American Bankers Association

Kathleen C. Ryan
Senior Vice President
Fair and Responsible Banking
kryan@aba.com

February 12, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Director Chopra:

The American Bankers Association (ABA)[1] appreciates your acknowledgment that financial service providers and the consumers they serve benefit from clear rules. As you noted in your written testimony to Congress in April 2022, "Laws work best when they are easy to understand, easy to follow, and easy to enforce."[2] You also promised that the Consumer Financial Protection Bureau (CFPB) would "[D]ramatically increase its issuance of guidance documents, such as advisory opinions, compliance bulletins, policy statements, and other publications."[3]

You have followed through on this commitment, overseeing the agency's issuance of a steady stream of guidance documents, which have had a significant impact on industry—and the products and services available in the consumer financial marketplace. However, this impact has not always been positive, and the guidance issuances have not always provided legal clarity or useful advice and information to regulated entities.

As discussed in ABA's white paper, *Effective Agency Guidance*,[4] this is sometimes the result of a failure to follow either the mandatory process of the Administrative Procedure Act (APA),[5] which is required for guidance that is a binding "legislative rule." In other cases, the guidance may in fact be an "interpretive rule" or "general statement of policy" that is not subject to the APA, but the failure to confer with regulated entities to understand their interpretive questions, operational impacts, and system constraints limits the utility of the guidance, undermines its acceptance, and may limit its durability as administrations change.

Because ABA and its members welcome guidance that complies with legal requirements while providing useful information and advice, we are offering industry feedback on certain recently published guidance documents. Our goal is to provide constructive feedback on the legal and

---

[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.
[2] Consumer Fin. Prot. Bureau, Press Release, Written Testimony of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs (Apr. 2022), https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs/.
[3] *Id.*
[4] Am. Bankers Ass'n, *Effective Agency Guidance* (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.
[5] 5 U.S.C. §§ 551-559.

operational issues presented, the benefits and costs, and to identify interpretive questions that remain—in other words, to provide the comments industry would have offered had the CFPB sought public comment prior to issuing the guidance. Our intent is for the Bureau to issue guidance documents that are transparent, consistent with the law, and focused on promoting the interests of consumers in a strong, vibrant, and innovative market for consumer financial products and services.

Summary of the Comment

On September 19, 2023, without consultation with the banking industry, the Bureau released Circular 2023-03 addressing creditors' responsibility to provide reasons for adverse action under Regulation B, which implements the Equal Credit Opportunity Act (ECOA).[6] The Circular responds to the following question: "When using artificial intelligence or complex credit models, may creditors rely on the checklist of reasons provided in CFPB sample forms for adverse action notices even when those sample reasons do not accurately or specifically identify the reasons for the adverse action?"

Not surprisingly, the Circular answers that question in the negative. Banks understand that they cannot use model form reasons if those reasons are not accurate. And the Bureau has made clear that Regulation B applies with equal force to all methods of credit decision making.[7] But the Circular makes certain statements that have generated confusion and concern about compliance with Regulation B. Our letter discusses the following issues presented by the Circular:

- The Circular exceeds Regulation B's requirements and conflicts with Official Commentary;
- The scope of the Circular is unclear;
- The Bureau has not considered the operational difficulties and unintended consequences presented by the Circular; and
- The Circular expresses the CFPB's view of what ECOA and Regulation B currently require; therefore, there is no time for implementation.

The ABA and its members urge the Bureau to rescind the Circular and to reissue it as proposed guidance, expressly inviting public comment on the issues identified above.

As issued, the Circular not only generates confusion for compliance, but it may also discourage responsible use of artificial intelligence (AI). As the Bureau has noted, "AI has the potential to expand credit access by enabling lenders to evaluate the creditworthiness of some of the millions of consumers who are unscorable using traditional underwriting techniques" because AI models

[6] Consumer Fin. Prot. Bureau, Circular 2023-03, *Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B* (Sept. 19, 2023), https://files.consumerfinance.gov/f/documents/cfpb_adverse_action_notice_circular_2023-09.pdf.
[7] S*ee, e.g.,* Director Chopra's Prepared Remarks on the Interagency Enforcement Policy Statement on "Artificial Intelligence" April 25, 2023, https://www.consumerfinance.gov/about-us/newsroom/director-chopra-prepared-remarks-on-interagency-enforcement-policy-statement-artificial-intelligence/.

allow "lenders to evaluate more information about credit applicants" which "may lead to more efficient credit decisions and potentially lower the cost of credit."[8]

Other regulators have encouraged banks' use of technology to expand access to credit, including Federal Reserve Governor Michelle Bowman:[9]

> Banks may also pursue expanding their lending opportunities through technology innovations that provide mechanisms for more effective risk modelling or enhancing their online access to financial services for consumers. These advancements can result in faster loan decision making, more convenient customer access, and reduced costs and risks for both banks and borrowers.

Despite our shared interest in innovation as a means to expand credit access to creditworthy borrowers, the confusion and enforcement risk generated by the Circular discourages the responsible use of AI. To avoid this result, we urge the CFPB to rescind the Circular and reissue it only after stakeholders have an opportunity to weigh in on the issues below and any others.

A. The Circular exceeds Regulation B requirements and conflicts with the Official Commentary.

The Circular correctly states that Regulation B requires creditors to provide a "specific" statement of reasons for adverse action, and the statement must "indicate the principal reasons" for the adverse action.[10] The CFPB also accurately notes that Comment 9(b)(2)-2 states that the statement must "relate to and accurately describe the factors actually considered or scored by the creditor."

The Circular then makes the following problematic statements, which exceed Regulation B and conflict with Commentary:

> Adverse action notice requirements promote fairness and equal opportunity for consumers engaged in credit transactions, by serving as a tool to prevent and identify discrimination through the requirement that creditors must *affirmatively explain their decisions*.
>
> *****
>
> For example, if a creditor decides to lower the limit on, or close altogether, a consumer's credit line based on behavioral data, such as the type of establishment at which a consumer shops or the type of goods purchased, it would likely be insufficient for the creditor to simply state "purchasing history" or "disfavored business patronage" as the principal reason for adverse action. *Instead, the creditor would likely need to disclose*

[8] Consumer Fin. Prot. Bureau, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/.

[9] *Building a More Inclusive Financial System through Collaboration and Action,* Governor Michelle W. Bowman, At the Aspen Institute, Washington, D.C., December 5, 2023, https://www.federalreserve.gov/newsevents/speech/bowman20231205a.htm.

[10] 12 C.F.R. § 1002.9(b)(2).

> *more specific details about the consumer's purchasing history or patronage that led to the reduction or closure, such as the type of establishment, the location of the business, the type of goods purchased, or other relevant considerations, as appropriate*.[11]

As noted, Regulation B simply requires that the reasons given be the principal reasons for adverse action. Moreover, neither the rule nor the commentary require creditors to explain the reasons. To the contrary, Comment 9(b)(2)-3 states that "a creditor need not describe how or why a factor adversely affected an applicant. For example, the notice may say "length of residence" rather than "too short a period of residence."[12] Additionally, Comment 9(b)(2)-4 states that when using a credit scoring system, the creditor must provide the actual reason for adverse action, e.g., "age of collateral," even if the reason's relationship to creditworthiness may not be clear to the applicant.[13]

The Circular not only conflicts with these comments, it also contradicts the Bureau's informal statements made just three years ago. In 2020, the Bureau cited Comments 9(b)(2)-3 and -4 as providing flexibility to creditors using AI models:

> The existing framework has built-in flexibility that can be compatible with AI algorithms. For example, although a creditor must provide the specific reasons for an adverse action, the Official Interpretation to Regulation B, which implements ECOA, provides that a creditor need not describe how or why a disclosed factor adversely affected an application, 12 CFR pt. 1002, comment 9(b)(2)-3, or, for credit scoring systems, how the factor relates to creditworthiness. Id. at 9(b)(2)-4. . . .This flexibility may be useful to creditors when issuing adverse action notices based on AI models where the variables and key reasons are known, but which may rely upon non-intuitive relationships.[14]

These contradictory statements by the Bureau are concerning. Banks pay special attention to the Commentary, because ECOA provides that creditors relying in good faith on the commentary have a safe harbor from ECOA's civil liability provisions.[15] The Bureau cannot nullify the safe harbor with a Circular, as the Circular is, in the Bureau's own words, a general statement of policy that does not "impose any legal requirements on external parties."[16]

---

[11] *Id.* at 2 and 5 (emphasis added).
[12] Comment 9(b)(2)-3.
[13] Comment 9(b)(2)-4.
[14] Consumer Fin. Prot. Bureau, *Innovation spotlight: Providing adverse action notices when using AI/ML models* (July 2020), https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/.
[15] *See* 15 U.S.C. § 1691e(e), "No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." Although the Federal Reserve Board originally issued Regulation B's commentary, the CFPB formally adopted the commentary in 2011-2012. 76 Fed. Reg. 79442) (Dec. 21, 2011).
[16] Circular at 7.

The Circular is disruptive, however, because it could be read to contradict the commentary upon which banks base their compliance programs. For example, Regulation B permits a creditor to either deny an incomplete application using that reason; or, alternatively, the creditor may send a notice of incompleteness listing the items needed to complete the application, giving the applicant a reasonable time to respond, and if the applicant does not respond, the creditor may decline the application without further notice to the applicant.[17] Similarly, the model form lists as a reason "unacceptable type of credit references provided," The Circular creates confusion because it could be read to call into question the ability to use these reasons.

Similarly, the model form lists as a reason "unacceptable type of credit references provided," but applying the Circular's logic, a creditor would have to specify what credit references were unacceptable to comply with Bureau expectations. The Circular seems to make the model form useless here.

The Circular also generates supervisory and enforcement risk for banks subject to supervision by the OCC, FDIC, and Federal Reserve Board. The Bureau states that the Circular is intended, "in the interest of maintaining consistency, [to] advise other parties with authority to enforce federal consumer financial law." Yet, the Circular conflicts with the rule and Commentary. We expect that the banking agencies will apply the Official Commentary and not the Circular. This may lead to inconsistent expectations between the banking agencies and the Bureau. For this reason alone, the Bureau should rescind the Circular.

B. The scope of the circular is unclear.

As stated above, the Circular begins with the following question: "When using artificial intelligence or complex credit models, may creditors rely on the checklist of reasons provided in CFPB sample forms for adverse action notices even when those sample reasons do not accurately or specifically identify the reasons for the adverse action?"[18] This initial question could be read to suggest that the circular is only applicable to creditors' use of "artificial intelligence" or "complex credit models."

However, it is not clear whether the CFPB intends the Circular to be applied more broadly. The Bureau has stated more than once that there is only one set of rules under ECOA applicable to credit decisions, and there are no exceptions for decisions made with AI.[19] The Bureau must clarify whether the Circular is meant to apply only to AI and complex models or to all credit decision-making.

It is also unclear how the Circular interacts with other CFPB rules, including Regulation C (Home Mortgage Disclosure Act) and the section 1071 small business reporting rule. Both rules require lenders to report reasons for credit denials from a list of reasons the CFPB provides.[20]

---

[17] *See* 12 CFR § 1002.9(c).
[18] Circular 2023-03, p. 1.
[19] *See, e.g., CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms; CFPB and Federal Partners Confirm Automated Systems Advanced Technology Not an Excuse For Lawbreaking Behavior*
[20] Regulation C requires lenders to report denial reasons; 12 CFR 1003.4(a)(16). The CFPB's HMDA Filing Instructions Guide requires lenders to use a set list of reasons or select "other." *See* Filing Instructions Guide, Data

The Circular does not discuss these requirements, suggesting that if a bank denies an application for credit, it must report reasons under Regulation C or section 1071 that do not match the bank's reasons for denial in the adverse action notice. These apparently different regulatory requirements for the same action – denying a request for credit – may increase compliance burden, with no benefit to the public.

C. The Bureau did not consider the operational difficulties and unintended consequences the Circular presents.

Because the Bureau did not engage with stakeholders before issuing this Circular, it has not considered the operational difficulties and unintended consequences of complying with these new and expanded expectations.

First, the Circular fails to consider the difficulties banks face when it comes to third party models. It may be infeasible for banks to explain the model's decisions with the Circular's desired degree of explanation. Third parties, for their part, are not required by law to make their models so transparent as to facilitate compliance with the Circular. Banks often lack sufficient leverage to compel third parties to make the models more transparent. For example, Fannie Mae's and Freddie Mac's automated underwriting systems are widely used to support homeownership, but lenders have little if any insight beyond the information supplied by Fannie and Freddie. For other models, lenders may have to forego innovation in underwriting if they are held to the standard in the Circular. That is an unfortunate outcome for consumers and small businesses who could benefit from innovative underwriting models.

Second, the Circular's insistence on explanations could lead to unintended consequences that harm banks and their customers. More granularity in the reasons will mean that less of the rationale for the overall decision is captured by the top 4 reasons. In other words, disclosing reasons at a slightly more general level means that consumers will learn more about the key drivers of the adverse decision.

The increased specificity could also inhibit a bank's ability to combat fraud and provide fraudsters with the information they need to overcome a bank's fraud detection system. For example, if a bank explains in an adverse notice that an application was denied because the consumer used three IP addresses, a fraudster will know in the future to only use two IP addresses. The specificity will also lead to more customized and granular explanations, which could result in more inconsistency across institutions, with a greater likelihood of gaps in third party risk management.

Third, and relatedly, the expanded specificity requirements contemplated by the Circular fail to consider or account for the difficulties that banks face when seeking to comply with both ECOA and their anti-money laundering ("AML") compliance obligations. Under the Bank Secrecy Act

---

Specifications (2-68 to 2-72) Paragraph 4(a)(16) — Reason for Denial, https://ffiec.cfpb.gov/documentation/fig/data-specifications.
Section 1002.107(a)(11) of the Section 1071 final rule requires lenders to report denial reasons, and lists the reasons in Comment 107(a)(11)-1 and –2. Both rules permit lenders to use "other" and fill in a free form text field.

("BSA") and its implementing regulations, banks must develop and maintain reasonably designed risk-based programs to combat money laundering. *See, e.g.*, 31 U.S.C. § 5311; 31 C.F.R. § 1020.210(a)(2)(v). Banks may not disclose any information that might indicate whether a "suspicious activity report" ("SAR") was filed, which federal law mandates be kept secret. *See* 31 U.S.C. § 5318(g)(2); 31 C.F.R. § 1020.320(e)(1); 12 C.F.R. § 21.11(k)(1). Requiring banks to specifically inform consumers about the details of potentially suspicious activity has the potential to disrupt and undermine both AML compliance efforts and ongoing law enforcement investigations, and may also implicate BSA disclosure restrictions.

D. The Circular expresses the CFPB's view of what ECOA and Regulation B currently require; therefore, there is no time for implementation.

Since the Circular exceeds Regulation B's requirements and Official Commentary, creditors that choose to comply with the Circular will need additional time to review their operations, their contracts with third party model providers, make changes to their loan operating systems and forms, and train staff. Most banks offer a variety of credit products with different underwriting methods, and they will need to identify all these products and conduct a gap analysis of changes necessary to comply.

The Circular's heightened expectation for explanations will require banks to review models to determine if explainability can be increased. This may require extensive work with third parties and even contract revisions. Once these processes are complete, banks must draft new denial narratives. Banks will also need to update their systems to include more narrative space, as many currently have limited word capacity. The Circular may also require banks to work with their third-party vendors, which, in turn, may require their contracts to be re-negotiated.

Finally, banks will need time to train staff. For many banks, adverse action reasons are selected from a pre-determined list developed by compliance and the business line. Our members are concerned that the Circular implies that they cannot rely on a standard list of reasons. Banks will need to train the staff that select the reasons for denial and the staff that construct the reasons. In addition, not using a standard list will lead to more errors, requiring additional compliance monitoring and testing.

Each of these steps will take time; however, the Circular, which is a "general statement of policy" expresses the CFPB's *current* analysis of Regulation B's adverse action requirements, putting all lenders at risk of noncompliance.

Conclusion

ABA urges the Bureau to rescind the circular and reissue it as proposed guidance that invites all stakeholders to comment on the issues identified and any additional concerns. At a minimum, the CFPB should explain how the Circular can be reconciled with the Commentary and share that with the other agencies responsible for supervision. We understand the CFPB's concerns with complex algorithms, but those concerns can be addressed without discouraging responsible use of AI to increase access to credit.

If you have questions about the comments, please contact Kitty Ryan at kryan@aba.com.

Sincerely,

Kathleen C. Ryan

Kathleen C. Ryan
Senior Vice President
Fair and Responsible Banking
Regulatory Compliance and Policy