

CONSUMER COMPLIANCE OUTLOOK[®]

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



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THE 2010 CENSUS DATA AND ITS IMPACT ON HMDA, CRA, AND FAIR LENDING COMPLIANCE

BY LAURA GLEASON, SENIOR CONSUMER REGULATIONS ANALYST, AND CAROLE FOLEY, MANAGER, FEDERAL RESERVE BANK OF PHILADELPHIA

INTRODUCTION

The census of the U.S. population is mandated by Article 1, §2 of the Constitution to reapportion seats in the U.S. House of Representatives every 10 years based on population changes. But the census also plays a critical role in the consumer compliance examination process. Regulators rely on census data to help assess compliance with the Home Mortgage Disclosure Act (HMDA) and the Community Reinvestment Act (CRA) and to perform fair lending examinations.

The most recent census was completed in 2010, and the Census Bureau and the Federal Financial Institutions Examination Council (FFIEC) recently published data from this census. As a result, the FFIEC has made corresponding changes to its publicly released census data files. The FFIEC has also changed the way census data will be used in the consumer compliance examination process. This article recaps recently released FFIEC information about the 2010 census data and discusses the implications of the 2010 data changes for HMDA, CRA, and fair lending.¹

THE AMERICAN COMMUNITY SURVEY

Until 2000, the Census Bureau collected demographic, social, and other data every 10 years through the Supplemental Survey. In 2005, the Supplemental Survey was replaced by the American Community Survey (ACS), an ongoing survey that provides data every year, because Congress was concerned about rising costs and falling census response rates. In addition, Congress wanted more timely survey sample data for policy purposes, noting that decennial census data were out of date not long after their release and became less useful over time. The new ACS includes data on race, Hispanic origin, age, sex, income, disability, and housing characteristics.

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¹ Financial institutions were previously alerted to these changes in the Compliance Alert in the First Quarter 2012 issue of *Consumer Compliance Outlook* (<http://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2012/first-quarter/compliance-alert.cfm>).

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ENHANCING THE COMPLIANCE MANAGEMENT PROGRAM WITH COMPLAINT DATA

BY ANDREA SOVICH, SENIOR SUPERVISORY ANALYST, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

The purpose of a compliance management program is to identify, measure, monitor, and control the inherent compliance risks in a financial institution's products, services, business lines, and legal entities. While its sophistication and complexity will vary based on a financial institution's inherent risk factors, the program must be composed of the following key elements:

- Active board of directors and senior management oversight;
- Comprehensive policies, procedures, and training;
- Effective monitoring and testing; and
- Meaningful reporting.

This article focuses on the importance of integrating consumer complaint data into the key elements of a compliance management program. Some financial institutions use complaint data in a limited way by monitoring and reporting only total volumes; however, consumer complaints contain valuable information that can help an organization better understand its compliance risks and issues. Complaint data can be used to validate and strengthen controls and to identify high-frequency trends or individual complaints that may indicate significant compliance risk.

INTEGRATING CONSUMER COMPLAINT DATA INTO THE COMPLIANCE MANAGEMENT PROGRAM

Board and Senior Management Oversight

The board should exercise appropriate oversight of the financial institution's compliance management program and ensure that it is reasonably designed to prevent and detect compliance breaches and issues. The board should also oversee senior management's implementation of the program and appropriate and timely resolution of compliance issues. The board should exercise reasonable due diligence by reviewing reports on the effectiveness of the compliance management program.

Typically, the compliance officer is responsible for reporting on the effectiveness of the compliance management program. Compliance issues and risks derived from complaint analysis should be factored into the overall compliance assessment provided to the board.

The following example illustrates how omitting consumer complaint data can adversely affect the board's ability to provide adequate oversight of the compliance management program.

The financial institution's analysis of its consumer complaint data revealed that consumers had complaints about a product involving potentially unfair or deceptive acts or practices (UDAP); however, the institution continued to offer the product despite the complaints. When

providing its compliance report to the board, the financial institution did not discuss the UDAP issue identified from the complaint analysis. During the next consumer compliance examination, examiners cited the UDAP issue. Ultimately, the financial institution was required to stop offering the product, and its compliance rating was downgraded. In addition, the financial institution was required to strengthen the board's oversight of the compliance management program.

In this scenario, the financial institution was analyzing its complaint data and identified the potential UDAP concern. However, the UDAP issue was not included as a significant compliance issue in the report to the board, and the institution failed to take appropriate action once the UDAP issue was identified. The institution's failure to recognize the importance of the issue resulted in a lower compliance rating, the inability to offer the product, and a directive from examiners to improve board oversight.

Policies, Procedures, and Training

An effective compliance management program has comprehensive policies, procedures, and training to ensure that all employees and third-party providers are aware of consumer protection laws and regulations and to deter or prevent compliance violations. Tracking and analyzing consumer complaint data can help a financial institution determine if its controls are effective and may highlight the need to conduct additional employee training.

The following example shows how a financial institution can use consumer complaints to validate the effectiveness of its compliance controls.

A financial institution received consumer complaints about branch employees' asking for the signature of an applicant's spouse when the applicant requested individual credit and individually met the creditworthiness standards. Through its research and analysis of the consumer complaints, the financial institution determined that the procedures and training materials used by its branches did not include the spousal signature requirements under Regulation B. To remedy the situation, the financial institution revised the branch procedures and training materials and provided targeted training on the spousal signa-

ture requirements to its branch employees. For its next examination involving Regulation B, it will be important for the financial institution to demonstrate to examiners how it used the consumer complaint data to identify and correct the weakness in controls in its compliance management program.

In this scenario, the financial institution effectively analyzed its complaint data and took action to correct the issues. The financial institution determined the root cause of the complaints and remedied the ineffective control. While the financial institution violated Regulation B, the institution self-identified the violation through complaint analysis and was able to strengthen its compliance controls.

Monitoring and Testing

Self-identification and prompt remediation of compliance violations are critical. Compliance monitoring and testing are necessary to ensure that key assumptions used to measure and monitor compliance risk are reliable. Analyzing complaint data can help a financial institution identify weaknesses in its controls, compliance violations, and the need for enhanced targeted compliance testing.

The following example illustrates how a financial institution can use consumer complaints to validate the effectiveness of its compliance monitoring and testing efforts.

Through its analysis of consumer complaints, a financial institution learned that consumers complained about not receiving an adverse action notice. The financial institution, which had used a third-party provider, found that the adverse action notices had not been mailed. The financial institution also realized that it lacked a control to monitor the mailing of adverse action notices by the third-party provider. To correct the control weakness, the financial institution implemented a reconciliation report to compare the volume of adverse action notices that should be mailed versus the actual notices mailed by the third-party provider. In its next examination involving Regulation B, the financial institution should explain how it used its consumer complaint data to identify the violation and missing control and how the regulatory requirement will be monitored going forward.

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FURNISHERS' COMPLIANCE OBLIGATIONS FOR CONSUMER CREDIT INFORMATION UNDER THE FCRA AND ECOA

BY KENNETH BENTON, SENIOR CONSUMER REGULATIONS SPECIALIST, AND CASEY MCHUGH, ASSISTANT EXAMINER, FEDERAL RESERVE BANK OF PHILADELPHIA

INTRODUCTION

Consumer reports and credit scores have become an indispensable tool for creditors, not only when evaluating credit applications and setting credit terms and conditions but also during account review for existing accounts. Because the information that furnishers provide to consumer reporting agencies (CRAs) can have significant consequences for consumers, Congress created consumer protections for furnished information.

The two primary laws are the Fair Credit Reporting Act (FCRA), as implemented by Regulation V,¹ 12 C.F.R. Part 1022, and the Equal Credit Opportunity Act (ECOA), as implemented by Regulation B, 12 C.F.R. Part 1002. This article reviews furnishers' compliance obligations under the ECOA and the FCRA.

EQUAL CREDIT OPPORTUNITY ACT/REGULATION B Section 1002.10 of Regulation B imposes three obligations on creditors furnishing consumer credit information to the CRAs. First, a furnisher must designate accounts to reflect both spouses' participation in the following circumstances: for new accounts when the spouse is an authorized user or is liable on the account (except as a guarantor, surety, endorser, or similar party); and for existing accounts when one of the spouses makes a written request to reflect both spouses' participation on the account. In the latter situation, the furnisher must make the designation within 90 days after receiving the written request.²

Second, when an account is designated to reflect the participation of both spouses, the information must be furnished to the CRAs in a way that enables the CRAs to provide access to the information in the name of each spouse.³

Finally, when a creditor receives an inquiry about an account that reflects the participation of both spouses, the creditor must furnish the information in the name of the spouse for whom the request is made.⁴ For example, if the inquiry concerns an account on which a husband and wife both participate, and the inquiry specifically is about the wife, the creditor must provide the information in the wife's name.

The Official Staff Commentary to §1002.10 clarifies that these requirements only apply to consumer credit and only apply to furnishers if they choose to furnish information to the CRAs because furnishing such information is not required.⁵ Further, in furnishing information to the CRAs, furnishers are not required to distinguish between an account on which a spouse is a contractually liable party and one on which a spouse is an authorized user.⁶

Violations of these provisions subject furnishers to civil liability for actual and punitive damages,⁷ but if a furnisher fails to comply with §1002.10 because of an inadvertent error, there is no violation. Upon discovering the error, the furnisher must correct it

¹ Most of the furnisher requirements discussed in this article under §623(a) and (b) of the FCRA do not have implementing regulations, so furnishers must focus on the statutory requirements. Rules, guidance, and model notices relating to the furnisher provisions in §623(a)(7), §623(a)(8), and §623(e) are implemented in Subpart E and Appendixes B and E of Regulation V.

² 12 C.F.R. §1002.10(a)

³ 12 C.F.R. §1002.10(b)

⁴ 12 C.F.R. §1002.10(c)

⁵ Comment 1002.10-1

⁶ Comment 1002.10-3

⁷ 12 C.F.R. §1002.16(b)(1)

as soon as possible.⁸ Under ECOA, violations may, in some circumstances, be referred to the Department of Justice⁹ or the Department of Housing and Urban Development.¹⁰

FAIR CREDIT REPORTING ACT/REGULATION V

A 1996 amendment to the FCRA¹¹ created compliance obligations for furnishers under §623 of the FCRA.¹² According to a report of the Senate Committee on Banking, Housing and Urban Affairs, “[t]he driving force behind the changes was the significant amount of inaccurate information that was being reported by consumer reporting agencies and the difficulties that consumers faced getting such errors corrected. In fact, during the period leading up to the amendments, the FTC [Federal Trade Commission] consistently indicated that it received more complaints about consumer report errors than any other item.”¹³ Section 623, among other things, generally provides that a furnisher must not furnish inaccurate consumer information to a CRA, and that furnishers must investigate a consumer’s dispute of the completeness or accuracy of information after the furnisher receives notice from a CRA.

Duty to Provide Accurate Information: FCRA §623(a) Inaccurate Information. Section 623(a) prohibits furnishers from reporting information to a CRA if the furnisher “knows or has reasonable cause to believe that the information is inaccurate.”¹⁴ The statute defines “reasonable cause to believe that the infor-

mation is inaccurate” to mean “specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.”¹⁵

Duty to Correct and Update Information. A furnisher that regularly furnishes information to CRAs is also required to notify a CRA if it has determined that previously furnished information is not complete or accurate and to correct that information.¹⁶ For example, if a bank reports to a checking account verification service that a consumer’s account was closed with an outstanding negative balance, and the consumer subsequently paid off that balance, the bank would have a duty to report that the balance had been paid off.¹⁷

Duty to Provide Notice of Dispute. When a consumer disputes the completeness or accuracy of furnished information, the furnisher must note the dispute to the CRAs when furnishing the information.¹⁸

Duty to Provide Notice of Closed Accounts. Furnishers that regularly furnish information to CRAs must notify the CRAs when a consumer voluntarily closes a credit account.¹⁹ This information must be included in information regularly furnished for the period in which the account is closed. The legislative history indicates that this requirement is designed to complement the requirement in §605 of the FCRA that CRAs must indicate in a consumer report when a consumer

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⁸ 12 C.F.R. §1002.16(c)

⁹ 15 U.S.C. §1691e(g)

¹⁰ 15 U.S.C. §1691e(k)

¹¹ Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208, Div. A, Tit. II, Subtit. D, Ch. 1

¹² 15 U.S.C. §1681s-2

¹³ S. Rep. 108-166, at 5-6 (2003)

¹⁴ 15 U.S.C. §1681s-2(a)(1)(A)

¹⁵ 15 U.S.C. §1681s-2(a)(1)(D)

¹⁶ 15 U.S.C. §1681s-2(a)(2)

¹⁷ H.R. Rep. 102-692, at 39 (1992)

¹⁸ 15 U.S.C. §1681s-2(a)(3)

¹⁹ 15 U.S.C. §1681s-2(a)(4)

NEWS FROM WASHINGTON: REGULATORY UPDATES*

Board of Governors of the Federal Reserve System (Board) releases policy statement on rental of residential real estate. On April 5, 2012, the Board released a policy statement reiterating that banking organizations may rent residential properties acquired in foreclosure as part of an orderly disposition strategy. The foreclosed properties (also known as other real estate owned, or OREO) may be rented within statutory and regulatory limits, such as within legal holding-period limits, without demonstrating continuous active marketing of the property for sale, provided that suitable policies and procedures are followed. The policy statement also clarifies to the extent that OREO rental properties meet the definition of community development under the Community Reinvestment Act (CRA) regulations, the banking organization would receive favorable CRA consideration. The policy statement applies to banking organizations for which the Federal Reserve is the primary federal supervisor, including state member banks, bank holding companies, nonbank subsidiaries of bank holding companies, savings and loan holding companies, nonthrift subsidiaries of savings and loan holding companies, and U.S. branches and agencies of foreign banking organizations.

Consumer Financial Protection Bureau (CFPB) proposes rule for the protection of privileged information. On March 12, 2012, the CFPB announced a proposed rule that would specify protections for privileged information submitted to the CFPB by financial institutions it regulates. The rule will allow the CFPB to facilitate the flow of information between the CFPB and its supervised entities and is intended to assure supervised entities that providing privileged information to the CFPB will not adversely affect the confidentiality of such information. The rule clarifies that the CFPB's transfer of privileged information to another federal or state agency does not result in a waiver of any applicable privilege. The CFPB also advised institutions it supervises that submission of privileged information to the CFPB does not waive any applicable privilege with respect to third parties.

CFPB is now taking complaints about private student loans. On March 5, 2012, the CFPB announced that it is accepting complaints from borrowers who are having difficulties with private student loans. The CFPB will assist borrowers who are experiencing problems with taking out a private student loan, repaying a private student loan, managing student loans that have gone into default, and dealing with student

loans that have been referred to a debt collector. Prior to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), there was no federal supervisory program over nonbanks issuing student loans. That authority now belongs to the CFPB under the Dodd-Frank Act. Among its reforms, the law created a private student loan ombudsman to assist borrowers and review complaints. The CFPB anticipates receiving complaints about difficulties making full payment, confusing advertising or marketing terms, billing disputes, deferment, forbearance issues, debt collection, and credit reporting problems. The CFPB expects financial institutions to respond to complaints within 15 days with the steps they have taken or plan to take and expects complaints to be closed in 60 days.

CFPB is accepting complaints on checking accounts. On March 1, 2012, the CFPB began accepting consumer complaints about bank accounts, including checking accounts, savings accounts, CDs, and related services. The CFPB anticipates receiving complaints pertaining to opening, closing, and managing accounts; making deposits and withdrawals; using a debit or ATM card; making or receiving payments; and sending money to others, as well as problems related to low account funds.

Board releases action plans addressing residential mortgage servicing and foreclosure issues. On February 27, 2012, the Board released action plans for nine supervised financial institutions to correct deficiencies in residential mortgage loan servicing and foreclosure processing. The action plans were required by formal enforcement actions issued by the Board in 2011. The enforcement actions direct mortgage loan servicers regulated by the Board to submit acceptable plans that describe how the institutions will strengthen communications with borrowers by providing each borrower with the name of a primary point of contact at the servicer; establish limits on foreclosures where loan modifications have been approved; establish robust third-party vendor controls; and strengthen compliance programs.

The Board's enforcement actions also require the parent holding companies of the mortgage servicers to submit acceptable plans that describe how the companies will improve oversight of servicing and foreclosure processing conducted by bank and nonbank subsidiaries. The enforcement actions further require the mortgage servicing subsidiaries to provide appropriate remediation to borrowers who suffered financial injury resulting from errors by the servicers. The Board's actions follow



reviews in which examiners found unsafe and unsound processes and practices in residential mortgage loan servicing and foreclosure processing at a number of supervised institutions. The Board will closely follow the implementation of the action plans to ensure that the financial institutions correct deficiencies and evaluate any harm that was done to homeowners in the foreclosure process in 2009 and 2010.

CFPB launches inquiry into overdraft practices. On February 22, 2012, the CFPB launched an inquiry into checking account overdraft programs to determine how these practices affect consumers. The CFPB is also seeking public input on a prototype “penalty fee box” disclosure for checking account statements that would highlight the amount overdrawn and total overdraft fees charged. For point-of-sale debit card and ATM transactions, Board regulations that became effective in 2010 prohibit a bank from charging the overdraft fee unless the consumer has opted in. Banks can charge an overdraft fee without a consumer opt-in for checks, online bill payment, and recurring debits. The average overdraft fee ranged from \$30 to \$35 in 2011 and has increased by 17 percent over the past five years, according to various industry sources. A study by the Federal Deposit Insurance Corporation published in 2008 found that consumers who overdraw 20 or more times per year paid an average of \$1,610 in overdraft fees annually. The CFPB includes data requests sent to a number of banks and a request for public comment. The inquiry focuses on transaction re-ordering that increases consumer costs, missing or confusing information, misleading marketing materials, and disproportionate impact on low-income and young consumers.

CFPB proposes rule to supervise larger participants in consumer debt collection and consumer reporting markets. On February 16, 2012, the CFPB announced a proposed rule to include debt collectors and consumer reporting agencies under its nonbank supervision program. The Dodd-Frank Act authorizes the CFPB to supervise nonbanks in the specific markets of residential mortgage origination, payday lending, and private education lending and also to supervise “larger participants” in other markets for financial services. The Dodd-Frank Act directs the CFPB to conduct a rulemaking to define “larger participants.” Under the proposed rule, debt collectors with more than \$10 million in annual receipts from debt collection activities would be subject to supervision. The CFPB estimates that the proposed rule would cover approximately 175 debt collection firms representing 4 percent of debt collection

firms that account for 63 percent of annual receipts from the debt collection market. Consumer reporting agencies with more than \$7 million in annual receipts from consumer reporting activities would be subject to supervision. Based on available data, this would include approximately 7 percent of consumer reporting agencies that account for about 94 percent of the annual receipts of consumer reporting agencies. The comment period closed on April 17, 2012.

CFPB seeks input on draft monthly mortgage statement. On February 13, 2012, the CFPB published a draft monthly mortgage statement designed to make it easier for homeowners to understand their loans and avoid unnecessary costs and fees. The Dodd-Frank Act requires most mortgage borrowers to receive periodic statements containing specified information and requires the creditor, the assignee, or the mortgage servicer to provide the statements. The statement must include information about the principal loan amount, the current interest rate, the date on which the interest rate may next reset, a description of any late payment and penalty fees, information about housing counselors, and a telephone number and e-mail address that may be used to contact the mortgage servicer. The CFPB also posted the prototype online to solicit general feedback from consumers, industry stakeholders, and other interested parties. Later this year, the public will have an opportunity to provide comments on a version of the draft model form.

CFPB releases mortgage origination examination procedures. On January 11, 2012, the CFPB announced a key initial step in implementing its nonbank supervision program by providing examination procedures for mortgage originations. The procedures are a field guide for CFPB examiners reviewing mortgage originators in both the bank and nonbank sectors of the industry. The product-specific procedures are an extension of the CFPB’s general supervisory and examination manual. The procedures outline the CFPB’s supervisory approach to ensure that mortgage originators, lenders, and brokers comply with federal consumer financial laws. The procedures describe the types of information that examiners will gather to evaluate mortgage originators’ policies and procedures, assess whether originators comply with applicable laws, identify risks to consumers throughout the mortgage origination process, and track key mortgage originator activities, from initial advertisements and marketing practices to closing practices.

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

ON THE DOCKET: RECENT FEDERAL COURT OPINIONS*

REGULATION Z – TRUTH IN LENDING ACT (TILA)

Rescission lawsuit must be filed within three years and cannot be extended by agreement. *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012). The Ninth Circuit affirmed the dismissal of a lawsuit seeking rescission of a mortgage loan because the case was filed more than three years after consummation. The plaintiff obtained a mortgage loan in April 2006 and sought to rescind it in January 2008 because the lender allegedly failed to disclose when the right to cancel expired, which would extend the rescission period for up to three years under §1635(f) of TILA. The lender responded that its rescission notice was proper and rejected the rescission request. The parties continued to discuss the issue, and the plaintiff alleged that the lender agreed to extend the rescission period. On August 28, 2009, more than three years after consummation, the plaintiff filed a lawsuit seeking to rescind the loan. The Ninth Circuit found that “rescission suits must be brought within three years from the consummation of the loan, regardless of whether [the] notice of rescission is delivered within that three-year period” and that the parties cannot extend this period by agreement. Because the lawsuit was filed after the three-year period, the court affirmed the dismissal of the case.

On a related note, a similar issue is pending before the Tenth Circuit in *Rosenfield v. HSBC Bank, USA*. The Consumer Financial Protection Bureau (CFPB) filed a friend-of-the-court brief in support of the consumer in this appeal. The brief argues that when the right of rescission is extended to three years because the creditor failed to provide the notice of right to cancel or material disclosures, the consumer effectuates rescission under TILA’s statutory language and Regulation Z by sending written notice to the creditor and is not required to file a lawsuit within three years to preserve the right. The brief specifically mentions the Ninth Circuit’s decision in *McOmie-Gray* and says the case was wrongly decided. The brief also indicates that this issue is pending before the Third, Fourth, and Eighth Circuits and that the CFPB intends to file briefs with those courts, too.

Creditors must allow mortgage borrowers to retain a signed copy of the rescission notice. *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787 (9th Cir. 2011). The Ninth Circuit reversed the dismissal of a lawsuit seeking to rescind a mortgage loan because the lender showed the borrowers a notice of the right to cancel with inaccurate and incomplete information and did not allow them to retain a copy. The non-English-speaking immigrant plaintiffs alleged that they were pressured by a mortgage broker to sign documents printed in English that they could not understand for a \$50,000 cash-out mortgage. They also alleged that after signing the documents, they were allowed to view the rescission notice but not allowed to retain a copy. They attempted to rescind the loan a few days later, but the creditor said it was too late. The trial court dismissed the lawsuit because the plaintiffs signed a form acknowledging receipt of the rescission notice. The Ninth Circuit reversed, holding that the acknowledgment form only creates a rebuttable presumption that the borrowers received the required disclosures. In particular, the court noted that if the plaintiffs’ allegation were true that they were shown the rescission notice and asked to sign it but not allowed to retain two copies, the creditor would have violated 12 C.F.R. §1026.23(b)(1) by failing to deliver two copies of the rescission notice, thus extending the rescission period for up to three years from consummation. The case was remanded for further proceedings.

FEDERAL ARBITRATION ACT (FAA)

The Eleventh Circuit upholds arbitration clauses of two banks in the overdraft fee litigation. *Hough v. Regions Financial Corp.*, 672 F.3d 1224 (11th Cir. 2012) and *Buffington v. SunTrust Bank, Inc.*, 2012 WL 660974



(11th Cir. Mar. 1, 2012). In two separate decisions, the Eleventh Circuit ordered the named plaintiffs in class-action lawsuits concerning overdraft fees against Regions Bank (Regions) and SunTrust Bank (SunTrust) to arbitrate their claims. Beginning in 2009, the federal Judicial Panel on Multidistrict Litigation consolidated more than 30 overdraft fee lawsuits into a single case, *In Re: Checking Account Overdraft Litigation* (MDL No. 2036), for purposes of resolving common pre-trial issues. The lawsuits challenge overdraft fee practices, including the practice of processing checks and debit transactions from highest to lowest to maximize overdraft fees. Regions and SunTrust each filed separate motions to compel arbitration, which were denied, but the banks renewed their motions after the Supreme Court's arbitration decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The district court denied the renewed motions, and the banks appealed.

In the *Regions* case, the district court ruled that the arbitration clause was substantively unconscionable because it allowed Regions to recover its arbitration expenses if it prevailed without providing a similar right to its customers. The district also ruled that the clause was procedurally unconscionable because it was not conspicuous and did not allow customers to opt out of the arbitration. On appeal, the Eleventh Circuit reversed the district court and upheld the arbitration clause. The Eleventh Circuit determined that the clause was conspicuously displayed on the second page of the account agreement in uppercase letters that were in bold and underlined and that the other provisions noted by the district court did not render the arbitration provision unconscionable under state law. Similarly, in the *SunTrust* appeal, the Eleventh Circuit held that the provisions in SunTrust's arbitration clause allowing it to recover its attorney's fees if it prevailed and to collect that amount as a set-off against the customer's account were not unconscionable under state law. Both cases were remanded to the lower court with instructions to compel arbitration.

FAIR CREDIT REPORTING ACT (FCRA)

A receipt displaying a credit card's expiration month violates the FCRA but did not constitute an intentional violation justifying statutory and punitive damages. *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371 (3d Cir. 2012). The Third Circuit affirmed the dismissal of a class-action lawsuit seeking statutory and punitive damages for a violation of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). Under the FACT Act, which amended the FCRA, merchant credit and debit card receipts cannot display a card's expiration date or more than the last five digits of the card number. See 15 U.S.C. §1681c(g)(1). The plaintiff purchased clothes at a Tommy Hilfiger store and received a receipt that displayed the month (but not the year) in which his card expired. The Third Circuit determined that printing the month in which a card expires, even if the year is not displayed, violates §1681c(g)(1) because had Congress intended to allow for the disclosure of partial expiration date information, it would have specified this as it did by allowing partial disclosure of the card number on receipts. However, the plaintiff did not allege any actual damages as a result of this violation and was instead seeking statutory and punitive damages, which are available only for a willful FCRA violation. Under the Supreme Court's decision in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), only an "objectively unreasonable" interpretation of the FCRA qualifies as a willful violation. The Third Circuit found that while it rejected Hilfiger's defense that printing a card's expiration month without the expiration year does not violate §1681c(g)(1), this interpretation was not objectively unreasonable because the statute does not define "expiration date" and no authoritative court decisions have addressed this issue.

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

THE 2010 CENSUS DATA AND ITS IMPACT ON HMDA, CRA, AND FAIR LENDING COMPLIANCE

FFIEC INFORMATION

Key dates for the 2010 census data are:

- Summer 2011: The Census Bureau released 2010 decennial census race and ethnicity data using 2010 tract boundaries.
- December 2011: The Census Bureau released its 2006-2010 ACS estimates.
- January 2012: HMDA reporters started using 2010 census tract identifiers for 2012 HMDA- and CRA-reportable loans, and the FFIEC updated its geocoding system using 2010 street address/census tract correspondence.
- March 2012: Reporters submitted 2011 HMDA and CRA data using 2000 census tracts and income.
- June 2012: The FFIEC released an updated census demographic file, including revised median family income estimates, population and housing characteristics, population counts by race and ethnicity, percent minority, and median age of housing stock.

Additionally, the 2010 Office of Management and Budget's Standards for Delineating Metropolitan and Micropolitan Statistical Areas are currently scheduled to be released in 2013.²

The FFIEC also announced that it will use the 2006-2010 five-year estimate data from the ACS to create a new census data "base" file. The file data are used to provide context for HMDA and CRA data.³ Although the five-year data estimate is updated as a rolling average on an annual basis, the FFIEC will only update the base file every five years. The 2010 census data have resulted in many new census tracts as well as the redefinition of the boundaries of some existing tracts. Updating the base file every five years will minimize the compliance burden that would result from more frequent updates and provide more up-to-date data

than decennial updates, which institutions can use in their compliance programs and to monitor demographic changes in the markets they serve.

Finally, the FFIEC announced that beginning in 2012 it will calculate the annual median family income (MFI) data previously calculated by the U.S. Department of Housing and Urban Development. The 2012 MFI data will incorporate the ACS data and will be referred to as FFIEC MFI data. The MFI data using ACS data were released in June 2012.

IMPLICATIONS OF THE 2010 CENSUS DATA FOR HMDA, CRA, AND FAIR LENDING

HMDA Data

The new 2010 census data include changes in the number of census tracts and changes to census tract boundaries. Because HMDA requires lenders to report the property location of HMDA-reportable loans by census tract, institutions relying on third-party or proprietary geocoding systems should ensure that their programs have been updated to reflect the current census data. The Board of Governors of the Federal Reserve System (Board) recently released a Consumer Affairs (CA) letter⁴ addressing examination issues related to the 2010 census data. The CA letter discusses the use of 2010 census data for financial institutions subject to CRA evaluations by the Federal Reserve. For HMDA data collection, the letter indicates that beginning January 1, 2012, institutions must collect 2012 HMDA data using the updated 2010 census tract information, as indicated in the FFIEC 2010 Census Update Notice.

CRA Performance Evaluations

Census Tract Changes. CRA examiners evaluate a financial institution's performance in meeting the credit needs of low- and moderate-income areas based on demographic information provided by the census,

² <http://www.Census.gov/population/metro/>

³ "FFIEC Announces the Use of American Community Survey Data in Its Census Data Files" (October 19, 2011). Available at http://www.ffiec.gov/press/pr101911_ACS.htm

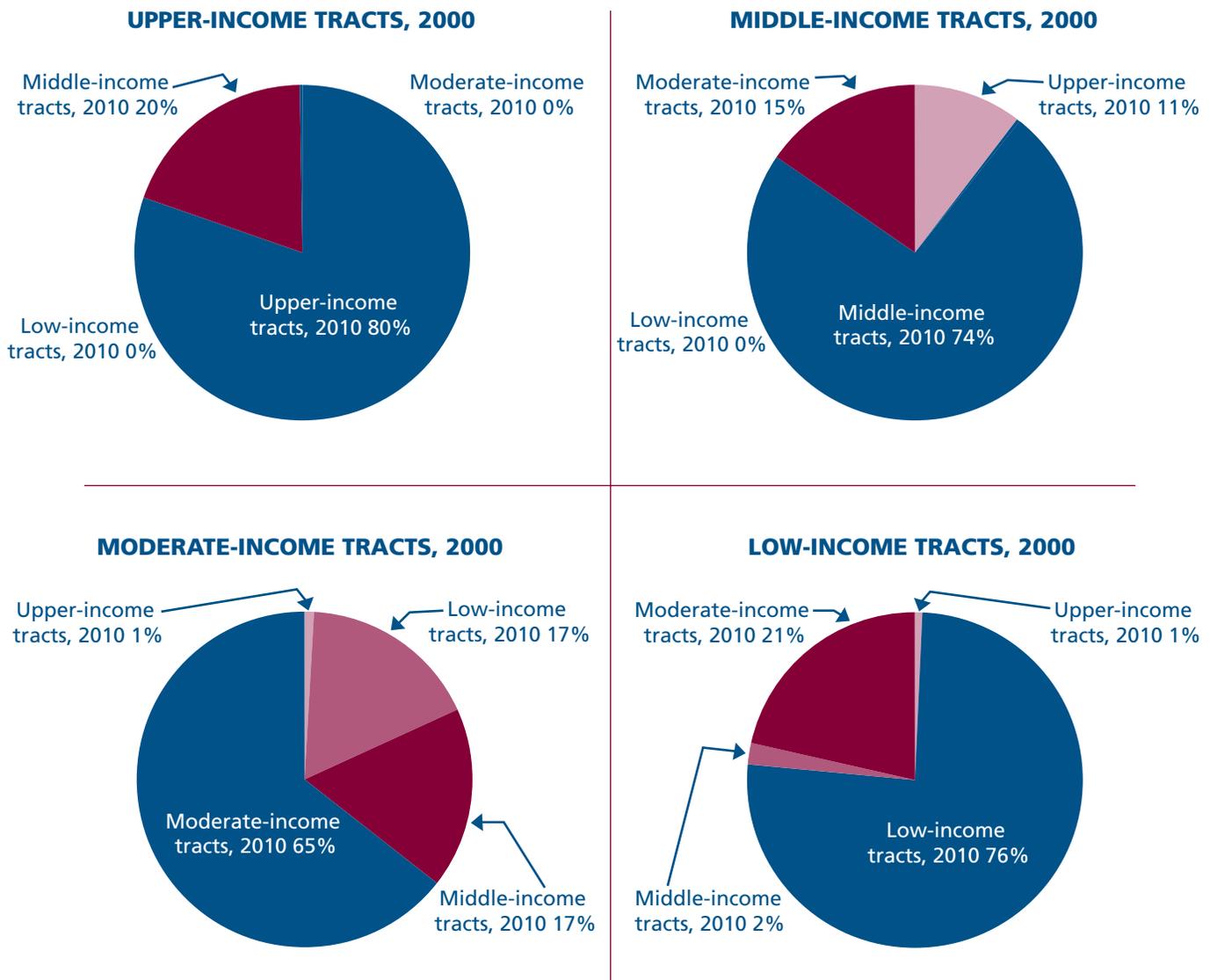
⁴ See CA Letter 12-4 (April 23, 2012). <http://www.federalreserve.gov/bankinforeg/caletters/caltr1204.htm>. Consumer Affairs letters address significant policy and procedural matters related to the Federal Reserve System's consumer compliance supervisory responsibilities.

which identifies census tracts as upper, middle, moderate, or low income. Changes in tract designations from low or moderate income to middle or upper income, or the reverse, could have a major impact on an institution's CRA profile. For example, a bank may see changes to the distribution of its branch locations across tracts of different income categories. A branch previously in a census tract designated as moderate income may now be a middle-income tract or vice versa. The same may hold true for community development investments originally made in a moderate-income tract that is now designated as middle income.

Figure 1 depicts for each income category of census tract the relative degree of stability or change in income classification from the 2000 to the 2010 census.

(For this analysis, the data were restricted to those census tracts that had little or no change in their boundaries.) For example, the pie chart labeled "Upper-Income Tracts, 2000" shows the highest degree of stability, with 80 percent of tracts remaining upper income, while 20 percent of upper-income tracts moved to the middle-income classification in the 2010 census. The pie chart labeled "Moderate-Income Tracts, 2000" conveys the least stability, with 35 percent of the tracts shifting to a different income classification in 2010. In particular, 17 percent of the tracts that were moderate income in the last census moved to the low-income classification, while 1 percent of those tracts moved to an upper-income classification. The effect of these changes on any particular market may vary widely, so it is important for financial institutions

FIGURE 1. TRANSITION EFFECTS OF THE REVISED 2010 CENSUS DATA ON CENSUS TRACTS



to analyze how the changes affect the specific assessment areas they serve.

One important question raised by the census changes is their effect on CRA consideration for multi-year investments. For example, suppose a financial institution, in 2008, made a qualified CRA investment that spanned five years. When the investment was made, it qualified for CRA consideration because of its location in a low- or moderate-income tract, as defined by 2000 income tract data. The 2010 census reveals that the area is no longer low or moderate income, but middle income. How is the financial institution's investment considered under a CRA evaluation conducted in 2013?

COMMUNITY DEVELOPMENT INVESTMENTS MADE IN LOW- OR MODERATE-INCOME CENSUS TRACTS WILL CONTINUE TO QUALIFY FOR CRA CONSIDERATION EVEN WHEN THE INCOME DESIGNATION OF THE TRACT CHANGED AS A RESULT OF THE 2010 CENSUS.

CA Letter 12-4 discusses the effect of the census changes on CRA performance evaluations. The letter makes it clear that “the eligibility of a loan, investment, or service as a community development activity is based on demographic information available to the bank at the time the activity is undertaken” (emphasis added). Community development investments made in low- or moderate-income census tracts will continue to qualify for CRA consideration even when the income designation of the tract changed as a result of the 2010 census.

The changes in the income designations of particular tracts have a more immediate impact on the evaluation of lending performance, however. Figure 2 displays the national distribution of loans reported for 2010 based on the census tract income classifications using 2000 census data and what percentage of those loans would be in tracts of a different income level using the 2006-2010 ACS data.

An analysis of the data indicates that 24 percent of 2010 loans made in moderate-income tracts, as defined by the 2000 census (reflected in the pie chart “Loans in Moderate-Income Tracts, 2000”), would have been in either a middle- or upper-income census tract using the 2010 census data. Although it is a shift of lesser magnitude, 2010 census definitions resulted in 9 percent of 2010 loans defined in the 2000 census as low-income tracts being in either a middle- or upper-income tract. Significantly less movement among the tract income classifications occurs at the higher end of the income spectrum. Most of the loans in middle-income tracts as defined by the 2000 census would remain in such a tract or be classified as a loan in an upper-income tract under the 2010

tract definitions. Under the 2010 tract definitions, all loans in upper-income tracts would be considered upper or middle income.

Examination Guidance. CA Letter 12-4 discusses the use of 2010 census data for financial institutions subject to CRA evaluations by the Federal Reserve. Beginning January 1, 2012, institu-

tions must collect 2012 HMDA and CRA loan data using the updated 2010 census tract information. CRA examiners will rely on the 2000 census data to assess lending performance in 2011 and the 2010 census data to assess lending performance in 2012 and subsequent years.

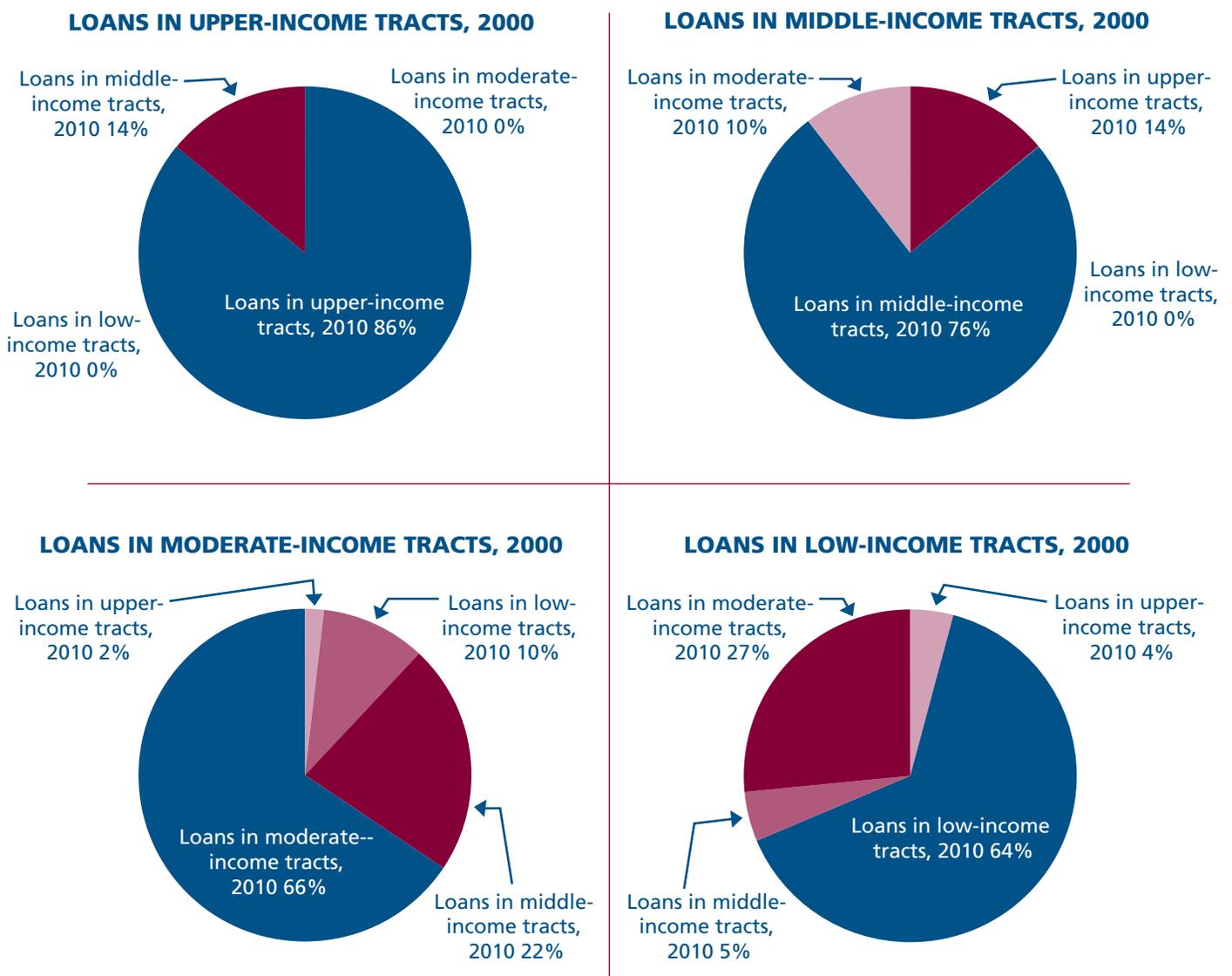
Examiners will also review bank assessment area designations to verify that financial institutions adequately adjusted their assessment areas based on differences in the census tract delineations under the 2010 census data. Bankers should identify any changes to their assessment area(s) and determine whether they need to change their approach to marketing and lending as a result of changes in census data. The income-level categories assigned to census tracts are a part of the performance context that is considered when the bank's performance is reviewed. Examiners will consider any changes to income-level categories as they review and evaluate the performance of

a bank and its peers or similarly situated institutions using the appropriate census data.

Assessment Areas and Branches. In 2010, the number of overall census tracts in the country increased by more than 11 percent. While some financial institutions may have experienced little change in the tract configuration of their assessment areas, for others, the changes could be considerable. Therefore, when re-examining existing assessment areas, institutions should include a review of the location of branches

to ensure that assessment area boundaries reflect census tracts based on the latest data. Further, when financial institutions review their assessment areas, they should evaluate the boundaries according to the more recent census data to be sure they are not inadvertently excluding any census tracts. The implementing regulation for the CRA specifically prohibits a financial institution from “arbitrarily exclud[ing] low- or moderate-income geographies, taking into account the bank’s size and financial condition.” See 12 C.F.R. §228.41(e)(3).⁵

FIGURE 2. TRANSITION EFFECTS OF THE REVISED 2010 CENSUS DATA ON LENDING



⁵ Regulation BB, 12 C.F.R. Part 228 is the Board’s CRA implementing regulation for the institutions it supervises. The other federal banking agencies’ CRA implementing regulations are substantially similar: 12 C.F.R. Part 25 for institutions examined by the Office of the Comptroller of the Currency and 12 C.F.R. Part 345 for institutions examined by the Federal Deposit Insurance Corporation.

Demographic Changes. Demographic changes will also have an impact on CRA assessment area profiles. For example, the 2010 census indicates a rapidly aging population,⁶ with more people 65 years and older than in any previous census. This could have CRA implications because credit needs may change as individuals age. When a trend appears across an entire community, it can drive business decisions about the mix of products and services offered. The aging of America, however, is just one demographic change that can represent both a challenge and an opportunity for financial institutions as they develop strategies for meeting their CRA obligations. Financial institutions will want to continually evaluate credit needs in their assessment areas in the context of demographic changes to ensure that their products continue to meet these needs.

Fair Lending Evaluations

Fair lending analysis incorporates the use of census tract minority-level data. The 2010 census data reveal significant changes in minority-level data since the 2000 census. For example, according to the Census Bureau's "Overview of Race and Hispanic Origin: 2010," about 10 percent (348 of 3,143) of U.S. counties are now majority-minority.⁷ Majority-minority states include California, Hawaii, New Mexico, and Texas, and the District of Columbia.⁸

The overall population increased by 27.3 million, from 281.4 million in 2000 to 308.7 million in 2010. Approximately 56 percent of that change resulted from an increase in the Hispanic population, which increased from 35.3 million in 2000 to 50.5 million in 2010.⁹ The Asian population also experienced a large change, growing from 10.2 million in 2000 to 14.7 million in 2010, a 43.3 percent increase.¹⁰ According

to the Census Bureau's report on "The Black Population: 2010," the black population grew in all four regions of the country, growing from 34.6 million in 2000 to 38.9 million in 2010, led by growth of 18 percent in the South and the West.¹¹

The Board relies on census tract data to identify lending disparities. This issue was discussed in a recent *Outlook* article on fair lending, which noted: "For both mortgage and nonmortgage products, [the Board] also uses census data to identify majority-minority census tracts and to determine whether disparities exist between minority and nonminority areas." (See "Fair Lending Webinar Questions and Answers," *Consumer Compliance Outlook*, First Quarter 2012.) The article also noted that census tract data are used in a redlining review to measure how a creditor's lending in minority tracts compares with other creditors' lending in those tracts.

Financial institutions should examine whether the minority composition of their assessment areas changed from the 2000 to the 2010 census. For example, if a portion of an institution's assessment area now contains significant minority populations according to 2010 census data, the institution should re-evaluate its redlining risk. Issues to consider include whether the institution has updated its marketing to reflect the minority population changes in the affected assessment area or whether there are gaps in credit extended to qualified minority applicants that need to be evaluated and addressed.

Figure 3 depicts the extent of such changes at the national level. For example, overall, 29 percent of the tracts that were low minority in 2000 (less than 10 percent minority population) are now moderate-minority tracts,

⁶ According to the census report on "Age and Sex Composition: 2010," growth by age bracket from 2000 to 2010 varied dramatically, with growth rates of 2.6 percent (under age 18), 0.6 percent (age 18-44), 31.5 percent (age 45-64), and 15.1 percent (age 65 and older) <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. Between 2000 and 2010, the population 65 years and older increased at a faster rate (15.1 percent) than the total U.S. population (9.7 percent). According to the census report on "The Older Population: 2010," in 2010 there were 40.3 million Americans 65 and older, up 5.3 million from the 2000 census. See <http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>

⁷ <http://www.Census.gov/prod/cen2010/briefs/c2010br-02.pdf>, p. 19.

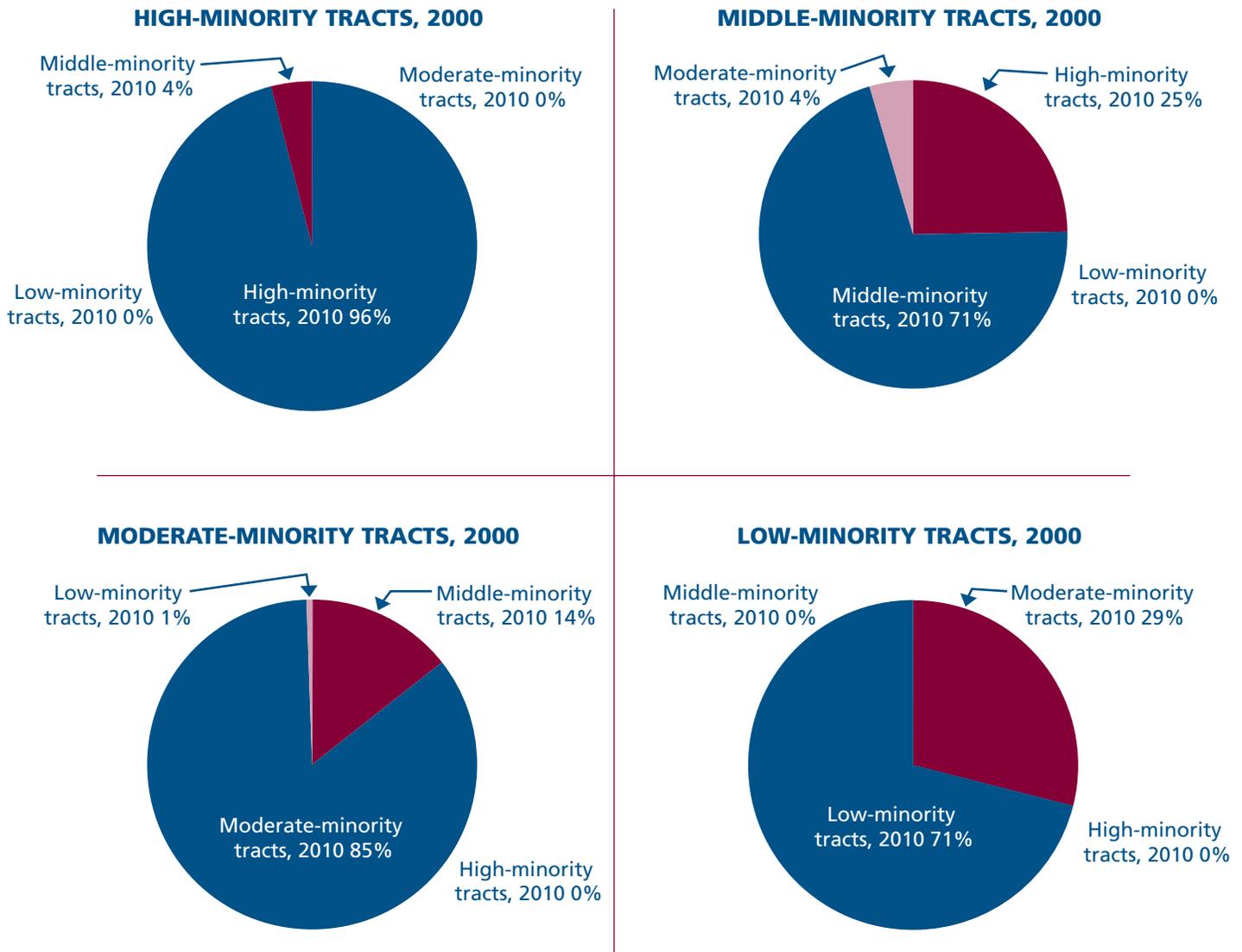
⁸ <http://www.Census.gov/prod/cen2010/briefs/c2010br-02.pdf>, p. 19.

⁹ <http://www.Census.gov/prod/cen2010/briefs/c2010br-02.pdf>, p. 3.

¹⁰ <http://www.Census.gov/prod/cen2010/briefs/c2010br-02.pdf>, p. 5.

¹¹ <http://www.Census.gov/prod/cen2010/briefs/c2010br-06.pdf>, p. 7.

FIGURE 3. TRANSITION EFFECTS OF THE REVISED 2010 CENSUS DATA ON CENSUS TRACTS



while 25 percent of the tracts that were middle minority in 2000 are now high-minority tracts (more than 80 percent minority population).

CONCLUSION

The 2010 census data will affect the delineation of census tracts and assessment areas as well as demographic information relating to income, race, and ethnicity. These changes may affect an institution's

ability to receive CRA credit for community development activities as well as its fair lending assessments. Therefore, institutions should evaluate how census tract changes in their lending areas may affect their fair lending and CRA performance and implement any changes needed to lessen any potential fair lending risk and ensure satisfactory CRA performance going forward. Specific issues and questions should be raised with your primary regulator. ©

ENHANCING THE COMPLIANCE MANAGEMENT PROGRAM WITH COMPLAINT DATA

In this scenario, the financial institution effectively analyzed its complaints, from which it learned that customers were not receiving adverse action notices. The financial institution also realized that it did not have a control in place to ensure that its third-party provider was meeting the mandated timeliness requirement. Prompt action was taken to remedy the deficiency in controls. In addition, the financial institution can demonstrate that the violation was self-identified and how it will monitor compliance with its third-party provider.

Reporting

Consumer complaint data should be tracked, analyzed, and reported to communicate potential areas of concern to business lines and management. Financial institutions should develop a way to track important information that will enable analysis and identification of trends and high-risk issues.

Examples of complaint-tracking mechanisms range from basic spreadsheets to sophisticated databases. Complaint data can be tracked in various ways, such as (but not limited to) business line, legal entity, product type or service, complaint reason, law or regulation, and the disposition (i.e., violation, no violation). It is also important to note that even a single consumer complaint has the potential to lead to a broader review of certain products or practices. Financial institutions should also consider establishing a way to track and report complaints with serious allegations or high compliance risk, such as illegal credit discrimination, predatory lending, or unfair and deceptive acts or practices.

USING CONSUMER COMPLAINT DATA TO PREPARE FOR COMPLIANCE EXAMINATIONS

The Board of Governors of the Federal Reserve System (Board) considers complaint data to be a critical

component of its risk-focused supervisory program and uses it as a risk factor to assess a financial institution's compliance with consumer regulations.

While consumers complain directly to financial institutions, they also file complaints with institutions' regulators. Consumer complaints filed against state member banks with assets of \$10 billion or less, against bank holding companies, and against savings and loan holding companies¹ are investigated by the 12 regional Federal Reserve Banks. If the investigation reveals that a federal law or regulation has been violated, the consumer is informed of the violation and the corrective action the financial institution has been directed to take specific to the consumer's situation. If a broader pattern or practice is identified while investigating a consumer complaint, the Reserve Bank does not share it with the consumer; however, the Reserve Bank can use its enforcement tools with the financial institution, ranging from nonpublic actions to public cease and desist orders, to ensure that the financial institution takes appropriate action to address the issue.

The Board tracks and analyzes the data from the consumer complaints received. Examiners regularly review complaint data to determine the areas on which they should focus during the next scheduled consumer compliance examination or if a targeted examination is warranted.

Financial institutions are encouraged to regularly analyze their consumer complaint data to anticipate areas of potential examination focus and to avoid any surprises from their regulators. In addition, financial institutions can also obtain complaint statistics in the banking regulators' annual reports to Congress. The Board's annual report to Congress can be found at <http://www.federalreserve.gov/publications/annual-report/default.htm>.

¹ Effective July 21, 2011, the Consumer Financial Protection Bureau (CFPB) assumed supervisory authority, including investigating consumer complaints, for banks and affiliates with assets over \$10 billion with respect to certain enumerated consumer protection laws and regulations.

RECOGNIZING THE RELATIONSHIP BETWEEN CONSUMER COMPLAINTS AND NEW REGULATIONS

It is important for financial institutions to recognize that data about consumer complaints are also used to determine the need for future regulations. The Dodd-Frank Wall Street Reform and Consumer Protection Act specifically provides that “in order to support its rulemaking and other functions, the [Consumer Financial Protection] Bureau shall monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.”²

To comply with new regulations, the financial institution must integrate the new requirements into all aspects of its compliance management program. By analyzing complaint data, financial institutions can use the results to inform their legislative initiatives and proactively address problems before new legal requirements are imposed.

In addition, some consumers will seek assistance from members of Congress when attempts to resolve complaints with financial institutions are unsuccessful. Consumer complaints filed with Congress are carefully reviewed and referred to the appropriate banking regulators for investigation. Financial institutions should be aware that a consumer complaint filed with Congress can quickly evolve into a broader inquiry of consumer protection practices. For example, consumers often complained about various credit card practices such as payment allocation, the number of fees assessed, and arbitrary increases in the annual percentage rate. In response, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009,³ which implemented the most sweeping changes to the credit card industry in over 40 years.

Another example that demonstrates the impact of consumer complaints involves a \$5 monthly fee proposed by a large financial institution in late 2011 for customers using its debit card. A consumer who was upset with the fee organized an online petition to

eliminate the fee. Over 300,000 people signed the petition, and Congress quickly responded. A member of Congress asked the U.S. attorney general to investigate whether banks have illegally conspired to raise fees charged to consumers for banking services. The financial institution ultimately decided to listen to the consumer complaints and cancelled the proposed fee. Regardless of the legality of charging the fee, one consumer complaint had significant influence and impact.

FINANCIAL INSTITUTIONS SHOULD BE AWARE THAT A CONSUMER COMPLAINT FILED WITH CONGRESS CAN QUICKLY EVOLVE INTO A BROADER INQUIRY OF CONSUMER PROTECTION PRACTICES.

Regular analysis of consumer complaints can help a financial institution understand potential areas of scrutiny by banking regulators and Congress. If consumer complaints go unaddressed by financial institutions, the issues raised in the complaints may result in new laws, regulations, or guidance.

CONCLUSION

Analyzing consumer complaint data and appropriately addressing issues noted in complaints will enhance and strengthen a financial institution’s compliance management program. A wealth of information can be found in consumer complaint data, and one complaint could be the catalyst for an examination or further review. By analyzing complaint data, a financial institution can use the findings to regularly assess its compliance risk, validate its compliance controls, and provide a comprehensive compliance assessment to its board. A financial institution can also leverage its complaints to proactively prepare for regulatory examinations and to anticipate potential areas of congressional focus for future regulation. ©

² Section 1022(c)(1) of the Dodd-Frank Act, Pub. L. 111–203, 2010 (codified at 12 U.S.C. §5512(c)(1))

³ Pub. L. 111–24 (2009)

FURNISHERS' COMPLIANCE OBLIGATIONS FOR CONSUMER CREDIT INFORMATION UNDER THE FCRA AND ECOA

voluntarily closes an account²⁰ and to “ensure that an account closed by a consumer does not lead to the incorrect assumption by credit grantors reviewing the consumer’s consumer report that the account was closed because the consumer failed to meet its terms. Such an assumption could result in the denial of credit to a consumer.”²¹

Duty to Provide Notice of Delinquency of Accounts. When an account is placed for collection, is charged to profit or loss, or a similar action is taken, and that delinquency is furnished to a CRA, the furnisher must notify the CRA of the date of delinquency on the account no later than 90 days after furnishing the information.²² This date is the month and year the account first becomes delinquent, not when the creditor places the account for collections, charges the account to profit or loss, or takes a similar action. For example, if an account became delinquent in January 2010 but the creditor waited until April 2010 to sell it to a collection agency, the “date of delinquency” is January 2010. See S. Rep. 104-185, at 49-50 (1995).

Identity Theft. Furnishers are required to maintain reasonable procedures to respond to notifications from the CRAs under §605B relating to information resulting from identify theft in order to prevent the refurnishing of this information. In addition, when a consumer submits an identity theft report to a furnisher indicating that furnished information resulted from identity theft, the furnisher may not report the information to the CRAs unless the furnisher subsequently knows or is informed by the consumer that the information is correct.²³

Negative Information. If a financial institution that extends credit and regularly furnishes information to a nationwide CRA furnishes negative information to the CRAs about a consumer credit extension, it must provide a clear and conspicuous written notice to the consumer indicating that it furnished negative information to the CRAs. The notice must be provided to the consumer no later than 30 days after furnishing the negative information. After providing the notice, the financial institution is not required to send the consumer additional notices if it furnishes additional negative information to the CRAs about the same transaction, credit extension, account, or consumer.²⁴ Two model forms (“Furnishing Negative Information”) are available in Appendix B of Regulation V. Appropriate use of one of the two model notices in Regulation V provides a safe harbor for complying with the notice requirement in §623(a)(7). See Appendix B of Regulation V.

Furnishers’ Investigation of Disputes Filed with CRAs: §623(b)

In addition to establishing accuracy requirements, the FCRA requires furnishers to investigate consumer disputes filed with the CRAs about information the furnishers provided. Note that this requirement under §623(b) applies only to disputes that consumers file *with the CRAs*, which the CRAs forward to the furnisher. Congress amended the FCRA in 2003 with the Fair and Accurate Credit Transactions Act (FACT Act), which established a furnisher’s obligation to investigate disputes that consumers file directly with the furnisher.²⁵ Those direct dispute requirements, which became effective July 1, 2010, are discussed later in the article.

²⁰ S. Rep. 104-85, at 50 (1995)

²¹ H.R. Rep. 103-486, at 41 (1994)

²² 15 U.S.C. §1681s-2(a)(5)

²³ 15 U.S.C. §1681s-2(a)(6)

²⁴ 15 U.S.C. §1681s-2(a)(7)

²⁵ FACT Act Pub. L. 108-159, §312(c) (codified as amended at 15 U.S.C. §1681s-2(a)(8))

Investigation Procedures. Under §623(b)(1), when a furnisher receives notice from a CRA that a consumer disputes the completeness or accuracy of information the furnisher provided to the CRA, it must investigate the disputed information, review all relevant information provided by the CRA, and report the results of its investigation to the CRA. If the furnisher determines that the information it provided was incomplete or inaccurate, it must notify all nationwide CRAs to which the information was furnished of its findings.²⁶ Finally, if the furnisher determines that the disputed information is inaccurate or incomplete or cannot be verified, the furnisher must promptly modify or delete the information or permanently block the reporting of that information.²⁷ The furnisher generally has 30 days from the date the consumer filed the dispute with the CRA to complete its investigation and make appropriate notifications, but the investigation period may be extended an additional 15 days in some circumstances.²⁸

Additional Furnishers' Duties under the FACT Act

Section 312 of the FACT Act expands furnishers' affirmative duties concerning the accuracy and integrity of the information they furnish, contains a provision that allows consumers to file disputes directly with the furnishers, and specifies the procedures furnishers must follow in responding to direct disputes. In July 2009, the federal banking agencies and the Federal Trade Commission (FTC) issued a final rule implementing §312's requirements, which became effective July 1, 2010.²⁹ Because the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for most

sections of the FCRA to the Consumer Financial Protection Bureau (CFPB),³⁰ the §312 regulations are now under the jurisdiction of the CFPB, which republished them as CFPB regulations.³¹ See 12 C.F.R., Part 1022, Subpart E.

Accuracy and Integrity Requirements: §1022.42. Section 1022.42 requires furnishers to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the consumer information furnished to CRAs. "Accuracy" means that the information provided to a CRA by a furnisher correctly:

- identifies the appropriate consumer;
- reflects the account's terms and liability; and
- reflects the consumer's performance with respect to the account.³²

"Integrity" means the information provided to a CRA by a furnisher:

- is substantiated by the furnisher's records at the time it is furnished;
- is in a form designed to minimize the likelihood that the information may be incorrectly reflected in a consumer report; and
- includes information in the furnisher's possession that the CFPB has determined would likely be materially misleading in evaluating a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, if absent.³³ For open-end credit products, the credit limit (if any) is the one item of information the agencies have determined would likely be materially misleading if omitted.³⁴

²⁶ 15 U.S.C. §1681s-2(b)(1)(D)

²⁷ 15 U.S.C. §1681s-2(b)(1)(E)

²⁸ 15 U.S.C. §1681s-2(b)(2)

²⁹ 74 Fed. Reg. 31,484 (July 1, 2009). *Outlook* published an article discussing the final rule in the Third Quarter 2010 issue, "Furnisher Requirements Under the FACT Act 'Accuracy and Integrity' Implementing Regulations." This section of the article is based largely on the previous article.

³⁰ Dodd-Frank Act, §1088

³¹ 76 Fed. Reg. 79,308 (Dec. 21, 2011)

³² 12 C.F.R. 1022.41(a)

³³ 12 C.F.R. 1022.41(d)

³⁴ "Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies," Appendix E of Regulation V, C.F.R. Part 1022, section I.(b)(2)(iii)

The final rule includes guidelines for designing and implementing policies and procedures to comply with the accuracy and integrity requirements in Appendix E of Regulation V (“Interagency Guidelines Concerning the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies”). Under §1022.42(b), furnishers must consider the guidelines in developing policies and procedures and incorporate them as appropriate in light of the nature, size, complexity, and scope of the furnisher’s activities.

Direct Disputes Rule: §1022.43. The dispute provision in §623(b) discussed above only requires furnishers to investigate a consumer dispute that is filed with a CRA, which, in turn, would forward the dispute to the furnisher to investigate. When Congress passed the FACT Act in 2003, it allowed consumers to also file disputes directly with the furnisher.³⁵

Under the regulations implementing this provision, when a consumer files a direct dispute, a furnisher is required to investigate if the dispute relates to any of the following issues: (1) the consumer’s liability for a credit account or other debt with the furnisher; (2) the terms of a credit account or other debt with the furnisher; (3) the consumer’s performance or other conduct concerning an account or other relationship with the furnisher; or (4) any other information contained in a consumer report for an account or other relationship with the furnisher that bears on the consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.³⁶

The direct dispute rule does not apply if the dispute relates to the consumer’s identifying information, the identity of past or present employers, or inquiries or requests for a consumer report. It also does not apply to disputes relating to information that is

derived from public records, provided to a CRA by another furnisher, or related to fraud alerts or active duty alerts.³⁷

A furnisher is required to investigate the dispute only if the consumer submitted the dispute notice to one of the following addresses: (1) an address the furnisher provided and is listed on the consumer report; (2) an address the furnisher clearly and conspicuously identified for submitting direct disputes; or (3) if no address is specified, any business address of the furnisher.³⁸ The dispute notice must contain sufficient information to identify the account in dispute, the specific information being disputed, an explanation of the basis for the dispute, and all supporting documentation reasonably required by the furnisher to substantiate the basis of the dispute.³⁹

After receiving the dispute notice, the furnisher must determine whether to initiate an investigation or dismiss the dispute as frivolous or irrelevant. A dispute is frivolous or irrelevant if the dispute notice (1) does not contain sufficient information to investigate the dispute; (2) raises a dispute about information exempted from the rule; or (3) raises a dispute that is substantially the same as a dispute previously submitted by the consumer and resolved in accordance with the regulations. If the dispute is found to be frivolous or irrelevant, the furnisher has five business days to mail the consumer a notice of determination. The notice of determination must include the reasons for the determination and any information required to investigate the disputed information.⁴⁰

If the furnisher does not find the dispute frivolous or irrelevant, the furnisher must review all relevant information provided by the consumer in the dispute notice and conduct a reasonable investigation. The furnisher has 30 days from receipt of the dispute no-

³⁵ FACT Act, §312(c)

³⁶ 12 C.F.R. §1022.43(a)

³⁷ 12 C.F.R. §1022.43(b)(1)

³⁸ 12 C.F.R. §1022.43(c)

³⁹ 12 C.F.R. §1022.43(d)

⁴⁰ 12 C.F.R. §1022.43(f)(1)

tice (with the possibility for a 15-day extension under certain circumstances) to complete the investigation and report the results to the consumer.⁴¹ If the furnisher finds that the information reported was inaccurate, the furnisher must promptly notify each CRA to which it provided the inaccurate information of the determination and provide the changes necessary to make the information accurate.⁴²

⁴¹ 12 C.F.R. §1022.43(e)(3)

⁴² 12 C.F.R. §1022.43(e)(4)

CONCLUSION

Financial institutions that furnish information to the CRAs must have adequate policies and procedures in place to ensure that they are complying with these requirements, including procedures to periodically test systems to verify compliance. Specific questions should be addressed to your primary regulator. ©

COMPLIANCE ALERT

CONSUMER FINANCIAL PROTECTION BUREAU ISSUES GUIDANCE ON COMPENSATION TO LOAN ORIGINATORS

In September 2010, the Board of Governors of the Federal Reserve System (Board) issued a final rule under Regulation Z (Truth in Lending Act [TILA]) to prohibit certain practices related to compensation of mortgage loan originators. See 12 C.F.R. §226.36. The rule became effective April 6, 2011. Subject to certain narrow exceptions, the rule provides that no loan originator may receive, directly or indirectly, compensation that is based on the terms or conditions of a mortgage transaction except for the amount of credit extended. The Board also stated that the rule prohibits compensation based on a factor that serves as a proxy for a transaction's terms or conditions (such as a credit score). The Board clarified that for purposes of the rule, compensation includes salaries, commissions, and annual or periodic bonuses.

In July 2011, general rulemaking authority for most provisions of TILA transferred to the Consumer Financial Protection Bureau (CFPB). The CFPB has received inquiries about whether and how the loan originator compensation rules under Regulation Z apply to qualified profit sharing, 401(k), or employee stock ownership plans (qualified plans). Specifically, financial institutions asked if contributions can be made to qualified plans for their employees who are loan originators if the employers' contributions to such plans are derived from profits generated by mortgage loan originations. In response to these inquiries, on April 2, 2012, the

CFPB published Bulletin 2012-02 as guidance ("Payments to Loan Originators Based on Mortgage Transaction Terms or Conditions under Regulation Z, 12 C.F.R. §1026.36"), which is available at <http://bit.ly/CFPB-LOC>.

Qualified Plans

The CFPB's bulletin recognized that there has been some confusion on how the loan originator compensation rules apply to qualified plans. The CFPB anticipates issuing proposed rules for public comment in the near future to implement provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) concerning loan originator compensation. However, until final rules are issued under the Dodd-Frank Act, the CFPB believes that it is important to clarify how the compensation rules apply to qualified plans. To provide clarity at this juncture, the CFPB stated that employers could contribute to qualified plans out of a pool of profits derived from loan originations.

Nonqualified Plans

The CFPB also received questions about how the compensation rules apply to nonqualified profit-sharing plans. The CFPB expects to provide greater clarity on these arrangements in connection with its proposed rule to implement the loan originator compensation provisions of the Dodd-Frank Act.*

* The CFPB recently released an outline of the proposals under consideration for that rulemaking, including a discussion of employers' contributions to qualified and nonqualified retirement plans. The outline is available at: <http://bit.ly/CFPB-SBREFEA>.

CONSUMER COMPLIANCE RESOURCES

Listed below are important compliance resources for financial institutions. Links to these and additional resources are available on Consumer Compliance Outlook's web page at: <http://www.philadelphiafed.org/src/consumer-compliance-outlook/links.cfm>.

| RESOURCE | DESCRIPTION |
|--|--|
| <i>Consumer Financial Protection Bureau (CFPB)</i> | |
| CFPB Federal Register Notices | Listing of recent CFPB notices in the Federal Register |
| "Know Before You Owe" | Prototype mortgage forms to consolidate the Good Faith Estimate and Truth in Lending Act disclosures |
| CFPB Guidance Documents | Guidance documents from the CFPB |
| Supervision and Examination Manual | Three-part supervision and examination manual |
| CFPB's Regulations | Link to 12 CFR 1000 |
| CFPB rulemakings | Status of CFPB's rulemakings |
| <i>Dodd-Frank Wall Street Reform and Consumer Protection Act</i> | |
| Regulatory Reform (Federal Reserve Board) | Status of Dodd-Frank Act regulations issued by FRB |
| Dodd-Frank Act Regulatory Reform Rules (St. Louis Fed) | Status of Dodd-Frank Act implementing regulations |
| ABA Dodd-Frank Act Tracker | Status of Dodd-Frank Act implementing regulations |
| <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 Geocoding Page | Web-based geocoding system |
| <i>Flood Insurance — Regulation H</i> | |
| Interagency FAQs for flood insurance | Interagency Q&A regarding flood insurance (eff. 9/21/09) |
| Revised Interagency FAQs for flood insurance | Interagency Q&A regarding flood insurance (eff. 10/17/11) |
| FEMA's Mandatory Purchase of Flood Insurance Guidelines | FEMA requirements when purchasing flood insurance |
| FEMA's Flood Manual | FEMA's in-depth guidance for flood insurance |
| FEMA's Flood Insurance Regulation | FEMA's regulation about flood insurance coverage and rates |
| Floodsmart: FEMA's Flood Insurance Purchase Page | Information about FEMA's flood insurance program |
| FEMA Map Service Center | Property search for special flood hazard areas |
| <i>Real Estate Settlement Procedures Act (RESPA) — Regulation X</i> | |
| HUD's RESPA Page | Collection of RESPA resources |
| <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 CRA |
| CRA Examinations | Collection of resources for CRA examinations from the FFIEC |
| Banker's Quick Reference Guide to CRA | CRA guide from the Federal Reserve Bank of Dallas |
| <i>Fair Credit Reporting Act (FCRA)</i> | |
| 40 Years of Experience with the Fair Credit Reporting Act | An FTC staff report with summary of interpretations |
| <i>Servicemembers Civil Relief Act (SCRA)</i> | |
| Justice Department Servicemembers Civil Relief Act Page | Collection of SCRA resources |
| SCRA Examination Procedures | The Board's revised SCRA examination procedures |
| <i>Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)</i> | |
| UDAP by State-Chartered Banks | UDAP guidance from the Board and the FDIC (2004) |
| UDAP Examination Procedures | The Board's UDAP examination procedures |
| UDAAP Under §1031 of the Dodd-Frank Act | The CFPB's authority to prohibit UDAAP |
| CFPB's UDAAP Examination Manual | CFPB's UDAAP examination guidelines |

REGULATORY CALENDAR*

| Effective Date | Statute/ Implementing Regulation | Regulatory Change |
|----------------|----------------------------------|--|
| 2/7/2013 | Reg. E | Final rule on foreign remittance transfers |
| ** | SCRA | Interagency guidance on mortgage servicing practices for military homeowners |
| 1/21/2013 | Dodd-Frank Act | CFPB outlines expected rulemaking on mortgage servicing |
| 1/13/2013 | Dodd-Frank Act | CFPB considers rules to simplify mortgage points and fees |
| ** | Dodd-Frank Act | CFPB seeks comments on compliance costs of proposed and existing regulations |
| ** | Dodd-Frank Act | CFPB proposal for procedural rules for supervisory authority over nonbank covered persons |
| ** | Reg. E | CFPB seeks comments for rulemaking on general purpose reloadable cards |
| ** | Reg. Z | CFPB seeks further comment on Ability-to-Repay mortgage rule |
| ** | Regs. DD and E | CFPB extends comment period for requested information on impact of overdraft fees on consumers |
| ** | Dodd-Frank Act | CFPB makes consumer complaints available to the public |
| ** | Reg. Z | CFPB seeks public comment on amendment to Credit CARD Act regulation |
| ** | Dodd-Frank Act | CFPB proposal to define larger participants in debt collector and consumer reporting agency markets |
| 1/1/2012 | Reg. Z | Annual adjustment of fee-based trigger for HOEPA loans |
| 1/1/2012 | Regs. Z and M | Annual adjustment of dollar threshold for exempt consumer credit and lease transactions |
| 12/30/2011 | Reg. B | Interim final rule republishing Reg. B as a CFPB regulation, 12 C.F.R. part 1002 |
| 12/30/2011 | Reg. C | Interim final rule republishing Reg. C as a CFPB regulation, 12 C.F.R. part 1003 |
| 12/30/2011 | Reg. E | Interim final rule republishing Reg. E as a CFPB regulation, 12 C.F.R. part 1005 |
| 12/30/2011 | Regs. G and H | Interim final rule republishing Regs. G and H (SAFE Act) as CFPB regulations, 12 C.F.R. parts 1007, 1008 |
| 12/30/2011 | Regs. J, K, L | Interim final rule republishing Regs. J, K, and L (Interstate Land Sales Registration Program) as CFPB regulations, 12 C.F.R. parts 1010, 1011, 1012 |
| 12/30/2011 | Reg. M | Interim final rule republishing Reg. M as a CFPB regulation, 12 C.F.R. part 1013 |
| 12/30/2011 | Regs. N and O | Interim final rule republishing Regs. N (mortgage advertising) and O (mortgage relief services) as CFPB regulations, 12 C.F.R. parts 1014, 1015 |
| 12/30/2011 | Reg. P | Interim final rule republishing Reg. P as a CFPB regulation, 12 C.F.R. part 1016 |
| 12/30/2011 | Reg. V | Interim final rule republishing Reg. V as a CFPB regulation, 12 C.F.R. part 1022 |
| 12/30/2011 | Reg. X | Interim final rule republishing Reg. X as a CFPB regulation, 12 C.F.R. part 1024 |
| 12/30/2011 | Reg. Z | Interim final rule republishing Reg. Z as a CFPB regulation, 12 C.F.R. part 1026 |
| 12/30/2011 | Reg. DD | Interim final rule republishing Reg. DD as a CFPB regulation, 12 C.F.R. part 1030 |
| ** | 24 CFR Part 100 | HUD proposal for uniform standards for identifying disparate impact discrimination under the FHA |
| 10/17/2011 | Reg. H | Revised interagency Q&A regarding flood insurance and new proposed questions on forced placement |
| 10/1/2011 | Reg. II | Final rule on debit card interchange fees and network exclusivity arrangements |

*Links to the regulatory changes are available on the *Outlook* website at: <http://consumercomplianceoutlook.org>

**Rulemaking proposals generally do not have an effective date, except for some of the proposed Dodd-Frank Act implementing regulations because Congress specified the effective date in the legislation. Agency requests for information also do not have effective dates.

CALENDAR OF EVENTS

September 6, 2012

Compliance Risk Workshop
Office of the Comptroller of the Currency
Hilton St. Louis at the Ballpark
St. Louis, MO

September 13-14, 2012

2nd Annual Mortgage Regulatory Forum
American Banker
Renaissance Arlington Capital View Hotel
Arlington, VA

September 30 - October 2, 2012

Regulatory Compliance Conference
Mortgage Bankers Association
Grand Hyatt Washington
Washington, DC