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Combating Elder Financial Abuse

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On October 8, 2009, a jury in New York City convicted Anthony Marshall of defrauding Brooke Astor, his late, elderly mother, of millions of dollars while she suffered from Alzheimer's disease.[1] Because Mrs. Astor was a famous philanthropist, this high-profile criminal case cast a national spotlight on the issue of financial exploitation of the elderly, commonly known as elder financial abuse.

Roughly one in 10 seniors have suffered financial, emotional, physical, or sexual abuse or neglect in the past year, according to one study, with financial abuse occurring the most.[2] Many elderly Americans own their own homes and are financially secure, but they may have cognitive impairments, making them prime targets for individuals seeking to exploit their financial assets.[3]

According to a report by the Consumer Financial Protection Bureau (CFPB), the estimated annual losses from elder financial abuse range from $2.9 billion to $36.48 billion.[4] Demographic trends suggest this problem will worsen in the future. The U.S. Census Bureau estimates that, by 2050, the population of Americans over the age of 65 will exceed 20 percent of the U.S. population (as shown in Figure 1 on page 11).

Research indicates that "the 'typical' victim of elder financial abuse is between the ages of 70 and 89, white, female, frail, and cognitively impaired."[5] Many news reports feature financial scams by strangers, but the victims usually know the perpetrators. Most often the perpetrators are family members (68%), friends and neighbors (17%), and home health-care aides (15%).[6] Although an estimated 5 million elderly adults experience financial abuse each year, it is believed that many do not report it for a variety of reasons such as embarrassment or fear of retaliation.[7]

Financial institutions should be aware of the signs of elder financial abuse. Institutions can play a key role in helping to prevent and respond to abuse because they interact directly with customers, have information about customers' accounts and transactions that may flag potential abuse, and have tools and resources to report suspected abuse. However, some financial institutions are concerned that state and/or federal privacy laws may prohibit them from disclosing their customers' financial records to authorities and are uncertain of the best way to proceed. To address these concerns, this article reviews federal privacy laws, regulatory guidance, and sound practices that institutions can adopt to help protect their elderly customers from financial abuse.

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Understanding Finance Charges for Closed-End Credit

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"The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction." — Regulation Z, 12 C.F.R. §1026.4(a)

The Truth in Lending Act (TILA) requires creditors to disclose key information about consumer credit transactions "so that the consumer will be able to compare more readily the various credit terms available" and "avoid the uninformed use of credit. …"[1] The finance charge disclosure informs consumers about the cost of credit expressed as a dollar amount.[2] It is also used in calculating other TILA disclosures, including the annual percentage rate (APR). Accurately computing and disclosing the finance charge is important because consumers may rely on it as well as related disclosures whose calculations are based on it, particularly the APR, when shopping for credit and evaluating credit offers. In addition, inaccurate finance charge and APR disclosures can result in restitution to the consumer if the errors exceed regulatory tolerances and can trigger the right of rescission in mortgage transactions subject to rescission.[3]

Despite the importance of the finance charge disclosure, violations continue to be frequently cited during Federal Reserve examinations.[4] To facilitate compliance, this article reviews the regulation's requirements for determining when a charge must be included in the finance charge, identifies common pitfalls, and offers tips and tools to assist lenders with avoiding and detecting finance charge violations.

Although the definition of a finance charge disclosure is the same for closed- and open-end credit transactions, the disclosure rules are different. This article will focus solely on the disclosure of finance charges for closed-end credit transactions, which are among the violations most frequently cited. The intent of this article is not to provide an exhaustive list of charges qualifying as finance charges under Regulation Z but to review the general principles for determining when a charge is a finance charge for closed-end credit.

IDENTIFYING FINANCE CHARGES

Section 1026.4(a) of Regulation Z defines a finance charge as "the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction."

While on its face this definition seems clear, it can be challenging to apply because of the wide range of fees and charges that can be incurred in credit transactions and because the definition is subject to several exceptions.

Table 1 on page 6 displays the "Interagency Examination Procedures for Regulation Z," which lenders may find helpful for identifying finance charges. That said, the chart and this article are instructive but meant only as a guide. Neither is exhaustive nor exclusive, nor does either substitute for the regulation or Official Staff Commentary (commentary). The chart categorizes charges into several categories: 1) some charges that are always included in the finance charge, 2) some that are always excluded, 3) some that may be excluded if certain conditions are met, and 4) some that are excluded with respect to credit secured by real property or in a residential mortgage transaction (even though they would be considered finance charges in other types of credit transactions). We use this framework for thinking about how charges should be included in the finance charge and when to exclude them.

FINANCE CHARGE RULES FOR CLOSED-END CREDIT

Charges Always Included

A key aspect of the finance charge definition quoted previously is that it captures charges borrowers incur only when they are financing their purchase instead of paying cash.[5] Interest is the most obvious example and most common finance charge. Other charges that always qualify include, but are not limited to:

- Loan origination fees[6]
- Mortgage broker fees[7]
- Transaction fees[8]
- Discount for inducing payment without using credit[9]
- Borrower-paid points[10]
- Credit guarantee insurance premiums[11]
- Construction loan inspection fees[12]
- Fees imposed, regardless of when collected, for services performed periodically during the loan term in connection with a real estate or residential mortgage transaction such as tax lien searches or flood insurance policy determinations[13]

Charges Never Included

Regulation Z and the commentary provide examples of charges that are never finance charges because they are not incident to, or a condition of, an extension of credit, or because they are imposed uniformly on credit and cash transactions:

- Charges for an unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence are not finance charges[14]
- Seller's points
- Taxes, license fees, or registration fees paid by both cash and credit customers are generally not finance charges.[15] However, a tax imposed by a state or other governmental body solely on a *creditor* (not the consumer) that the creditor separately imposes on the consumer is a finance charge.[16] Also, to the extent a charge imposed by a creditor exceeds the same charge in a comparable cash transaction, the difference is a finance charge.[17]
- When a borrower is required to purchase an item or service in a credit transaction, but that item or service is not required in a comparable cash transaction, the charge *would* be a finance charge, even if the item or service may be voluntarily purchased by a consumer paying cash. For example, if a lender required the purchase of a maintenance or service contract in a credit transaction, the charge would be a finance charge even though cash customers in that scenario have the *option* of purchasing such a contract.[18]

Charges Included Unless Conditions Met

In three different categories — third-party fees, insurance premiums and fees for debt cancellation/debt suspension coverage, and security interest fees — charges are included in the finance charge unless certain conditions are satisfied.

> A KEY ASPECT OF THE FINANCE CHARGE DEFINITION QUOTED PREVIOUSLY IS THAT IT CAPTURES CHARGES BORROWERS INCUR ONLY WHEN THEY ARE FINANCING THEIR PURCHASE INSTEAD OF PAYING CASH.

THIRD-PARTY FEES

In some credit transactions, particularly secured ones, consumers may incur charges for services provided by third parties, such as a courier service, that are not otherwise payable in a comparable cash transaction. The regulation generally includes these third-party charges in the finance charge (when not expressly excluded elsewhere), if the creditor either:

- requires the use of the third party as a condition of or an incident to the extension of credit, even if the consumer can choose the particular third party; or
- retains a portion of the third-party charge (and if it does retain a portion, that portion is a finance charge).[19]

If neither of these conditions apply, the third-party charges may be excluded from the finance charge.

A separate rule applies for charges by a third-party closing agent (such as a settlement agent, attorney, or escrow or title company). These charges are included in the finance charge if the creditor: 1) requires the particular service for which the fee is incurred, 2) requires the charge be imposed, or 3) retains a portion of the charge (if a portion is retained, that portion is a finance charge).[20] Similar to the third-party charges described previously, if none of these circumstances apply, the charge may be excluded from the finance charge. Comment 4(a)(2)-1 of the commentary to Regulation Z provides as an example that a courier fee *would* be included when the creditor requires the use of a courier. (See also the discussion about lump sum closing charges.)

Special Rule for Borrower-Paid Mortgage Broker Fees
Borrower-paid mortgage broker fees are finance charges *even if* the creditor does not require the consumer to use the broker and does not retain any portion of the charge.[21]

INSURANCE AND DEBT CANCELLATION AND DEBT SUSPENSION COVERAGE

In the case of a charge on premiums for certain types of voluntary insurance, such as credit life, accident, health, and loss-of-income, and premiums charged for voluntary debt cancellation or suspension coverage (whether or not the coverage is considered insurance), the charge may be excluded from the finance charge if the following conditions are satisfied:

- The insurance or coverage is not required by the creditor and is disclosed in writing.
- The consumer is provided the written disclosure for the particular insurance or coverage required by §1026.4(d)(1)(ii) or §1026.4(d)(3)(ii) and (iii).
- The consumer affirmatively elects the insurance or coverage.[22] To evidence consent, the consumer must sign or initial an affirmative written request for the insurance or coverage after receiving the required disclosures. In the case of telephone purchases, the creditor must make the disclosures orally, send printed copies within three business days, and maintain records that the consumer elected to purchase the insurance or coverage after receiving the disclosures.

Property insurance premiums may also be excluded from the finance charge if the consumer can choose the insurer and this option is disclosed.[23] Additional disclosures regarding premiums and the terms of insurance are required if the insurance is obtained from or through the creditor.[24]

These same rules apply to a vendor's single interest (VSI) insurance but only if the VSI insurer waives all rights of subrogation against the consumer.[25]

CERTAIN SECURITY INTEREST CHARGES

The following charges incurred for a security interest in the collateral securing a loan may also be excluded from the finance charge if the charges are itemized and disclosed:

- Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest; alternatively, the premium for insurance in lieu of perfecting a security interest may be excluded to the extent it does not exceed the amount of such fees that would otherwise be payable.
- Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness.[26]

Real Estate-Related Fees
Regulation Z applies a special rule that excludes five types of charges from the finance charge in a residential mortgage transaction[27] or a real estate-secured loan, provided the charges are both bona fide and reasonable:

- Fees for title examination, abstract of title, title insurance, property survey, and similar purposes
- Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents
- Notary and credit-report fees
- Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood-hazard determinations
- Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge[28]

As noted in the commentary, these fees are excluded from the finance charge even if the creditor's employees, rather than a third party, perform the services for which the fees are imposed.[29] The cost of verifying or confirming information connected to an excludable item is also excludable. For example, credit-report fees cover not only the cost of the report but also the cost of verifying information in the report.[30]

When a lump sum is charged for several services, any portion attributable to a nonexcludable charge should be allocated to that service and included in the finance charge. However, the staff commentary notes that if a lump sum is charged for conducting or attending a closing and the charge is primarily for services related to items listed in §1026.4(c)(7), the entire charge is excluded even if a fee for incidental services provided (such as explaining various documents or disbursing funds for the parties) would be a finance charge if it were imposed separately.[31]

Finally, the charges under §1026.4(c)(7) for consumer loans secured by real estate and residential mortgage transactions are excludable only when imposed solely in connection with the initial decision to grant credit. For example, as noted previously, a fee for one or more determinations during the loan term of the current tax-lien status or flood-insurance requirements is a finance charge, regardless of whether the fee is imposed at closing or when the service is performed.

The commentary states the entire fee may be treated as a finance charge if a creditor is uncertain about what portion of a fee paid at consummation or loan closing is related to the initial decision to grant credit.[32]

DISCLOSURE REQUIREMENTS AND TOLERANCES

Finance Charge Disclosure in Closed-End Transactions

While this article focuses on identifying and disclosing the finance charge, it is important to recognize that errors in determining the finance charge can contribute to errors in other TILA disclosures that rely upon an accurate finance charge.

EXCLUDING CHARGES FROM THE FINANCE CHARGE THAT SHOULD HAVE BEEN INCLUDED WILL RESULT IN AN UNDERSTATED APR, WHICH MAKES THE APR APPEAR LOWER THAN IT ACTUALLY IS.

In any closed-end credit transaction, TILA requires disclosure of the total finance charge, which is the sum of all charges, expressed as a dollar amount, that meet the regulatory definition of finance charge. For consumer closed-end real-estate secured loans (i.e., loans subject to the CFPB's TILA-RESPA integrated disclosure rule that went into effect in October 2015), the finance charge must be disclosed on page 5 of the "Closing Disclosure," as required by §1026.38(o)(2). For other closed-end loans, §1026.18(d) provides for disclosure of the finance charge, using that term, and a brief description such as "the dollar amount the credit will cost you." The APR is also calculated based on the finance charge. Excluding charges from the finance charge that should have been included will result in an understated APR, which makes the APR appear lower than it actually is.

Regulatory Tolerances

Regulation Z defines tolerances with respect to the disclosed finance charge. For closed-end loans, the tolerances appear in Section 1026.18(d).

Mortgage loans:[33]

- understated by no more than $100, or
- greater than the amount required to be disclosed.

Other credit:

- If the amount financed is $1,000 or less, the finance charge cannot be more than $5 above or below the amount required to be disclosed.
- If the amount financed is greater than $1,000, the finance charge cannot be more than $10 above or below the amount required to be disclosed.

Inaccurate disclosure of the finance charge and APR outside of tolerances can result in restitution to consumers affected by such errors.

COMMON ISSUES, TIPS, AND TOOLS

Common Issues

Properly classifying fees as finance charges can be challenging, and errors can be costly. Common issues Federal Reserve examiners have seen that result in finance charge errors include:

- *Not accounting for all charges* — Lenders should ensure that they consider every charge paid by a consumer when determining the total finance charge; in other words, each charge should be clearly identified as either a finance charge or not a finance charge. Errors may occur because the lender failed to evaluate whether or not the charge was a finance charge.
- *Mischaracterizing charges* — The service for which a charge is incurred, not the name of the service, determines if it is a finance charge. For example, calling a loan origination fee a "processing" fee does not change the nature of the charge; it would still be a finance charge.
- *Failure to meet the requirements for "conditional" exclusions* — Another source of error is excluding charges from the finance charge even though the conditions to exclude the charge have not been met. For example, not having a customer sign or initial an affirmative election of credit life insurance as required would make the cost of the insurance a finance charge.
- *Payments to third parties* — A creditor may mistakenly believe that if it does not retain a charge collected on behalf of a third party, it is not a finance charge. Charges paid to third parties can be excluded if the use of the third party is not required to obtain the loan and the creditor does not retain a portion of the charge. However, in some cases, charges paid to third parties are excluded only if certain conditions are met, such as making required disclosures about the charge and the voluntary nature of the charge. Finally, some charges paid to third parties, such as credit guarantee insurance premiums and mortgage broker fees, are always finance charges.
- *Automated systems* — The use of automated loan and disclosure systems can facilitate compliance; however, creditors must understand how these systems function. This understanding helps ensure the creditor properly sets system parameters and inputs accurate information into the system. Many systems require an initial set-up, which may require the user of the system to correctly identify which charges are finance charges. Once set up correctly, a properly functioning system can produce consistently accurate disclosures. However, errors in the set-up process; changes in a lender's practices, such as introducing new charges; or system updates/changes can result in a system that produces erroneous disclosures.

TABLE 1: Finance Charge Chart

Finance Charge = Dollar Cost of Consumer Credit: It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as a condition of or incident to the extension of credit.

Charges Always Included	Charges Included Unless Conditions Are Met	Conditions (any loan)	Charges Not Included (residential mortgage transactions and loans secured by real estate)	Charges Never Included
Interest	Premiums for credit life	Insurance not required, disclosures are made, and consumer authorizes	Fees for title insurance, title examination, property survey, etc.	Charges payable in a comparable cash transaction
Transaction fees	Debt cancellation fees	Coverage not required, disclosures are made, and consumer authorizes	Fees for preparing loan documents, mortgages, and other settlement documents	Fees for unanticipated late payments
Loan origination fees; consumer points	Premiums for property or liability insurance	Consumer selects insurance company and disclosures are made	Amounts required to be paid into escrow, if not otherwise included in the finance charge	Overdraft fees not agreed to in writing
Credit guarantee insurance premiums	Premiums for vendor's single interest (VSI) insurance	Insurer waives right of subrogation, consumer selects insurance company, and disclosures are made	Notary fees	Seller's points
Changes imposed on the creditor for purchasing the loan, which are passed on to the consumer	Security interest charges (filing fees), insurance in lieu of filing fees and certain notary fees	The fee is for lien purposes, prescribed by law, payable to a third public official and is itemized and disclosed	Preconsummation flood and pest inspection	Participation or membership fees
Discounts for inducing payment by means other than credit	Charges imposed by third parties	Use of the third party is not required to obtain a loan, and creditor does not retain the charge	Appraisal and credit report fees	Discount offered by the seller to induce payment by cash or other means not involving the use of a credit card
Mortgage broker fees	Charges imposed by third-party closing agents	Creditor does not require and does not retain the fee for the particular service		Interest forfeited as a result of interest reduction required by law
Other examples: Fee for preparing TILA disclosures; real estate construction loan inspection fees for postconsummation tax or flood service policy; required credit life insurance charges	Appraisal and credit report fees	Application fees, if charged to all applicants, are not finance charges; application fees may include appraisal or credit report fees		Charges absorbed by the creditor as a cost of doing business

Source: Federal Financial Institutions Examination Council (FFIEC) Rev. 5/2011

Tips and Tools

Creditors can employ a number of techniques to prevent finance charge violations, including the following:

- Train staff and provide tools, such as the chart on page 6, to help with accurately recognizing, classifying, and disclosing finance charges. It is important to remember, though, that the chart provides a high-level guide to the regulatory requirements (as do other tools or job aids) but is not a substitute for the regulation or the commentary.
- Establish processes for trained staff to evaluate all charges associated with all consumer loan products to determine which charges are finance charges and which are not. These processes should be repeatable so that as lender practices change over time, such as with the introduction of new charges or new products, finance charges are correctly identified and disclosed.
- Use automated systems that correctly capture and disclose finance charges. The systems should also accurately factor finance charges into the computation and disclosure of items related to the finance charge, such as the amount financed. If a creditor imposes a new fee, it should be vetted to determine if it is a finance charge. Verify system settings periodically/routinely and test them after any update or change.
- Review loan disclosures, including the finance charge, for accuracy when initially setting up a loan and during periodic testing.

CONCLUSION

Although the definition and treatment of finance charges have not changed in recent years, finance charge errors for closed-end loans remain a source of frequent violations and can result in restitution to affected borrowers. By taking a step back and looking at the charges using a methodical process, creditors can enhance controls to mitigate potential risk. Ensuring that staff is appropriately trained and that disclosure systems are up to date and accurate will help prevent disclosure errors. Routine testing processes will allow creditors to detect and correct any errors. Specific issues and questions should be raised with your primary regulator. ■

Endnotes

[1] 15 U.S.C. §1601
[2] 12 C.F.R. §1026.4(a)
[3] 15 U.S.C. §1607(e) (restitution); 12 C.F.R. §1026.23(a)(3)(i) and (ii) (the finance charge and the APR are two material disclosures that trigger right of rescission for up to three years after consummation if they are inaccurate.
[4] The Federal Reserve Board examines state-chartered banks that are members of the Federal Reserve System with assets of $10 billion or less to ensure compliance with federal consumer protection laws, including Regulation Z. As of February 2017, the number of such banks was 830.
[5] 12 C.F.R. §1026.4(a)
[6] 12 C.F.R. §1026.4(b)(3)
[7] 12 C.F.R. §1026.4(a)(3)
[8] 12 C.F.R. §1026.4(b)(2)
[9] 12 C.F.R. §1026.4(b)(9). The commentary provides this example: A tract of land is sold for $9,000 if paid in cash, but $10,000 if financed. The $1,000 difference is a finance charge if the purchase is financed. Comment 4(b)(9)-1.
[10] 12 C.F.R. §1026.4(b)(3)
[11] 12 C.F.R. §1026.4(b)(5)
[12] Comment 4(a)-1.ii.A
[13] 12 C.F.R. § 1026.4(c)(7) and Comment 4(c)(7)-3
[14] 12 C.F.R. §1026.4(c)(2)
[15] Comment 4(a)-1.i.A
[16] Comment 4(a)-5.i.A
[17] Comment 4(a)-1.iii
[18] Comment 4(a)-1.ii.C
[19] 12 C.F.R. §1026.4(a)(1)
[20] 12 C.F.R. §1026.4(a)(2)
[21] 12 C.F.R. §1026.4(a)(3)
[22] 12 C.F.R. §1026.4(d)(1) and (d)(3)
[23] 12 C.F.R. §1026.4(d)(2)
[24] 12 C.F.R. §1026.4(d)(2)(ii)
[25] 12 C.F.R. §1026.4(d)(2)
[26] 12 C.F.R. §1026.4(e)
[27] This is defined in §1026.2(a)(24) as a credit transaction secured by the consumer's principal dwelling to finance the purchase or initial construction of the dwelling.
[28] 12 C.F.R. §1026.4(c)(7)
[29] Comment 4(c)(7)-1
[30] Comment 4(c)(7)-1
[31] Comment 4(c)(7)-2
[32] Comment 4(c)(7)-3
[33] These tolerances apply to loans secured by real property or a dwelling. These same tolerances apply to loans secured by real property subject to §1026.38 as set forth in §1026.38(o)(2).

Implementing the New Uniform Interagency Consumer Compliance Rating System

By Lanette Meister, Senior Supervisory Consumer Financial Services Analyst, Federal Reserve Board

In November 2016, the Federal Financial Institutions Examination Council (FFIEC) announced its updated Uniform Interagency Consumer Compliance Rating System (CC Rating System) in the *Federal Register*.[1] The revisions reflect the regulatory, examination, technological, and market changes that have occurred since the release of the original rating system. The FFIEC member agencies (agencies) each implemented the updated rating system with consumer compliance examinations that began on or after March 31, 2017.

The CC Rating System is a supervisory policy used by the agencies' examiners to evaluate financial institutions' adherence to consumer compliance laws and regulations. The primary purpose of the CC Rating System is to ensure that financial institutions are evaluated in a comprehensive and consistent manner and that supervisory resources are appropriately focused on areas exhibiting the risk of consumer harm and on institutions that warrant elevated supervisory attention.

Financial institution management teams and compliance officers should be familiar with the factors that examiners will assess when assigning the consumer compliance rating at the conclusion of consumer compliance examinations. This article will highlight the foundational principles of the CC Rating System, discuss the framework on which the CC Rating System is based, and explain how examiners will apply the CC Rating System in evaluating a financial institution's consumer compliance management system (CMS).

PRINCIPLES OF THE INTERAGENCY CC RATING SYSTEM

When the original consumer compliance rating system was developed in 1980, examinations were more focused on validating regulatory compliance and less focused on evaluating the effectiveness of a financial institution's CMS. In the intervening years, supervisory practices have evolved, and the agencies now place greater emphasis on an institution's strong CMS, which can effectively prevent violations of law and support consumer protection in the delivery of financial services. The revised CC Rating System better reflects current consumer compliance supervisory approaches and more fully aligns the rating system with the agencies' risk-based, tailored examination processes.

The agencies developed the following principles to serve as a foundation for the CC Rating System:

Risk-based — Recognize and communicate clearly that a CMS can vary based on the size, complexity, and risk profile of the supervised institutions

Transparent — Provide clear distinctions between rating categories to support consistent application by the agencies across supervised institutions; reflect the scope of the review that formed the basis of the overall rating

Actionable — Identify areas of strength and direct appropriate attention to specific areas of weakness, reflecting a risk-based supervisory approach; convey examiners' assessment of the effectiveness of an institution's CMS, including its ability to prevent consumer harm and to ensure compliance with consumer protection laws and regulations

Incentives for Compliance — Provide incentives for the institution to establish an effective consumer compliance system across the institution and to identify and address issues promptly, including self-identification and correction of consumer compliance weaknesses; reflect the potential impact of any consumer harm identified in examination findings

It is important to note that the revisions to the CC Rating System were not developed to set new or higher supervisory expectations for financial institutions. Instead, the revised system provides a consumer compliance rating that more fully complements the agencies' risk-focused examination approach. Its adoption has no additional regulatory burden.

FRAMEWORK OF THE CC RATING SYSTEM

The CC Rating System establishes a framework of compliance factors that examiners use during consumer compliance examinations to assess a financial institution's performance. Based upon the examiners' comprehensive evaluation of the institution's performance under those assessment factors, the examiners assign an overall consumer compliance rating to the financial institution. The CC Rating System is not based upon a numeric average or any other quantitative calculation. Specific component ratings will not be assigned to the underlying assessment factors.

The 12 CC Rating System assessment factors are organized within the following three categories:

Board and Management Oversight

- Oversight and Commitment
- Change Management
- Comprehension, Identification, and Management of Risk
- Corrective Action and Self-Identification

Compliance Program

- Policies and Procedures
- Training
- Monitoring and/or Audit
- Consumer Complaint Response

Violations of Law and Consumer Harm

- Root Cause
- Severity
- Duration
- Pervasiveness

The first two categories of assessment factors — Board and Management Oversight and Compliance Program — encompass an institution's CMS. Examiners will evaluate the institution's performance under these categories based upon the institution's size, complexity, and risk profile. This tailored evaluation acknowledges that the roles and responsibilities of boards and management teams and the sophistication of compliance programs can vary significantly between financial institutions and yet still be effective at ensuring compliance with regulatory requirements and preventing consumer harm. All institutions, regardless of size, should maintain an effective CMS.

Compliance expectations within the first two categories of assessment factors also extend to third-party relationships in which the financial institution is engaged. In addition to traditional core bank processing and information technology services, financial institutions outsource operational activities such as audit, sales and marketing, loan review, appraisal management, asset and wealth management, and loan servicing. Effectively managed third-party relationships can help institutions maintain a strong CMS. However, the CC Rating System acknowledges that, if a financial institution outsources the operational aspects of a product or service, the institution cannot abdicate the responsibility for complying with the law or managing the risks associated with those third-party relationships.

The third category — Violations of Law and Consumer Harm — encompasses assessment factors that measure the dimensions of identified violations of consumer protection laws and regulations and any resultant consumer harm. Similar to the current rating system, the assigned consumer compliance rating will be a number ranging from 1 to 5, in increasing order of supervisory concern. As described within the CC Rating System:

- The highest rating of 1 is assigned to a financial institution that maintains a strong CMS and takes action to prevent violations of law and consumer harm.
- A rating of 2 is assigned to a financial institution that maintains a CMS that is satisfactory at managing consumer compliance risk in the institution's products and services and at substantially limiting violations of law and consumer harm.
- A rating of 3 reflects a CMS deficient at managing consumer compliance risk in the institution's products and services and at limiting violations of law and consumer harm.
- A rating of 4 reflects a CMS seriously deficient at managing consumer compliance risk in the institution's products and services and/or at preventing violations of law and consumer harm. "Seriously deficient" indicates fundamental and persistent weaknesses in crucial CMS elements and severe inadequacies in core compliance areas necessary to operate within the scope of statutory and regulatory consumer protection requirements and to prevent consumer harm.

- A rating of 5 reflects a CMS critically deficient at managing consumer compliance risk in the institution's products and services and/or at preventing violations of law and consumer harm. "Critically deficient" indicates an absence of crucial CMS elements and a demonstrated lack of willingness or capability to take the appropriate steps necessary to operate within the scope of statutory and regulatory consumer protection requirements and to prevent consumer harm.

PERFORMANCE WITH THE CC RATING SYSTEM

The CC Rating System includes guidance for assigning ratings based upon the effectiveness of the CMS in managing consumer compliance risk and guidance for determining how any identified violations of law or consumer harm will influence an institution's assigned rating. This guidance provides examiners with direction on how to use the rating definitions when assigning a consumer compliance rating to an institution.

Consistent with its fourth principle, the CC Rating System incorporates incentives through the definitions associated with a 1 rating to recognize financial institutions that adopt proactive strategies to promote consumer protection. Performance assessed at a 1-rating level is characterized by management and compliance programs that anticipate, actively identify, and prevent violations of law or facilitate early detection of potential violations. These proactive approaches can limit the size and scope of consumer harm and demonstrate the institution's commitment to responsibly address underlying risks.

Along with conveying a consumer compliance rating, examiners will highlight their conclusions regarding the institution's performance under the CC Rating System's assessment factors. Examiners will discuss any assessment factors relevant to the consumer compliance rating either through observed weaknesses or strengths, based upon the size, complexity, or individual risk profile of the institution. To illustrate this point, at an institution that has introduced a new third-party lending product or relationship, examiners may apply more weight to performance under the Change Management and Comprehension, Identification, and Management of Risk assessment factors than they would at an institution that continues to offer the same loan products since the last examination. This weighting is used because effective change management practices and management of risk are more critical to the institution's success when a new third-party relationship or product has been introduced than if no changes have taken place.

In applying the CC Rating System, examiners also will consider that, while the expectations for compliance with consumer protection laws and regulations are the same across institutions of varying sizes, the means to achieve an effective CMS may differ across institutions. Examiners also will evaluate the various control environments within which the institution's products, services, and activities are managed. Examiners may identify weaknesses isolated to individual products or lines of business. In arriving at a consumer compliance rating, examiners will apply greater weight to assessments related to material products, services, or activities with significant potential consumer compliance risk.

ASSIGNMENT OF THE CONSUMER COMPLIANCE RATING

Examiners will assign a consumer compliance rating after weighing the institution's performance under the CC Rating System assessment factors. An institution need not achieve a satisfactory assessment in all of the factors to be assigned an overall satisfactory rating. Conversely, an institution may be assigned a less-than-satisfactory rating even if some of its individual assessments are satisfactory.

Further, an institution may be assigned a less-than-satisfactory rating primarily based upon deficiencies or weaknesses in its CMS. Since a deficient CMS can lead to future violations and consumer harm, these weaknesses can impact the consumer compliance rating, even if no violations are identified. Conversely, the presence of violations does not guarantee that an institution will be assigned a less-than-satisfactory rating. For example, when violations involve limited impact on consumers, are self-identified, and are resolved promptly, the evaluation may result in a 1 or 2 rating.

CONCLUSION

Financial institution managers and compliance officers can anticipate discussing the new CC Rating System with the examiner-in-charge during their next consumer compliance examination. The consumer compliance rating assigned at the conclusion of that examination will represent a comprehensive evaluation of the institution's entire CMS and any violations and resultant consumer harm. If questions arise before the next scheduled consumer compliance examination, state member banks are welcome to contact their Reserve Bank consumer compliance team. Other institutions may contact their primary regulator. ■

Endnote

[1] 81 Fed. Reg. 79473 (November 14, 2016)

 Continued from page 1

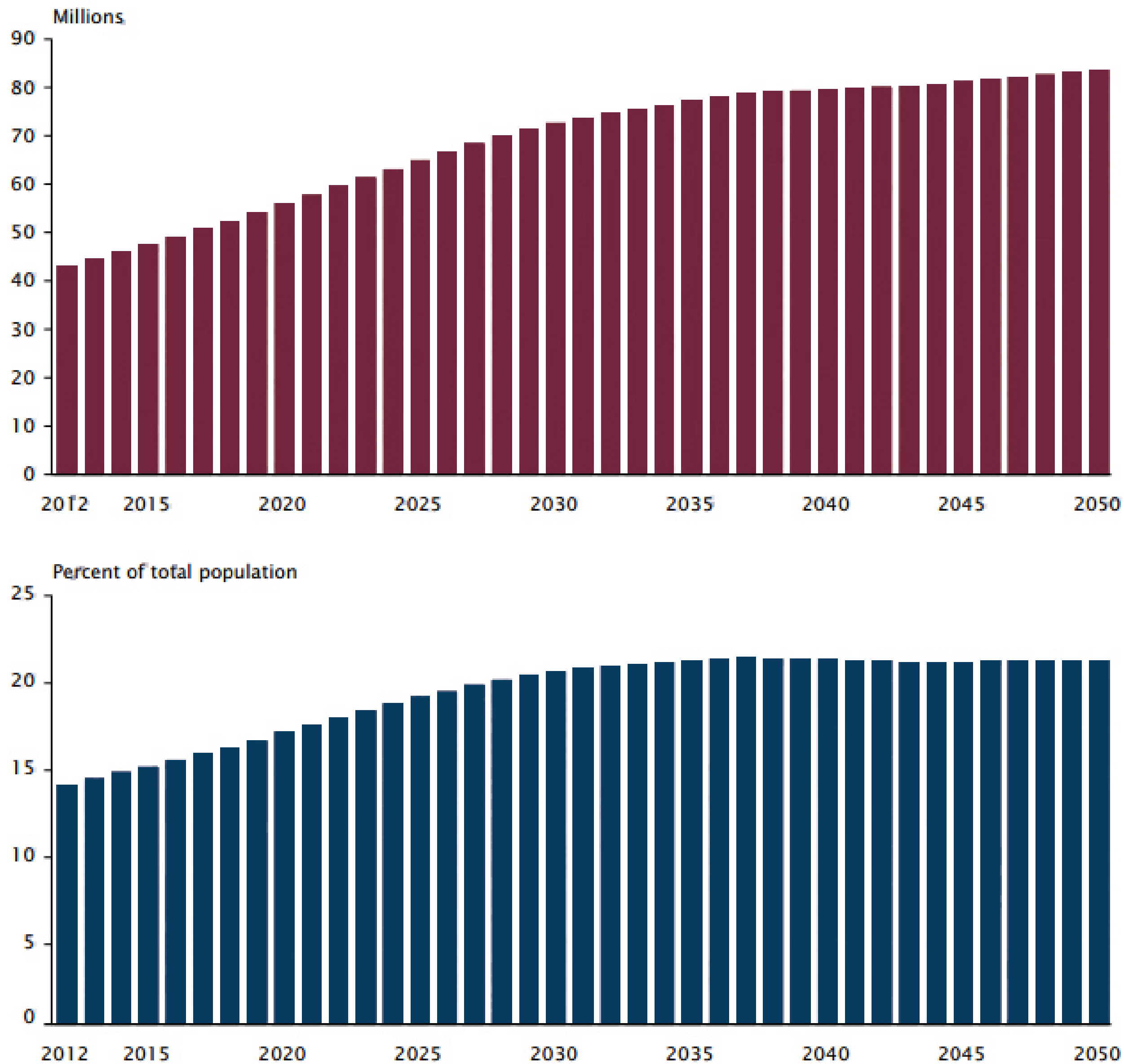
FEDERAL PRIVACY PROTECTION

Various laws, regulations, and guidance apply to elder financial abuse. The focus here is on federal law and guidance, but financial institutions may also be subject to state and local laws in the jurisdictions in which they do business.[8]

Sharing Nonpublic Information to Third Parties – The GLBA

What does the law require? Section 502 of the Gramm-Leach-Bliley Act (GLBA) generally prohibits a financial institution from disclosing nonpublic personal information about a consumer to nonaffiliated third parties unless the

FIGURE 1
Population Aged 65 and Over for the United States: 2012 to 2050



Source: U.S. Census Bureau, 2012 Population Estimates and 2012 National Projections.

consumer is notified and has the opportunity to opt out.[9] “Nonpublic personal information” (NPPI) generally is any information that is not publicly available and that:

- a consumer provides to a financial institution to obtain a financial product or service from the institution;
- results from a transaction between the consumer and the institution involving a financial product or service; or
- a financial institution otherwise obtains about a consumer in connection with providing a financial product or service.[10]

What information can financial institutions share related to suspected elder abuse? In 2013, several federal regulatory agencies jointly issued the “Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults” (guidance) to clarify whether the privacy provisions of the GLBA apply to reporting suspected financial exploitation of older adults.[11] The guidance notes that, while the GLBA restricts sharing NPPI, the law contains exceptions, four of which may apply to the reporting of elder financial abuse depending on the particular circumstances of the suspected abuse:

- Protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability (Section 502(e)(3)(B))
- Report to law enforcement agencies to the extent specifically permitted or required under other applicable laws, including the Right to Financial Privacy Act (RFPA) (Section 502(e)(5))
- Comply with federal, state, or local laws, rules, and other applicable legal requirements, such as state laws that require financial institutions to report suspected abuse (Section 502(e)(8))
- Respond to a civil, criminal, or regulatory investigation or subpoena or summons by federal, state, or local authorities; or respond to judicial process or government regulatory authorities (Section 502(e)(8))

The guidance also provides the following two examples of permissible disclosure under the fraud exception that are relevant for elder financial abuse:

- Report incidents when an elderly adult’s funds are taken without actual consent
- Report incidents of an older adult’s consent to sign over assets where the intent of the transaction has been misreprented.

A concluding statement in the guidance is particularly important: “[G]enerally disclosure of nonpublic personal information about consumers to local, state, or federal agencies for the purpose of reporting suspected financial abuse of older adults will fall within one or more of the exceptions.”[12]

SOUND PRACTICES

Financial institutions can play a critical role in helping to detect and prevent elder abuse. Here are some sound practices for your consideration.

Prevention

The best outcome for financial institutions and their customers is to prevent elder financial abuse from occurring. In March 2016, the CFPB published a comprehensive report titled *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* that focuses on sound practices to help prevent elder financial abuse. The CFPB’s recommendations include the following:

- Coordinate efforts to better educate older customers and other stakeholders about the problem
- Use technology to flag and to identify warning signs of abuse
- Report suspected abuse to the authorities and develop a relationship with the state adult protective services agency
- Protect account holders; for example, by extending the time period under Regulation E to report unauthorized transactions when a customer has extenuating circumstances, such as hospitalization

The report notes that elders are an attractive target for criminals because of their financial assets and vulnerability and concludes that “financial institutions have a tremendous opportunity to serve older consumers by vigorously protecting them from financial exploitation.” Further details are available in the CFPB’s report.[13]

Age-Friendly Banking

Age-friendly banking refers to recommendations from the National Community Reinvestment Coalition (NCRC) to improve banking services for older adults.[14] Age-friendly banking includes proactive strategies to address the particular needs of elderly customers in their use of banking services. This approach is designed in part to lead to reduced levels of financial abuse and exploitation while leading to increased levels of inclusion and access to the banking system. Principles of age-friendly banking include:

- customizing products for elderly customers and making customer service personnel available with knowledge of the products;
- offering affordable financial management services such as retirement planning;
- ensuring that older adults have access to critical income support programs and electronic benefits;
- incorporating age-friendly design features and training on online banking; and
- establishing a program to identify and report suspected elder financial abuse.[15]

The Federal Reserve Bank of San Francisco's Center for Community Development Investments also published a working paper on this issue, "What Can We Do to Help? Adopting Age-Friendly Banking to Improve Financial Well-Being for Older Adults." The working paper reported that, with the elderly population expected to represent 20 percent of the U.S. population by 2050, financial institutions are instituting age-friendly banking programs. The paper identifies impactful strategies such as maintaining branches in neighborhoods with high percentages of elderly populations and designating "older adult specialist" staff equipped to assist in all issues affecting older adults.[16]

Training

Training staff, especially tellers, is critical to combating elder financial abuse because they interact directly with elderly customers. The San Francisco Fed working paper found that many elderly consumers are concerned about the safety of online banking, do not own a computer or smartphone, and/or may experience physical limitations that make them less able to rely upon computers for banking purposes.[17] It is therefore not surprising that a Federal Deposit Insurance Corporation survey found that more than half of consumers aged 65 or older rely on bank tellers to access bank accounts.[18] Additionally, tellers are in a good position to observe suspicious conduct, such as changes in banking patterns and unusual transactions.

Bank staff must be able to identify suspected elder financial abuse before it can be reported.

Tellers also often develop a relationship with customers and might be able to recognize if a customer is acting in an unusual manner or under duress. The San Francisco Fed's working paper reported that a large bank partnered with a city agency in Philadelphia to train tellers and customer service staff to identify signs of abuse. More than 3,000 cases were investigated, potential losses of $2.2 million were prevented, and $62.5 million in assets were protected.[19] Bank tellers are thus a key resource in the battle against elderly financial abuse.

Identification

Bank staff must be able to identify suspected elder financial abuse before it can be reported. In 2011, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued an alert on elder financial exploitation that encouraged financial institutions to file a Suspicious Activity Report (SAR) when abuse is suspected.[20] To assist institutions in identifying possible illicit activity, the advisory listed the following warning signs:

Erratic or unusual banking transactions or changes in banking patterns

- Frequent large withdrawals, including daily maximum currency withdrawals from an ATM
- Sudden nonsufficient fund activity
- Uncharacteristic nonpayment for services, which may indicate a loss of funds or a loss of access to funds
- Debit transactions that are inconsistent for the elderly
- Uncharacteristic attempts to wire large sums of money
- Closing CDs or accounts without regard to penalties

Interactions with older adults or caregivers

- A caregiver or other individual shows excessive interest in the elder's finances or assets, does not allow the elder to speak for himself or herself, or is reluctant to leave the elder's side during conversations.
- The elder shows an unusual degree of fear or submissiveness toward a caregiver.
- A representative from a financial institution is unable to speak directly with the elder, despite repeated attempts to contact him or her.
- A new caretaker, relative, or friend suddenly begins conducting financial transactions on behalf of the elder without proper documentation.
- The elder moves away from existing relationships and toward new associations with other friends or strangers.
- The elderly individual's financial management changes suddenly, such as through a change of power of attorney to a different family member or a new individual.
- The elderly customer lacks knowledge about his or her financial status or shows a sudden reluctance to discuss financial matters.

Periodically incorporating some of the key considerations about elder financial abuse and the warning signs into a financial institution's staff meetings or training can be an effective reminder. Institutions also can provide sample questions to staff to ask elderly consumers under common red flag scenarios to elicit additional information about potential abuse. Finally, training should include action items to complete when elder fraud is suspected.

REPORTING

Financial institutions should have policies and procedures in place to address the point at which staff should report suspected elder financial abuse, to whom those concerns should be reported, and to designate the person who should be contacted if staff have questions. All states have established an agency responsible for protecting adults, typically called Adult Protective Services. The National Adult Protective Services Association has contact information on its website for all 50 state agencies.[21] Finally, as noted earlier, FinCEN issued an advisory in 2011 that encouraged financial institutions to file SARs when abuse is suspected.

CONCLUSION

Financial institutions play a critical role in helping to prevent elder financial abuse. Institutions are encouraged to enhance their policies, procedures, and training to ensure they identify and report suspected elder financial abuse to the appropriate authorities in compliance with applicable laws. Specific issues or questions should be discussed with your primary regulator.

RESOURCES

Links are available to elder financial abuse resources on the *Outlook* website at consumercomplianceoutlook.org. ■

Endnotes

[1] John Eligon,"Brooke Astor's Son Guilty in Scheme to Defraud Her," *New York* Times, October 8, 2009. On March 26, 2013, the Appellate Division affirmed the verdict. Francis X. Morrissey Jr., an attorney hired by the accused, Anthony Marshall, was also convicted of defrauding Brooke Astor. See courts.state.ny.us/REPORTER/3dseries/2013/2013_02032.htm.
[2] Ron Acierno, Melba Hernandez, Ananda Amstadter, et al., "Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study," *American Journal of Public Health*, February 2010, 100:2, pp. 292–297, available at ncbi.nlm.nih.gov/pmc/articles/PMC2804623/.
[3] The guidance is available at federalreserve.gov/newsevents/press/bcreg/bcreg20130924a2.pdf.
[4] Consumer Financial Protection Bureau, *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation*, March 2016, http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.
[5] National Center on Elder Abuse, "What We Do, Research, Statistics, Data," available at https://ncea.acl.gov/whatwedo/research/statistics.html.
[6] National Center on Elder Abuse, "What We Do."
[7] National Center on Elder Abuse, "What We Do."
[8] Some states have permissive reporting regimes for suspected elder abuse, while other states have mandatory reporting. The CFPB has prepared a report on elder financial abuse that discusses the states that require mandatory reporting of suspected elder financial abuse. See *Recommendations and Report for Financial Institutions*, March 2016, p. 23, fn 40.
[9] Codified at 15 U.S.C. §6802
[10] 12 C.F.R. §1016.3(p)(1)
[11] "Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults," Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, CFPB, Federal Deposit Insurance Corporation, Federal Trade Commission, National Credit Union Administration, Office of the Comptroller of the Currency, and Securities and Exchange Commission, September 24, 2013.
[12] See "Interagency Guidance," p. 3.
[13] See CFPB, *Recommendations and Report for Financial Institutions*, March 2016, The CFPB also simultaneously issued a shorter advisory on this issue, http://files.consumerfinance.gov/f/201603_cfpb_advisory-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.
[14] National Community Reinvestment Coalition (NCRC), "Age Friendly Banking: Policies to Protect and Grow the Economic Security of Older Adults," September 2013, available at www.ncrc.org/fleeced/wp-content/uploads/2013/09/age-friendly-banking-fact-sheet-NEW.pdf.
[15] NCRC, "Age Friendly Banking."
[16] Maya Abood, Robert Zdenek, and Karen Kali, "What Can We Do to Help? Adopting Age-Friendly Banking to Improve Financial Well-Being for Older Adults," Federal Reserve Bank of San Francisco Working Paper 2015-01, January 2015, p. 12.
[17] Abood et al., p. 8.
[18] See fdic.gov/householdsurvey/2013report.pdf.
[19] Abood et al., p. 11.
[20] See fincen.gov/sites/default/files/advisory/fin-2011-a003.pdf.
[21] See napsa-now.org/get-help/help-in-your-area/.

Outlook Live

Outlook Live is the Federal Reserve System's webinar series dedicated to consumer compliance. These events, which we host throughout the year, cover a broad range of consumer compliance topics. While the sessions are generally structured to assist community bankers in complying with federal consumer protection laws and regulations, the topics addressed during these sessions may be of value to the financial services industry more broadly.

The Outlook Live webinars involve a variety of presenters from both the Federal Reserve System and the other Federal financial regulatory agencies, focusing on key emerging issues in the industry. For example, we conduct an annual interagency webinar on fair lending hot topics that involves, among other presenters, staff from the Federal Reserve Board, the U.S. Department of Justice, the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the U.S. Department of Housing and Urban Development, and the National Credit Union Administration. Finally, many of the Outlook Live webinars have focused on new regulatory requirements. As these sessions often involve rules written by the CFPB, we have hosted a number of CFPB presentations to help ensure that new regulatory requirements are well understood.

To receive e-mail notice of future Outlook Live webinars, register at http://bit.ly/outlook-live. There is no charge to register or to view webinars, which are part of the Federal Reserve System's outreach program.

Regulatory Calendar*

Effective Date	Implementing Regulation	Regulatory Change	Outlook Live Webinar
10/19/17 (most provisions)	Regs. Z and X	Final rule for amendments to certain mortgage servicing provisions	
4/1/18 (most provisions)	Reg. E	Final rule extending the effective date for the prepaid account rule to April 1, 2018	
1/1/18 (most provisions)	Reg. C	Final rule implementing Dodd–Frank Wall Street Reform and Consumer Protection Act changes to the Home Mortgage Disclosure Act (HMDA)	
6/10/16	Regs. J and L	Final rulemaking adjustments to submission of filings under the Interstate Land Sales Full Disclosure Act	
3/31/16	Reg. Z	Interim final rule implementing Helping Expand Lending Practices in Rural Communities Act to broaden exemption for small creditors operating in rural and underserved areas	
1/1/17	Reg. C	Final rule adjusting asset-size threshold for exemption from HMDA reporting	
1/1/17	Reg. Z	Final rule adjusting asset-size threshold to qualify for small creditor exemptions	
1/1/16	Reg. H	Final rule implementing provisions of the Homeowners Flood Insurance Affordability Act	10/22/15
1/1/16	Reg. Z	Final rule to expand definitions of *small creditor* and *rural area* for purposes of certain mortgage rules with reduced regulatory requirements for small creditors and small creditors operating primarily in rural areas	

* Links to the regulatory changes are available in the online version of *Outlook* at tinyurl.com/calendar-cco.
† Rulemaking proposals generally do not have an effective date.

News from Washington: Regulatory Updates*

The Consumer Financial Protection Bureau (CFPB) seeks comment on its plan to assess the effectiveness of its 2013 mortgage servicing rule under the Real Estate Settlement Procedures Act (RESPA). The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) requires the CFPB to assess the effectiveness of each significant rule it has enacted no later than five years after the effective date of the rule. On May 11, 2017, the CFPB announced it is seeking public comment on its plan to assess the effectiveness of its RESPA servicing rule, which imposed requirements and prohibitions under RESPA on servicers of federally related mortgage loans for force-placed insurance, errors asserted by borrowers, borrowers' requests for information, and early intervention for delinquent borrowers.

The assessment plan will focus on how well the rule has met the four purposes of the 2013 rule: 1) responding to borrow requests and complaints in a timely manner, 2) maintaining and providing accurate information, 3) helping borrowers avoid unwarranted or unnecessary costs and fees, and 4) facilitating review for foreclosure avoidance options. The CFPB seeks public comment on its assessment plan and other aspects of the servicing rule, including information about the benefits and costs of the rule and recommendations for modifying, expanding, or eliminating the rule. The comment period closes on July 10, 2017.

The CFPB seeks comment on its plan to assess the effectiveness of its remittance transfer rule. On March 15, 2017, the CFPB announced that it is seeking public comment on the effectiveness of its foreign remittance transfer rule that created new consumer protections for remittance transfers sent by U.S. consumers to individuals and businesses in foreign countries. As discussed previously, the Dodd–Frank Act requires the CFPB to review its significant regulations five years after they became effective. The remittance transer rule, which became effective in October 2013, is codified in Regulation E (Electronic Fund Transfer Act). The CFPB seeks public comment on its plan to review the rule and various aspects of the rule, including its impact on transparency, efficiency, access to remittance services, and effect on market innovation. The CFPB is also soliciting suggestions for modifying, expanding, or eliminating the rule. The comment period closed on May 23, 2017.

The CFPB postpones the effective date of its rules for prepaid accounts. On October 5, 2016, the CFPB issued final rules for prepaid accounts under Regulation E and Regulation Z (Truth in Lending Act). The rules, which create consumer protections for general-purpose reloadable cards, were scheduled to become effective on October 1, 2017, except the requirement for submitting copies of prepaid account agreements to the CFPB, which becomes effective on October 1, 2018. Other prepaid accounts, such as reloadable payroll cards and government benefit cards, were already subject to Regulation E.

On April 25, 2017, the CFPB issued a final rule to delay the October 1 effective date until April 1, 2018. The proposal would not affect the deadline for submitting agreements. The CFPB explained that industry participants expressed concerns that, without a delay in the effective date, they would be required to pull prepaid account access devices and packaging materials with noncompliant disclosures from the marketplace that were produced before October 1, 2017.

The Office of the Comptroller of the Currency (OCC) issues draft licensing manual supplement for evaluating charter applications from financial technology companies. Last year, the OCC announced that it was considering offering a special purpose national bank (SPNB) charter for financial technology (fintech) firms. On March 15, 2017, the OCC followed up on this announcement with a draft licensing manual supplement for a SPNB charter, for which it seeks public comment. The manual provides details about the process for fintech firms to apply for the charter, the chartering standards, the business plan the applicant should provide, and the factors the OCC will consider in deciding whether to approve a SPNB charter. The comment period closed on April 14, 2017.

The Board of Governors of the Federal Reserve System (the Board) adjusts the civil money penalties (CMPs) it may impose to account for inflation. On January 18, 2017, the Board announced that it had finalized a rule adjusting the maximum amount of each CMP within its jurisdiction to account for inflation, as required by law. In November 2015, a law was passed that requires all federal agencies to adjust their maximum CMP limits annually for inflation rather than

* Links to the announcements are available in the online version of *Outlook* at consumercomplianceoutlook.org.

every four years as previously required. The maximum CMP limits depend on several factors, including the severity and type of violation. Additionally, the law dictates the annual adjustment formula for federal agencies. The final rule increases the maximum CMP limits for 2017 by the amount required by law. The new CMP amounts, which can be found at 12 C.F.R. §263.65, apply as of January 15, 2017.

The CFPB issues a request for information (RFI) about the use of alternative data and modeling techniques in the credit process. Lenders using automated credit systems typically rely on information from consumer credit bureaus and credit scores when making credit decisions. This can present a challenge for the estimated 26 million consumers who do not have a file with a major credit bureau and the additional 19 million consumers who do not have a credit score because their credit history is too thin or too stale to generate a reliable credit score.

On February 21, 2017, the CFPB published an RFI in the *Federal Register* seeking information about alternative credit modeling systems, which could help identify creditworthy applicants who are "credit invisible" when lenders use traditional credit approval systems. As an example, the CFPB cited alternative credit systems that analyze nontraditional consumer data to inform their credit decisions, such as bill payment, and checking account transactions. To help the CFPB assess the benefits and risks of using nontraditional data in consumer credit decisions, the RFI seeks information from the public on specific questions such as "What does available evidence suggest about the potential benefits for consumers of using alternative modeling techniques?" The comment period closed on May 19, 2017.

Agencies release annual CRA asset-size threshold adjustments for small and intermediate small institutions. On December 29, 2016, the federal bank regulatory agencies announced the annual adjustment to the asset-size thresholds used under the CRA regulations to define small bank, small savings association, intermediate small bank, and intermediate small savings association. Financial institutions are evaluated under different CRA examination procedures based upon their asset-size classification. Institutions meeting the small and intermediate small institution asset-size thresholds are not subject to the reporting requirements that apply to large banks and savings associations. The annual adjustment to asset-size thresholds is based on the change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). As a result of the 0.84 percent increase in the CPI-W for the period ending in November 2016, the definitions of small and intermediate small institutions for CRA examinations changed as follows, effective January 18, 2017:

- *Small bank* or *small savings association* means an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.226 billion.

- *Intermediate small bank* or *intermediate small savings association* means a small institution with assets of at least $307 million as of December 31 of both of the prior two calendar years and less than $1.226 billion as of December 31 of either of the prior two calendar years.

Agencies issue final rule to adjust the threshold for exempting small loans from special appraisal requirements and announce 2017 threshold. In November 2016, the Board, the CFPB, and the OCC issued a final rule for the method they will use to make annual inflation adjustments to the threshold for exempting small loans from special appraisal requirements. The final rule also applies the calculation method to the exemption threshold for 2017. The threshold will remain at $25,500, based on the CPI-W in effect on June 1, 2016.

The Dodd–Frank Act amended the TILA to add special appraisal requirements for higher-priced mortgage loans, including a requirement that creditors obtain a written appraisal based on a physical visit to the home's interior before making a higher-priced mortgage loan. The rules implementing these requirements contain an exemption for loans of $25,000 or less and provide that the exemption threshold will be adjusted annually to reflect increases in the CPI-W. Among other clarifications, the final rule details that, if the CPI-W does not increase in the year being reviewed, the agencies will not adjust the exemption threshold from the prior year. ■

On the Docket: Recent Federal Court Opinions*

REGULATION B — EQUAL CREDIT OPPORTUNITY ACT (ECOA)

The Fifth Circuit addresses ECOA liability of secondary market assignees. *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698 (5th Cir. 2017). ECOA and Regulation B prohibit creditors from discriminating against credit applicants on a prohibited basis for any aspect of a credit transaction, including whether any part of an applicant's income is derived from income received from a public assistance program. 15 U.S.C. §1691(a)(2); 12 C.F.R. §1002.1. Twelve individuals filed a lawsuit against defendants AmeriPro Funding, Inc. and Wells Fargo Bank, NA (as well as a third defendant, a second national bank, which settled the claims that were brought against it) alleging that they were discriminated against when applying for residential mortgage loans because they received Section 8 housing assistance.

Defendant Wells Fargo both originates loans as a creditor and acquires them in the secondary market from lenders such as defendant AmeriPro. Wells Fargo's publicly available secondary-market investor guidelines, which correspondent lender AmeriPro followed regarding loans that it intended to sell to Wells Fargo, indicated that it would not purchase loans underwritten, in whole or in part, based on Section 8 income.

Two of the 12 plaintiffs applied directly to Wells Fargo for credit (Wells Fargo Applicants), four applied directly to AmeriPro (AmeriPro Applicants), and six inquired about loans from AmeriPro but did not complete applications (AmeriPro Inquirers). The district court dismissed all 12 plaintiffs' claims for failure to state a claim upon which relief could be granted. On appeal, however, the Fifth Circuit affirmed the lower court's dismissal of Wells Fargo Applicants' and AmeriPro Inquirers' claims but reinstated some of the AmeriPro Applicants' claims and remanded them for further proceedings consistent with its opinion.

The Wells Fargo applicants alleged that defendant Wells Fargo violated ECOA because its investor guidelines specifically state that it will not purchase loans underwritten with reliance on Section 8 income. However, the court found that the guidelines applied to Wells Fargo secondary market residential mortgage purchases and were not relevant here given that these plaintiffs applied *directly* to Wells Fargo.

Reviewing the AmeriPro Inquirers' claims, the court found that ECOA only permits an "aggrieved applicant" to bring a private cause of action and that individuals who inquire about loans without actually applying for them do not qualify. The court added that Regulation B's prohibition against discouraging — on a prohibited basis — applications for credit, 12 C.F.R. §1002.4(b), provides for no equivalent private cause of action and could solely be enforced by administrative agencies.

The court reinstated the AmeriPro Applicants' claims that plausibly alleged that defendant AmeriPro denied their credit applications on the grounds that they received public assistance. However, it rejected their additional claims that defendant Wells Fargo violated ECOA because its secondary-market policy of not purchasing mortgages underwritten in reliance on Section 8 income resulted in defendant AmeriPro's primary-market discrimination against applicants with such income.

Under ECOA, loan assignees are liable only if they participate in the credit decision or have knowledge of the violation. Referencing a 2003 ECOA rulemaking ("The final rule clarifies that the definition of creditor includes those who make the decision to deny or extend credit, as well as those who negotiate and set the terms of the credit with the consumer. But a potential assignee who establishes underwriting guidelines for its purchases but does not influence individual credit decisions is *not* a creditor" (emphasis in original)), the court stated: "The AmeriPro Applicants fail to state a claim against Wells Fargo because they fail plausibly to allege that Wells Fargo 'participate[d]' in the decision to extend credit. They make no allegations whatsoever concerning Wells Fargo's alleged 'participation' other than pointing out that Wells Fargo had a policy *in the secondary market* of not purchasing mortgages that were originated *by someone else in the primary market* based on Section 8 income. Again, this policy does not violate any prohibition under the ECOA. The ECOA does not apply, and does not purport to apply, to arms-length transactions in the secondary mortgage market" (emphasis in original).

* Links to the announcements are available in the online version of *Outlook* at consumercomplianceoutlook.org.

FAIR CREDIT REPORTING ACT (FCRA)

The Ninth Circuit rules that an employer violates the FCRA by combining an employment application consumer report disclosure with a liability waiver. *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017) (amended opinion). Under the FCRA, a party, including a prospective employer, which seeks to obtain a consumer report "for employment purposes with respect to any consumer," including a job applicant, must provide a disclosure that "a consumer report may be obtained for employment purposes" and obtain the applicant's written authorization. The disclosure must appear in a document consisting solely of the disclosure, although it may also include the authorization. 15 U.S.C. §1681b(b)(2)(A).

When the plaintiff applied for employment, the defendant provided the required disclosure (and the authorization) but combined it with a waiver of liability. The plaintiff, who brought suit on behalf of himself and any other plaintiffs allegedly similarly affected by the defendant employer and the defendant company that obtained consumer reports on the employer's behalf, alleged that this conduct violated the FCRA. The district court dismissed the lawsuit for failure to state a claim upon which relief could be granted, but on appeal, the Ninth Circuit reversed.

The court was not persuaded by the employer's argument that the FCRA permitted employers to combine the authorization with disclosure because "the disclosure and authorization requirements fit hand in glove" to protect consumers against improper invasions of privacy. The court also determined that also including a liability waiver on the document "pulls the applicant's attention away from his privacy rights protected by the FCRA by calling his attention to the rights he must forego if he signs the document." Noting that the FCRA allows for actual damages in the event of negligent violation of FCRA requirements regarding obtaining and using consumer reports, 15 U.S.C. §1681o, the court determined that the plaintiff instead had recourse to the statutory damages, punitive damages, and attorney's fees and costs associated with a willful violation, 15 U.S.C. § 1681n. Explaining that "[t]he FCRA's employment disclosure provision 'says what it means and means what it says,'" the court remanded the case to the district court for further proceedings consistent with its opinion.

The Seventh Circuit finds that the plaintiff alleging a FACT (Fair and Accurate Credit Transactions Act of 2003) Act violation without suffering harm lacks legal standing. *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016). The FACT Act's identity theft-related amendments to the FCRA prohibit printed receipts provided for credit and debit card transactions at the point of sale or transaction from displaying more than the last five digits of the card number or the expiration date. 15 U.S.C. §1681c(g)(1).

The plaintiff brought a class action on behalf of himself and similarly situated patrons against the defendant restaurant after it printed his credit card's expiration date on his receipt. The district court denied the plaintiff's motion for class certification. On appeal, the Seventh Circuit vacated the district court's judgment and remanded the matter for dismissal due to a lack of jurisdiction. In particular, the court determined that the plaintiff lacked Article III legal standing under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), which held that a plaintiff must allege more than a "bare procedural violation, divorced from any concrete harm … [s]uch an injury 'must be `de facto'; that is, it must actually exist.'"

The court found that, because the plaintiff here discovered the violation on his receipt immediately after receiving it and without anyone else seeing it, he was not at risk for identity theft. The court also noted the legislative history finding that "proper truncation of the card number, by itself, prevents identity theft and credit card fraud, regardless of inclusion of the expiration date." 15 U.S.C. §1681n (notes). The court concluded: "This case asks whether the violation of a statute, completely divorced from any potential real-world harm, is sufficient to satisfy Article III's injury-in-fact requirement. We hold that it is not."

The Washington, D.C. Circuit grants the CFPB's petition for *en banc review of PHH Corporation v. Consumer Financial Protection Bureau*. Last year, a divided three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that "the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director." *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1, 37 (D.C. Cir. 2016). The CFPB later petitioned the D.C. Circuit to vacate the panel's decision and have the entire court decide the appeal. On February 16, 2017, the D.C. Circuit granted the CFPB's petition. In May 2017, the court heard oral arguments. ■

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2017 Calendar of Events

June 11–14	**ABA National Regulatory Compliance Conference** Walt Disney World Dolphin Hotel, Orlando, FL
June 22–23	**2017 Policy Summit on Housing, Human Capital, and Inequality** Federal Reserve Bank of Cleveland, Cleveland
September 7–8	**New Perspectives on Consumer Behavior in Credit and Payments Markets** Federal Reserve Bank of Philadelphia, Philadelphia
October 13	**FDIC Consumer Research Symposium** FDIC, Arlington, VA