a rate-spread loan. Employees with input access to the HMDA LAR, and/or employees involved in self-monitoring and other review activities, require the most training, but all employees involved in the collection of LAR data need periodic training as well.

USING HMDA DATA TO ASSESS FAIR LENDING COMPLIANCE AND CRA PERFORMANCE

The compliance officer should evaluate HMDA data from both a fair lending and CRA perspective. This evaluation should mirror how HMDA data are used by examiners for CRA and fair lending evaluations. Many banks have complex data analysis tools to evaluate lending patterns. However, even without using robust data analysis tools, the compliance officer can perform a simple and effective analysis by using spreadsheets

EMPLOYEES WITH INPUT ACCESS TO THE HMDA LAR, AND/OR EMPLOYEES INVOLVED IN SELF-MONITORING AND OTHER REVIEW ACTIVITIES, REQUIRE THE MOST TRAINING, BUT ALL EMPLOYEES INVOLVED IN THE COLLECTION OF LAR DATA NEED PERIODIC TRAINING AS WELL.

to sort HMDA data. For example, the compliance officer can sort HMDA data by census tract to determine the geographic dispersion of lending among the various census tracts in the institution's assessment area, including low- and moderate-income tracts.

The compliance officer can also review the borrower income distribution. If the data indicate disparities, the compliance officer should communicate this to management. A HMDA data sort based on declined applications could reveal correlations with race, sex, or some other prohibited basis. The compliance officer should investigate and address any observations in a proactive manner with management, who could

examine the data more closely and perhaps consider increased outreach, second review programs, or other appropriate measures.

Finally, the compliance officer should always compare the data to the most recent CRA performance evaluation. This simple step can show the compliance officer how HMDA lending activity affects the institution from a CRA perspective.

Based on the results of the data evaluation, the compliance officer should update the institution's HMDA, fair lending, and CRA risk assessments. If, for example, the HMDA data revealed numerous errors in accuracy, the compliance risk assessment should be updated to identify a weakness in the control environment for inputting HMDA data. The lowered confidence in input controls would result in a higher residual risk in the activity, with more control resources being applied to that activity to correct the weakness. Similarly, a data evaluation that showed that the institution was lending to all census tracts and income levels in its assessment area (including low- and moderate-income) could reflect increased confidence in the control environment and lower residual risk in the CRA program and result in correspondingly fewer resources allocated to that activity.

In any case, the compliance officer should focus resources, such as training, monitoring programs, and increased testing, toward activities that have demonstrated either data-quality or lending patterns that do not fit the institution's stated goals and objectives for CRA and fair lending. By linking the application of resources to areas of demonstrated risk exposure, the compliance officer achieves a more efficient use of limited resources and lowers the institution's compliance risk profile.

CONCLUSION

Following the steps outlined in this article will help compliance officers enhance their HMDA reporting programs and meet HMDA's regulatory requirements for their institutions. Specific issues and questions should be raised with the consumer compliance contact at your Reserve Bank or with your primary regulator. ©

NEW FFIEC RATE-SPREAD CALCULATORS

The Federal Financial Institutions Examination Council (FFIEC) maintains rate-spread calculators on its website to help institutions determine if a loan qualifies as a rate-spread loan under the new HMDA definition of a rate-spread loan that became effective on October 1, 2009: <http://www.ffiec.gov/ratespread/newcalc.aspx>. The website also lists current prime offer rates and is updated weekly. The FFIEC offers both a single-loan and a batch-loan calculator on its website to determine whether either a single loan or a batch of them qualifies as rate-spread loans. Images of both calculators appear below along with their web addresses.

Single-loan calculator (<http://www.ffiec.gov/ratespread/newcalc.aspx>)

The screenshot shows the 'NEW FFIEC Rate Spread Calculator' web form. At the top is the FFIEC logo and navigation links: HMDA, FFIEC Main, Site Index, Disclaimer, Privacy Policy, PDF Help. The form title is 'NEW FFIEC Rate Spread Calculator'. Below the title, it shows 'Action Taken: 1 - Loan Originated (Info)'. The 'Amortization Type' section has radio buttons for 'Fixed' (selected) and 'Adjustable'. There are input fields for 'Lock-In Date (mm/dd/ccyy)', 'APR (00.00)%', 'Fixed Term = Loan Maturity', and 'Variable Term = Initial Fixed-Rate Period (Years, Whole Number; Info)'. A dropdown menu for 'Lien Status' is set to '1 - Secured by a first lien'. At the bottom are 'Submit' and 'Reset' buttons.

Batch-loan calculator (<http://www.ffiec.gov/ratespread/NewBulkRateSpread.aspx>)

The screenshot shows the 'NEW FFIEC Bulk Rate Spread Calculator' web form. It features the same FFIEC header and navigation as the single-loan calculator. The title is 'NEW FFIEC Bulk Rate Spread Calculator'. Below the title is a table with 8 columns: Record ID, Action Taken, Amortization Type, Lock-In Date (mm/dd/ccyy), APR (00.00)%, Term (Years, Whole Number), Lien Status, and Rate Spread. The table contains three rows, each with a 'Record ID' of 1, 2, and 3 respectively. Each row has an 'Action Taken' of 1, 'Amortization Type' with 'Fixed' selected, and 'Lien Status' set to '1 - Secured by a first lien'. The 'Rate Spread' column is empty for all rows.

Record ID	Action Taken	Amortization Type	Lock-In Date (mm/dd/ccyy)	APR (00.00)%	Term (Years, Whole Number)	Lien Status	Rate Spread
1	1	<input checked="" type="radio"/> Fixed <input type="radio"/> Adjustable	<input type="text"/>	<input type="text"/>	<input type="text"/>	1 - Secured by a first lien	
2	1	<input checked="" type="radio"/> Fixed <input type="radio"/> Adjustable	<input type="text"/>	<input type="text"/>	<input type="text"/>	1 - Secured by a first lien	
3	1	<input checked="" type="radio"/> Fixed	<input type="text"/>	<input type="text"/>	<input type="text"/>	1 - Secured by a first lien	

ADDRESS SERVICE REQUESTED

CALENDAR OF EVENTS

- | | | | |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------|-------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| Feb. 21-24 | National Conference for
Community Bankers and
De Novo Forum
American Bankers Association
Westin Diplomat
Hollywood, FL | March 21-23 | Real Estate Lending Conference
American Bankers Association
Hyatt Regency Bonaventure
Conference Center
Greater Ft. Lauderdale, FL |
| March 14-18 | National Interagency Community
Reinvestment Conference
New Orleans Marriott
New Orleans, LA | May 12-14 | Reinventing Older Communities
Federal Reserve Bank of Philadelphia
Hyatt Regency at Penn's Landing
Philadelphia, PA |
| March 19-25 | National Compliance School
American Bankers Association
Dolce Hayes Mansion &
Conference Center
San Jose, CA | | |