CBA | CONSUMER BANKERS ASSOCIATION

June 25, 2018
Submitted via regulations.gov
Monica Jackson, Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW

Re: Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities (Docket No. CFPB-2018-0012)

Dear Ms. Jackson,

The Consumer Bankers Association[1] ("CBA") appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's ("Bureau") inherited regulation and rulemaking authorities.[2] CBA's members work every day to comply with the Bureau's various inherited regulations, while providing financial security for millions of consumers.

Banking has changed dramatically in the short time since the Bureau was established. Most notably, every aspect of banking is becoming more digital, from the internal processes at each institutions, to how our member's customers interact with their financial institution. As the way our members do business transforms to reflect the rapid changes technology has brought to their doorsteps, CBA members need rules and regulations that reflect the digital world in which we now live, while maintaining the flexibility to adjust to emerging opportunities and challenges presented in this new landscape. As such, we recommend the Bureau examine the following recommendations, and most importantly, update the inherited regulations to reflect the drastic changes new and developing technologies has had on how financial institutions best serve their customers.

I. Issues Reaching Across Multiple Inherited Regulations

In addition to examining how updates in technology has changed the inherited regulations since the Bureau took over responsibility for them, the Bureau should establish a process to review rules on a regular basis as the landscape of financial services changes. Taking an internal review of every inherited rule to address the challenges and opportunities new technology brings to the industry is key to ensuring financial institutions are well poised to serve the financial needs of consumers today, and into the future. Additionally, the Bureau

[1] The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

[2] Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities, 83 F.R. 12881 (Mar. 26, 2018).

should undertake the following recommendations as they apply to multiple inherited regulations.

a. Update and Harmonize Regulations Dealing with Electronic or Digital Advertising and Disclosures

Regulations X, Z, and DD all have standards establishing the prominence and proximity for various disclosures, including where certain disclosures must be displayed, how they must be displayed, and what disclosures they should be grouped together with. These regulations should be amended and harmonized to indicate that the prominence and proximity standards they include meet the "clear and conspicuous" standards for all applicable electronic advertisements and disclosures set forth in the Regulations.

Regulations B, E, X, V, Z, and DD should be amended to better clarify that required language, including required disclosures and language related to advertisements, may be provided to consumers via a hyperlink, when included in an electronic document. This will greatly increase the accessibility of the required language for consumers. To this end, the Bureau should issue similar guidance on disclosure requirements to harmonize the requirements of the Homeowners Protection Act.

Accordingly, the required language should be considered:

- Prominent if:
  - It is at least the same size as the trigger term; or
  - Where it is provided through a separate link, the link is as prominent as the trigger term.
- Proximate if:
  - It is in close proximity to the trigger term;
  - Where it is provided through a separate link, the link is in close proximity to the trigger term; or
  - The trigger term itself links to it.

Amending the above regulations to allow financial institutions to better provide electronic disclosures will help lead to better informed consumers as electronic disclosures can be expanded to accommodate the individual needs of the document they appear on, and can easily be printed in a large format.

b. Amend and Clarify Various Requirements of the E-Sign Act & Modernize Rules Governing Delivery of Disclosures Provided Electronically

The Bureau should remove the e-consent requirement under the Electronic Signatures in Global and National Commerce Act[3] ("E-Sign Act") which requires consent prior to providing

[3] *See*, Electronic Signatures in Global and National Commerce Act, Pub. L. 106-229, 114 Stat. 464 (enacted June 30, 2000).

adverse action notices under Regulation B. This extra requirement is inconsistent with the requirements of Regulation V, which allows the electronic delivery of adverse action notices without e-consent. Additionally, financial institutions are often able to make credit determinations before a consumer has established a relationship with the lender and gone through an e-consent process.

The Bureau should also provide guidance on what consumer behavior constitutes "reasonable demonstration of access" to electronically receive and access information under the E-Sign Act. This is especially important when consumers consent to a financial institution's E-Sign disclosure using bank technology or devices. Accordingly, the timing for delivery of electronic disclosures should be more flexible, and allow electronic delivery to qualify for the longer time periods permitted for delivery when the consumer is not present. For example, Regulation DD requires account disclosures to be made at account opening, but allows up to 10 business days to deliver the disclosure to a consumer if they are not present at the time the account is opened, unless the consumer uses electronic means to open the account. Allowing the 10 day delivery window when a consumer is present at the financial institution, and provides E-Sign consent to electronic delivery on a device at the financial institution would allow the consumer the opportunity to view the disclosures before account opening, and would accommodate the convenience of in-person account opening by allowing the consumer to consent either at the financial institution or on a personal device after account opening. Additionally, allowing for electronic delivery of Regulation Z disclosures without requiring E-Sign consent will help facilitate closed-end loans at the point of sale. Finally, clarification stating that when a consumer submits an application electronically, and consents to electronic delivery of communications when submitting the application, this should allow financial institutions the ability to deliver adverse action letters to the consumers provided digital delivery channel. Greater flexibility on E-Sign requirements will greatly impact the convenience and availability of important information for CBA member's customers, and help permit financial institutions to better serve their customers in an increasingly digital world.

c. Issue Binding Guidance on UDAAP

The Bureau has one of the most powerful enforcement tools among federal regulatory agencies, the Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP") authority granted to the Bureau under the Dodd-Frank Wall Street Reform and Consumer Protection Act[4] ("Dodd-Frank Act"). CBA's members would greatly benefit from binding guidance on this enforcement tool to better ensure compliance with the Dodd-Frank Act, and avoid running afoul of UDAAP.

The Bureau should issue guidance stating that the Bureau has sole jurisdiction for supervision and enforcement of UDAAP over covered entities in its jurisdiction, and seek limits on jurisdiction of state law over national banks that may be subject to multiple agency

[4] *See*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (enacted July 21, 2010).

enforcement actions. Further, guidance should be issued stating that acts or practices deemed acceptable under the UDAAP standard should not be considered a violation of any state UDAAP or Unfair or Deceptive Acts or Practices ("UDAP") laws; and acts or practices that comply with substantive laws and regulations (such as Regulation Z's "clear and conspicuous" disclosure standards) cannot be deemed unfair, deceptive, or abusive. Clarity on this issue will help financial institutions innovate new solutions for consumers seeking financial security, and pass these benefits on to consumers.

Additionally, greater clarity should be issued in guidance surrounding what qualifies as an "abusive" act or practice. The Bureau has used the "abusive" tag in enforcement actions sparingly, and never on its own, and as such, the use of an "abusive" claim should be reserved for intentional behavior. To further foster innovation by financial institutions, UDAAP should be revised to add a statute of limitations of 2 years. Finally, the Bureau should allege any acts or practices deemed in violation of UDAAP with specificity, consistent with Federal Trade Commission UDAP requirements[5] to best inform the financial services industry on what behavior runs inconsistent with UDAAP standards.

II. Issues with Specific Inherited Regulations

a. Regulation B: Equal Credit Opportunity Act

i. Simplify the Collection of 1071 Data

Section 1071 of the Dodd-Frank Act, amends the Equal Credit Opportunity Act ("ECOA") to require financial institutions to compile, maintain, and report information concerning credit applications made by women-owned, minority-owned, and small businesses. Under the section, every financial institution must inquire of any business applying for credit whether the business is a small business, or a women or minority-owned business, maintain a record of that information separate from the application, and report that information along with related information about the application to the Bureau. The information must be made public, on request, in a manner to be established by regulation, and will be made public annually by the Bureau.

As stated previously in comments filed by CBA on the issue,[6] while Section 1071 mandates this rule, the collection of data on women or minority-owned businesses and small businesses is extremely complex, and presents many challenges. CBA notes the construction of a rule under 1071 presents two-fold challenges:

1. Determining which data fields to mandate be collected, developing standard values to be reported for many of the fields, and proposing workable rules for

[5] 15 U.S.C. §45(a)(1).
[6] Comments of Consumer Bankers Association, Re: Docket No.: CFPB-2017-001 – Small Business Data Collection (filed Sep. 13, 2017).

how to collect and report the data will be tremendously difficult, at least if the goal is to have a thoughtful, achievable rule that yields useful data; and

2. Constructing fair lending analysis approaches that will yield meaningful and appropriate conclusions for business lending is likely even more challenging.

In light of these major challenges and the need to streamline the credit process in order to extend credit with greater speed to qualified applicants, CBA must stress the importance of well-balanced rules under Section 1071 in order to avoid burdensome data collection requirements that could greatly stifle small business lending, increase compliance costs for small business lenders, and open the floodgates for costly litigation. Rulemaking must be sure to address 1071 reporting compliance with existing reporting systems to ensure as little disruption to the credit process as possible.

ii. Repairing Issues with Applications, Valuations, and Adverse Actions

Under Regulation B, the term "application" is defined one way, while Regulation C and the new TRID requirements define "application" in two different ways. The Bureau should examine and review the term, and determine if there is a way to harmonize the definition across the regulations.

There is also ambiguity under Regulation B surrounding what constitutes a "valuation" and "appraisal" for purposes of delivery of a copy of an appraisal to a consumer. Due to the ambiguities surrounding these terms, financial institutions are often forced to provide multiple versions of appraisals to consumers, creating a great cost for the institution, and confusing and frustrating the consumer.

Rules surrounding adverse action decisions require clarity so decisions may be of more use to consumers. Borrowers frequently choose to communicate and interact with their financial institutions electronically, and at a more frequent rate. Additionally, many borrowers interact with their financial institution through a portal that permits co-borrowers to view all of the documents associated with an application, raising the pertinence of this issue moving forward. Accordingly, co-applicants should be permitted to view the credit scores of other co-applicants across an application as consumers become more engaged in the credit process.

Additionally, the Bureau should clarify for institutions that providing more than four reasons for an adverse action or denial of an application is not a regulatory violation. As financial institutions look to incorporate the use of alternative data and modeling techniques in their credit process to make credit more readily available for consumers, providing more than four reasons for an adverse action will help inform consumers, especially as it may be difficult to distinguish and convey the primary reason for denial.

Regulation B should also be revised to explicitly exclude loss mitigation applications from adverse action and valuation requirements, as they impose additional burdens on financial institutions that are unnecessary in light of the loss servicing rules present in

Regulation X. Regulation B’s adverse action requirements should also be eliminated for consumers in imminent default who apply for loss mitigation as these requirements are once again duplicative with Regulation X, in this case, through the missing items letter and decision letter requirements.[7] Finally, Regulation B’s valuation requirements should be eliminated for consumers who apply for loss mitigation as Regulation X covers the issue by providing consumers who are denied a loss mitigation option with a decision letter that indicates whether the value of the property was a factor in the denial, and provides consumers with the opportunity to appeal if they believe the value was inaccurate.[8] At a minimum, Regulation B’s valuation requirement should only apply when a property valuation was actually a factor in a denial decision.

The Bureau should also issue guidance on what circumstances qualify as an “application” under Regulation B. While Regulation B provides discretion for financial institutions to define an application, the Regulation’s Commentary also includes language stripping financial institutions of the discretion, and leaving a broad definition of any written or oral request or inquiry pertaining to credit.[9] This in turn leads to financial institutions being unable to respond to many consumer inquiries in fear of running afoul of adverse action requirements, as many preliminary communications may be considered an “application”.

Further, the Bureau should eliminate Comment 1 to §1002.2(C)(2)(v), which states that if a financial institution does not offer credit terms requested by an applicant, this constitutes a denial of the application. The circumstances in which this issue arises do not relate to the applicant, are not terms that a consumer can change, and lead to financial institutions being forced to provide adverse action notices when the credit terms are not offered by the institution. Section 1002.2(C)(2)(iv) should also include examples of “applicable laws” and include cases of fraud and identity theft in the exceptions to adverse actions section.

iii. Clarify Disparate Impact Implications

The Supreme Court set forth a framework in *Texas Department of House and Community Affairs v. Inclusive Communities Project, Inc*. for the application of disparate impact to the Fair Housing Act. To the extent Regulation B and ECOA is interpreted as including disparate impact, the Regulation should be clarified to incorporate a similar set of principles.

iv. Make Technical Clarifications

The Bureau should provide clarification surrounding what constitutes “discouragement” in the context of marketing consumer products under §1002.4. Specific clarification from the Bureau on what types of marketing practices and messages might be considered

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[7] 12 C.F.R. 1024.41

[8] *Id*.

[9] 12 C.F.R. Appendix Supp. I to Part 202, *Official Staff Interpretations*.

discouragement towards a protected class would be of great use to financial institutions and consumers alike. Currently, the lack of clarity on "discouragement" leads to inefficiencies when financial institutions attempt to decide what type of marketing is applicable to protected classes. To this end, the Bureau should provide more clarity around the definition of "credit" under the regulation, specifically in regards to credit cards. Specifically, the definition should include the actual provision of credit, not provision of insurance products, promotions, and statement credits.

Additionally, clarification is needed regarding the expected lookback period for customer remuneration and remediation. Section 1002.12 establishes a record retention period of 25 months, while § 1002.16 establishes a civil liability timeframe of 5 years. Policy statements from the Fair Housing Administration indicate both 24 months and 6 months for lookbacks. The Bureau should harmonize these dates and clarify that the appropriate timeframe is 2 years to best allow financial institutions to properly adhere to effective lookback periods.

v. Clarify Stance on Redlining Risk for Non-Mortgage Products

The long-standing Interagency Fair Lending Examination Procedures[10] suggests that examiners focus on residential, real-estate loans during examinations. However, a recent trend in examinations has begun to set the expectation that other lending products be reviewed for redlining as well. This creates challenges as there is less available information on other lending products for financial institutions to compare their performance against the marketplace, so any analysis done may be less reliable or conclusive for these non-mortgage products. Clarification from the Bureau about what should be considered during these exams would help financial institutions better prepare for examinations, and work to collecting more valuable information.

vi. Confirm Leases Do Not Apply to Regulation B

Clarification is needed setting a clear stance on the applicability of leases (such as automobile or equipment leases) to Regulation B. Under Regulation B's definition of "credit", there exists a gray area around the applicability to leases. While some financial institutions feel Regulation B does not technically apply to leases, many apply fair lending principles and compliance management systems to leases nonetheless. Clarification is needed from the Bureau to exclude leases from Regulation B, and to ensure that Regulation B's definition of "credit" includes loans and lines of credit.

b. Regulation C: Home Mortgage Disclosure Act

Under the Bureau's 2015 final Home Mortgage Disclosure Act ("HMDA") Rule, the Bureau interpreted HMDA to require the Bureau to use a balancing test to determine if and

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[10] *See*, Federal Financial Institutions Examination Council, *Interagency Fair Lending Examination Procedures* (Aug. 2009).

how HMDA data should be modified prior to public disclosure to protect applicant and borrower privacy while fulfilling HMDA's disclosure purposes. The test examines whether the release of unmodified data creates risk to privacy interests that are not justified by the benefits of public release of data, in light of HMDA's statutory purpose.

As part of the loan process, consumers and businesses provide a wide range of personal and financial information to financial institutions, and as the keepers of this sensitive information, CBA's members note that the Bureau's balancing test fails to consider real threats to consumers' private information, as re-identification of individuals through the data provided is a virtual certainty. Under the current public HMDA data, re-identification is already highly possible, and with more data publically available, the threat of re-identification will increase exponentially. Advances in technology will continue to enable easier methods of re-identification of the data, and as such, the Bureau should disclose the new data collected only in aggregate form to protect the privacy of individual consumers.

Additionally, CBA notes that data security is of the upmost importance, and the Bureau should undertake a comprehensive update of its data security practices to restrict access to the data collected, and ensure it is properly protected. The Bureau has announced that it will continue to move forward with HMDA rulemaking in 2019,[11] and CBA looks forward to further engaging the Bureau on these important issues at that time as well.

c. Regulation E: Electronic Funds Transfer Act

The Bureau should provide clarification surrounding the applicability of §205.14 to digital wallets that hold bank account information and online retailer user accounts. Clarification would greatly help foster innovation in this space, and allow for consumers to more readily adopt mobile and online banking technologies. The Bureau should also better define "Electronic Funds Transfer Service" under §205 to exclude a merchant who initiates an Electronic Funds Transfer ("EFT") to pay a debt owed to a merchant.

The Bureau should also take steps to limit bank liability when a consumer reports an EFT error more than 60 days after a statement is issued, as currently, financial institutions can be held liable for errors reported beyond the 60 day window provided for in the regulation. Further, the Bureau should not require a 10-day notice of varying preauthorized EFTs to be in writing as this creates an unnecessary burden both for consumers and CBA members.

Finally, there is no way at present for an entity that receives an electronic payment, or an EFT service provider, to confirm the name, routing and transit number, and account number provided by the individual making the EFT or electronic payment actually belongs to that individual. As such, the Bureau should require the financial institution that holds an asset account to confirm if the information provided by the consumer is correct.

[11] Office of Information and Regulatory Affairs, Office of Management and Budget, *Agency Rule List – Spring 2018, Consumer Financial Protection Bureau*, RIN 3170-AA76.

d. Regulation F: Fair Debt Collection Practices Act

Under the Dodd-Frank Act, the Bureau is charged with writing regulations implementing the Fair Debt Collection Practices Act ("FDCPA"), and has argued that the Bureau's 1031 UDAAP authority under the Dodd-Frank Act allows the Bureau to extend FDCPA-like rules to creditors. As the Bureau noted in its unified agenda released earlier this year,[12] the formal rulemaking process for FDCPA will continue in early 2019. CBA looks forward to further engaging the Bureau on that issue at that time, but notes that CBA strongly opposes placing FDCPA-like restrictions and requirements on creditors. Additionally, CBA is in support of establishing ethical guidelines for the collection of consumer debt by third-party debt collectors, as the FDCPA was established to cover. Finally, CBA emphasizes that consumers facing issues repaying a debt are best served if they are able to communicate freely with their creditors, so ensuring that communication channels are left uninhibited by any future rule is vital to consumer success in repaying a debt.

e. Regulation G: S.A.F.E. Mortgage Licensing Act

The Bureau should recognize that artificial-intelligence-based tools, or other tools enabling financial institutions to collect information that a home lending advisor would otherwise take should not fall under the definition of a "mortgage loan originator" in Regulation G.[13] These tools do not directly engage in activities for compensation or gain, and as such, only human home lending advisors who use those tools directly should satisfy the requirement.

f. Regulation P: Privacy of Consumer Financial Information

Under the Gramm-Leach-Bliley Act ("GLBA") of 1999,[14] and its implementing Regulation P, financial institutions are required to furnish customers with an annual privacy notice. This notice is provided at considerable cost to providers, yet provides little benefit to consumers. The annual privacy notice has long been one of the least useful yet most burdensome requirements placed on CBA members, especially those members that do not share information outside one of the statutory exceptions, or have not changed their information sharing practices since the last time a customer was provided with a disclosure.

The Bureau amended Regulation P in 2014 to offer an alternative means for providers to comply with the statutory annual notice requirement. However, the Bureau's final rule included a number of conditions and qualifications that significantly limited its use by financial

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[12] Office of Information and Regulatory Affairs, Office of Management and Budget, *Agency Rule List – Spring 2018, Consumer Financial Protection Bureau*, RIN 3170-AA41.

[13] 12 C.F.R. 1007.102.

[14] Annual Privacy Notice Requirement Under the Gramm-Leach Bliley Act (Regulation P), 81 Fed. Reg. 44801, July 11, 2016.

institutions, including requiring financial institutions to post the notice online and annually notify customers that the information is available online, either in written or electronic form. These conditions eliminated any benefits from the 2014 proposal and deterred institutions from taking advantage of the intended relief.

After the amendment to Regulation P was released, the United States Congress amended GLBA to eliminate the annual notice requirement demonstrating Congress' conclusion that the annual notices provided little benefit to consumers, and contributed to consumer information overload. The FAST Act[15] eliminated the annual privacy notice, provided a financial institution meets two simple conditions. First, the financial institution can only share information within the parameters of one of GLBA's statutory exceptions, and second, the institution may not have changed its information sharing practices since the last time the customer was provided with a privacy notice.

While the FAST Act provision was self-enacting, CBA strongly urges the Bureau to eliminate the annual notice as superfluous where there is no sharing under either GLBA or Fair Credit Reporting Act ("FCRA") that would require the institution to offer customers an opt-out. Additionally, the Bureau should develop model forms for electronic delivery of disclosures that will provide the same safe harbor provided when presenting the printed forms.

Further, the §1016.14 exceptions to notice and opt-out requirements for processing and servicing transactions should be expanded to include an exception for private label credit cards to include co-brands.

Additionally, financial institutions often do not share account numbers with third parties when the third party is to provide a service to consumers because of a lack of clarity around what the term "marketing" means under the GLBA, and if a the prohibition against "marketing" would be triggered. Clarification on what constitutes "marketing" for purposes of the prohibition on sharing account numbers under the GLBA[16] would help reduce fraud risk for consumers, and allow financial institutions to better serve their customers.

Finally, clarity is needed on the relationship between GLBA prohibitions on the re-use and re-disclosure of data in relation to its open access banking requirements. Specifically, information about when financial institutions allowing consumers to access data are considered "custodians" of the data, and obliged to follow and protect the data despite not having any further control over it.

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[15] Fixing America's Surface Transportation Act, Pub. L. No. 114-94.

[16] 16 C.F.R. §313.13.

g. Regulation V: Fair Credit Reporting Act

i. Place Caps for Fair Credit Report Act Class Action Lawsuits

Unlike the FDCPA, ECOA, and many other of the inherited regulations, the FCRA does not impose a cap on recovery in class action lawsuits. As such, plaintiffs in FCRA class action lawsuits may pursue unlimited damages, including punitive damages and attorneys' fees. This imbalanced structure invites class action lawsuits, alleging technical violations of the FCRA, as a means to generate bloated payouts for attorneys. For many financial institutions, this risk of uncapped liability forces them into settling even the most speculative of claims, ultimately leading to higher costs for consumers.

ii. Use of Alternative Data

Additionally, the use of alternative data and modeling techniques in the credit process presents significant potential benefits for consumers by enabling financial institutions to serve more consumers and better assess the creditworthiness of consumers. CBA members have found the use of alternative data and modeling techniques can improve their predictive power in the credit process, facilitate operational improvements within their institutions, reduce fraud, and can be used by consumers spanning the entire credit spectrum. The use of alternative data and techniques can help financial institutions better serve the credit invisible, and thin-credit-file consumers. As new techniques are still being developed in this space, CBA advocates that the Bureau should continue to examine the benefits of using alternative data and techniques, but stray away from new regulatory policy on the use of alternative data and techniques as to encourage innovation.

CBA members are conscientious of the various fair lending laws and requirements, and do not use alternative data and techniques if they may run afoul of those concerns. Additionally, CBA feels that alternative data sources should meet rigorous enterprise data management standards, and comply with all existing regulatory requirements, especially those listed herein, or risk violating UDAAP or other laws. Further, alternative data used in the credit process should adhere to safety and soundness principles, including:

- complying with laws, rules, and regulations;
- ensuring the data is effective at demonstrating a consumer's creditworthiness and willingness to repay;
- confirming the data is accurate; and
- ensuring the data is transparent to the client

Allowing financial institutions to innovate in this space is key to increasing credit to those that need it most, while staying abreast of changes new and developing technology may have on the credit market.

iii. Reform Secondary Use Data to Better Serve Consumers

Regulation V, FCRA, and its related guidance set limits on the secondary use of account review data for marketing purposes, and allows for credit data only to be used to offer an improvement or upgrade to an existing account. The Bureau should issue guidance clarifying that both refinances and home equity lines of credit are examples of an improvement or upgrade to an existing mortgage, given their functional equivalence and the need to allow financial institutions to offer customers a full suite of options so the customer can become better informed, and best choose the product that fits their financial needs.

iv. Amend Exceptions to Direct Dispute Investigations

The Bureau should amend 12 CFR § 1022.43(b) so exceptions to direct dispute investigations are treated solely as exceptions, and not as also requiring a notice of determination within 5 days. If amended, financial institutions could treat disputes as complaints or customer service inquiries, and treat them as such, instead of responding to the consumer with a form notification in order to meet a regulatory requirement and time constraint, that may leave the consumer's concern unaddressed.

v. Increase Identity Theft Block Requirements

The Bureau should enhance the obligations of consumer reporting agencies, pursuant to FCRA §605B,[17] regarding blocking information as a result of identity theft. Under §605B, consumer reporting agencies are permitted to decline or rescind blocks of reported information in three scenarios.[18] However, consumer reporting agencies often do not have consistent practices to effectuate rescinding these blocks on information, which may lead to consumers who have had a block placed in error unable to have the block removed. The Bureau should require the consumer reporting agency to notify all parties that were notified of the block in the first place to ensure the consumer is able to have the block removed, if appropriate.

vi. Clarify Permissible Purpose

The Bureau should consider promulgating rules to create greater clarity around permissible purposes to obtain credit reports, especially with regard to a financial institution's use of account review data to conduct portfolio management activities and obtaining credit reports on individuals in business transactions.

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[17] 15 U.S.C. § 1681c-2.

[18] *See Id.* stating "(c) Authority to decline or rescind. (1) In general. A consumer reporting agency may decline to block, or may rescind any block, of information relating to a consumer under this section, if the consumer reporting agency reasonably determines that— (A) the information was blocked in error or a block was requested by the consumer in error; (B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or (C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions."

vii. Expand Credit Reporting and Credit Score Impact Statements

The Bureau should expand on Bulletin 2013-08,[19] and clarify what financial institutions are permitted to communicate to consumers about the impact paying a debt may have on credit reports and scores. While CBA members agree with the Bulletin's purpose of ensuring that collectors do not misrepresent the impact of paying debts as a means of making payment, the broad language in the Bulletin makes it difficult for financial institutions to properly educate their consumers about how to improve credit scores.

viii. Revise Notice Requirements

The Bureau should revise both the long and short form notice requirements set under the FCRA to eliminate redundancies between the two notices, including stating that there is no need for financial institutions to disclose both the long and short form if done on the same page.

h. Regulation X: Real Estate Procedures Act

The Bureau should provide clarification surrounding enforcement orders related to Section 8 of the Real Estate Procedures Act ("RESPA").[20] CBA members are in need of clear tests for compliance in regards to relationships with marketers, builders, and other service providers. In addition, the Bureau should provide clarification on how to evidence the market value of services rendered, and how to account for products and services that are provided at no, or reduced, consumer expense.

i. Regulation Z: Truth in Lending Act

i. Reform Change in Terms Provisions

Regulation Z's "Change in Terms" ("CIT") provisions generally help consumers understand the changes issuers make to their credit products, including those changes that may increase the product's cost, and help ensure consumers have the time to consider the changes, and decide whether they want to continue to use that account or close it. However, there are times when consumers seek and affirmatively request changes to their credit products, or wish to migrate to a different credit product that may be better suited to the consumer's financial situation. Often, these consumers make it clear to their institution they understand the implications of changing products, and want to do so as soon as possible, despite potential for an added fee. In these cases, the Bureau should foster informed consumer choice by allowing consumers who affirmatively request, and provide express affirmative consent to certain card

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[19] Consumer Financial Protection Bureau, *CFPB Bulletin 2013-08 (Fair Debt Collection Practices and the Dodd-Frank Act)* (July 10, 2013).
[20] 12 U.S.C. § 2607.

changes, to receive these changes without forcing them to wait through the 45-day CIT waiting period.

The most common instances of these issues occurring take place when consumers with multiple card products request to combine into a single card product, when consumers request that their card be upgraded to a card with better rewards or benefits, or wish to change products that allow for different terms for a balance transfer. In many of these situations, the CIT requirements work adverse to consumer interests, and as the consumer is in the ideal position to know which products are best for them, financial institutions should be permitted to change the product for the consumer without enduring the CIT waiting period.

While Regulation Z permits changes to a credit product without enduring the CIT waiting period for paper access checks, this exemption should be modernized to cover other notice and payment technologies that provide effective disclosure, and permit informed affirmative consent. Additionally, Regulation Z codified obsolete technology and hindered innovation when permitting financial institutions to charge a previously undisclosed balance fee for a balance transfer without a CIT only if they deliver the consumer a "check that can be used to access the account."[21] There is no reason to believe that consumers are more likely to understand disclosures on paper checks than they are to understand the same disclosures on channels they more frequently use, including digital channels. As long as balance transfer disclosures are clear and conspicuous, Regulation Z should not mandate a particular form of disclosure, and as such, the Bureau should amend Regulation Z to permit any clear and conspicuous disclosure of previously undisclosed balance transfer fees, either on an access check, electronically, or otherwise.

ii. Issues with the Credit Card Accountability Responsibility and Disclosure Act

2009's Credit Card Accountability Responsibility and Disclosure Act ("CARD Act") has created some major burdens for CBA members and their customers. Most notably, provisions surrounding a customer's ability to repay, which requires financial institutions to collect data on applicant income, is extremely time consuming for financial institutions and their customers alike. The Bureau should state that for existing customers, the ability to repay test should be removed, or limited to the use of modeled income to better allow financial institutions to provide lines of credit to their customers.

The provisions requiring the collection of this data make the application process significantly more difficult and confusing for consumers, and can lead to financial institutions being forced to decline otherwise credit-worthy applicants if the information cannot be collected. Similar burdens are imposed on financial institutions and consumers when credit line

[21] *See* § 1026.9(c)(2), Comment 2, stating for "checks that can be used to access a credit card account" under § 1026.9(b)(3), "the creditor is not subject to the CIT requirement even if using the checks would trigger a new or higher rate or fee, if that rate or fee is properly disclosed on the check."

increases are considered as the increases also require the collection of income information. These burdens lead to fewer credit-worth individuals getting access to the credit they deserve. For example, one CBA member reported that the CARD Act provisions forced the institution to decline credit to roughly 50,000 consumers, and grant about 125,000 fewer credit line increases per year.

CARD Act provisions also established a prohibition against multiple fees being charged concurrently. Individual violations of an agreement impose separate costs on financial institutions. As such, financial institutions should be permitted to collect multiple fees for multiple violations of an agreement with a customer, and the CARD Act's prohibition against these fees is an overreach of the Bureau's power in this space.

iii. Adopt a Single Rescission Form

The Bureau should adopt a single rescission form as identifying cash out and same creditor refinancings creates an undue burden on financial institutions. To this end, the Bureau should modify the H-8 Model Rescission Form to reflect the alternative language conveyed in H-9 Model Rescission Form, or re-tool the H8 to make it more comprehensive.

iv. Provide Clarification on Bona Fide Discounts Points

Since Fannie Mae and Freddie Mac have removed their language defining an objective & mathematical test for methods to calculate bona fide discount points,[22] the Bureau should provide clarification on how to calculate these points.

v. Establish a Time-limit for Claims and Defenses

Regulation Z, §1026.12 should be amended to include a time limit on clams and defenses to ensure financial institutions are not forced to resolve product and service quality disputes indefinitely.

vi. Changes to Rates and Fees

Regulation Z currently requires penalty fees to be reasonable and proportional to the violation, and the Bureau provides a standard for financial institutions to determine what is reasonable, and also provides a safe harbor which caps the amounts of the penalty fees, which is updated with the Consumer Price Index ("CPI") increases. To avoid issues in updating the safe harbors in a reasonable time, the Bureau should treat increases to the CPI similarly to increases made in conjunction with the Prime rate, where there is no involvement from the Bureau.

Maximum amounts of permissible late fees are tied to the CPI, with the Bureau able to change the maximum late fee amount when the CPI changes, and will typically send a bulletin announcing the change. However, if the CPI (and thus the maximum fee) decreases, financial institutions are automatically and instantaneously prohibited from charging a fee that exceeds

[22] *See*, Fannie Mae, *Selling Guide Announcement SEL-2016-06* (Issued Aug. 20, 2013).

that amount. When the CPI (and maximum fee) increases, financial institutions can only charge the higher fee after giving customers 45 days advance notice, with the right to opt out and close their account. Allowing financial institutions to send a notice of the changes, would help relieve the rigid formatting requirements required with opt-out messaging.

Under Regulation Z, §1026.59, if a financial institution increases an annual percentage rate based on the credit risk of the consumer, market conditions, or other factors, the financial institution must re-evaluate those factors at least every six months to determine if a rate change is warranted. As the amount of days in a given month vary, clarification that doing the review every 180-185 days would satisfy the "6 months" requirement would be of much use to financial institutions.

Under §1026.9(g) of Regulation Z, financial institutions must provide notice of an increase due to a penalty rate for a borrower who is at least 60 days late on payment at least 45 days prior to the effective date of the increase. Under this timeframe, financial institutions must wait at least 105 days before imposing a penalty rate on existing balances. As the penalty rate, and the mechanism for applying it must be clearly disclosed in various sections of the agreements between the customer and the financial institution, the 45 day requirement should be replaced with a requirement to notify the customer within a reasonable period of time, such as one billing cycle, after the rate increase, and a notice to notify the customer about consecutive payments cure rights.

vii. Update Website Requirements

Regulation Z requires credit card issuers to establish and maintain a website on which they post agreements between the issuer and the consumer for each credit card account, and to also provide the Bureau with those agreements, which the Bureau in turn posts on their website. The Bureau should permit issuers to provide a link to the issuer's website on the Bureau page that holds all the agreements so consumers can more easily access information about credit card offers being made by various issuers.

viii. Reform Dispute Resolution Timing

The Bureau should also require that disputes asserted under §1026.12(b) must be asserted within 60 days of when the unauthorized charge first appeared on the cardholder's billing statement. Currently, there is no applicable time limit for a cardholder to assert an unauthorized charge dispute under §1026.12(b), requiring financial institutions to investigate claims years after the charges are placed on the account, making investigation near impossible to complete. Under §1026.13(a), unauthorized charges must be asserted no later than 60 days after the unauthorized charge first appeared on the consumer's billing statement in order to be subject to Regulation Z's timing requirements for resolution of billing error disputes.

ix. Clarify the Commentary on Periodic Statements

The Bureau should amend the Commentary to §1026.5 which provides that creditors do not have to send a period statement to consumers if the creditor receives return of a statement sent previously as undeliverable to apply more broadly. Specifically, the Commentary should apply to all notices required by Regulation Z to be delivered in writing to a consumer, if a notice or statement previously sent to the consumer at the same address was undeliverable.

j. Regulation DD: Truth in Savings Act

As stated above in regard to the clarifications for electronic disclosures under the E-Sign Act requirements, Regulation DD, §1030.4(a)(a) should be changed to permit up to 10 business days to deliver account opening disclosures electronically to a consumer if they are present at the financial institution when the account is opened and provided E-Sign consent on a financial institution's device.

III. Conclusion

CBA greatly appreciates the Bureau's continued investigation into its own processes and rules, and encourages the Bureau to carefully review the inherited regulations to ensure they stay up to date with changes in technology. Ensuring the financial services industry has workable and tailored rules will help ensure CBA members are able to best serve consumers, and increase consumer financial security. If you have any questions about the information contained herein, please do not hesitate to contact the undersigned directly.

Sincerely,

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