American Bankers Association
Building Success. Together.

Rob Nichols
President & CEO
202-663-7512
rnichols@aba.com

February 12, 2024

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

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

The Honorable Michael Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Mr. Michael J. Hsu
Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Dear Gentlemen:

Re: Effective Agency Guidance: Examining Bank Regulators' Guidance Practices

On behalf of the American Bankers Association, I am writing to call your attention to a growing concern of our members: the use of "guidance" to advance regulatory policy agendas. While the banking industry welcomes guidance that helps banks understand and comply with legal requirements, too often recently, your agencies have characterized as guidance what is in practice a "legislative rule" that Congress requires to go through notice-and-comment rulemaking. In the most egregious cases, your agencies have issued guidance that exceeds the legal authority Congress provided.

These guidance documents typically come without warning. And the failure to confer with industry about interpretive questions, operational impacts, and system constraints limits the utility of guidance, undermines its acceptance, and may limit its durability as administrations change.

As a courtesy, I am sharing a copy of our latest white paper, *Effective Agency Guidance: Examining Bank Regulators' Guidance Practices*. It examines the legal requirements applicable to guidance, describes instances in which your agencies issued guidance consistent with these legal requirements, and contrasts these examples with a discussion of instances when we believe they did not. In addition, the white paper recommends that your agencies adopt written procedures governing the development, issuance, and use of guidance, which will maximize the utility of future guidance documents. Our intent is for your agencies 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.

In addition, I have also attached copies of five letters that offer industry feedback on recently issued "guidance" that we believe would benefit from public input. These include comments on the FDIC's supervisory guidance on multiple re-presentment NSF Fees, the CFPB's advisory opinion on customer information requests, the CFPB's advisory opinion on the application of RESPA to digital mortgage comparison shopping platforms, the CFPB's circular on adverse action notification requirements, and the CFPB and Department of Justice's joint statement on immigration status and Regulation B. We hope your agencies will consider our members' constructive feedback on each and welcome the opportunity for further discussion.

Sincerely,

Rob Nichols

Jonathan Thessin
Vice President/Senior Counsel
Consumer & Regulatory Compliance
Regulatory Compliance and Policy
jthessin@aba.com

February 12, 2024

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Dear Chairman Gruenberg,

On behalf of the American Bankers Association[1] (ABA), I write to express the banking industry's concern with the Federal Deposit Insurance Corporation's (FDIC) issuance of guidance to announce new regulatory expectations for banks' nonsufficient funds (NSF) fee practices.

Our members value agency guidance that clarifies existing law and regulation, and we encourage the use of guidance for this purpose. However, bankers object to the issuance of guidance, without the opportunity for advance stakeholder comment, when that guidance changes existing law, regulation, or official commentary and is applied retrospectively. In 2021, the FDIC established new expectations—effectively changing existing law—regarding NSF fees through a Financial Institution Letter issued in August 2022[2] (FIL) and revised in June 2023[3] (Revised FIL).

As discussed in ABA's white paper, *Effective Agency Guidance*,[4] the issuance of these guidance documents reflects a failure to follow the mandatory process of the Administrative Procedure Act[5] (APA), which is required for guidance that is the equivalent of a binding "legislative rule." Under the APA, legislative rules must be the product of the "notice-and-comment" rulemaking process.[6] The agency must issue a proposal, seek public comment, and then publish a final rule that incorporates and responds to the comments received.[7] The FDIC failed to follow the APA's notice-and-comment process when issuing the FIL and Revised FIL, which we believe constitute legislative rules.[8] In fact, the FDIC does not have the authority to issue a rule that defines

[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] Fed. Deposit Ins. Corp. (FDIC), Supervisory Guidance on Multiple Re-Presentment NSF Fees 3 (2022), https://www.fdic.gov/news/financial-institution-letters/2022/fil22040a.pdf [hereinafter, FIL].
[3] *Id.*, Supervisory Guidance on Multiple Re-Presentment NSF Fees (revised 2023), https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf [hereinafter, Revised FIL].
[4] Am. Bankers Ass'n, *Effective Agency Guidance* (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance [hereinafter, *Effective Agency Guidance*].
[5] 5 U.S.C. § 553(b) & (c).
[6] *Id.*
[7] *Id.*
[8] In addition, as discussed in Part II of this letter, the FDIC lacks rulewriting authority to write a consumer protection rule regarding NSF fees.

specific acts or practices as unfair or deceptive under section 5 of the Federal Trade Commission (FTC) Act, as the FDIC effectively did in this case.[9]

By avoiding the rulemaking process, and even less formal outreach, the FDIC lost a valuable opportunity to obtain broad public feedback on the practical implications, costs, and benefits of the proposed policy change. This process encourages adoption of a regulatory framework that benefits both consumers and financial institutions as well as promotes public acceptance and the longevity of the regulatory policy change.

Equally concerning, the FDIC has applied the new expectations created by the FIL and Revised FIL retrospectively. Banks have been cited for violations of section 5 of the FTC Act for charging fees that were fully disclosed and completely lawful. They were required to conduct extensive reviews to identify and remediate customers for fees that were lawfully charged. Moreover, we note that the use and enforcement of "guidance" is contrary to the FDIC's binding regulations that prohibit enforcement based on supervisory guidance.[10]

We urge the FDIC to rescind the FIL and Revised FIL. These documents are legislative rules that the FDIC had no authority to issue. If the FDIC seeks to issue what is in fact guidance that advises FDIC-supervised banks about the agency's supervisory expectations with respect to charging represented NSF fees, the agency should do so only after providing notice and an opportunity for the public to comment on the draft guidance. The FDIC and other financial services regulators often seek comment on guidance before it is issued, even when the APA does not require it. Following this approach will lead to the issuance of guidance that minimizes operational challenges, facilitates compliance, and is more durable.

I. Background

When a merchant submits a check or ACH transaction initiated by a customer and the customer's account does not have sufficient funds to cover the payment, the bank may return the item to the merchant and charge an NSF fee. The fee covers the cost to process the return and serves as a penalty to encourage responsible deposit account management. A merchant has the right to resubmit the transaction to the bank with the expectation that the customer will have money in his account so that the transaction will be paid. If the account balance remains insufficient to pay the transaction, the bank may return it a second time and charge another NSF fee (Representment NSF Fee). A bank has no control over whether, or when, a merchant resubmits a transaction.

No statute or regulation prohibits a bank from charging a Representment NSF Fee when it returns a transaction presented against insufficient funds in the customer's account. Moreover, Regulation DD requires banks to disclose the NSF fees they charge.[11] But in 2021, FDIC examiners—without warning—began scrutinizing account disclosures to determine whether they adequately (in the judgment of the examiner/agency) informed consumers that they could be

---

[9] *See* Federal Trade Commission Act, § 5, *codified at* 15 U.S.C. § 45.
[10] *See* 12 C.F.R. § pt. 302 (App. A).
[11] NSF fees, like other deposit account fees, are governed by the Truth in Savings Act disclosure rules as implemented by Regulation DD. *See* Reg. DD, 12 C.F.R. § 230.4(a)(4) (requiring banks to disclose the "amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed").

charged Representment NSF Fees. If not, the FDIC began citing banks for a "deceptive" act or practice under section 5 of the FTC Act.

After assessing UDAP violations and without undertaking notice and comment rulemaking or soliciting stakeholder feedback, the FDIC issued the FIL in August 2022[12] and, subsequently, the Revised FIL in June 2023[13] to nearly 3,000 financial institutions under its direct supervision.[14] The FIL directed FDIC-supervised institutions to "self-identify" allegedly flawed customer agreements and to provide restitution to impacted customers.[15] The FIL and supervisory examinations made clear that banks must provide new representment disclosure language in customer agreements to avoid a deception finding.[16] The FDIC's restitution requirement in the FIL has led institutions to conduct a manual, time-intensive "lookback" process to identify represented transactions in customers' accounts over a multi-year period.[17] Also, regardless of the clarity of the disclosures given to consumers, the FIL states that "multiple NSF fees . . . assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance" may be considered unfair.[18] Thus, the FIL makes clear that following the FDIC's new disclosure requirements does not protect an institution from an "unfairness" claim by the FDIC.[19] We also note that the FDIC has cited banks for UDAP violations on the basis of the FIL and Revised FIL despite a prohibition in the agency's regulations against taking enforcement actions based on supervisory guidance."[20]

---

[12] FDIC, FIL, *supra* note 2.
[13] *Id.*, Revised FIL, *supra* note 3.
[14] FDIC, BankFind Suite: Find Institution Financial & Regulatory Data, https://banks.data.fdic.gov/bankfind-suite/financialreporting (calculating 2,989 institutions where the FDIC is the institution's primary Federal regulator, as of June 30, 2023).
[15] *Id.*, FIL, *supra* note 2, at 3.
[16] *See id.* at 1.
[17] For additional explanation of banks' processes for conducting required lookbacks, see footnote 37 and accompanying text.
[18] *Id.* at 2.
[19] Regrettably, the Office of the Comptroller of the Currency, the Federal Reserve Board of Governors, and the Consumer Financial Protection Bureau decided to follow the FDIC's approach and scrutinize banks' decisions to charge Representment NSF Fees. All three agencies went beyond the FDIC's focus on disclosures and began citing banks for unfairness violations. Specifically, in March 2023, the Bureau issued a Supervisory Highlights publication that stated that examiners have found that banks engaged in unfair acts or practices in violation of section 1031 of the Dodd-Frank Act (UDAAP) by charging Representment NSF Fees. Consumer Fin. Prot. Bureau (Bureau), Supervisory Highlights: Junk Fees Special Edition, Issue 29, Winter 2023, at 5-6 (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf. In April 2023, the OCC issued a bulletin that similarly stated that the agency has issued findings that the practice of charging these fees "was unfair and deceptive." Office of the Comptroller of the Currency (OCC), Overdraft Protection Programs: Risk Management Practices, OCC Bulletin 2023-12, at 6 (2023), https://occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html. Finally, in September 2023, the Federal Reserve issued a "Compliance Spotlight" that stated that the agency's "examiners cited the assessment of NSF fees on represented transactions as an unfair practice in violation of section 5" of the FTC Act. Bd. of Govs. of the Fed. Reserve Sys. (Federal Reserve), Compliance Spotlight – Supervisory Observations on Representment Fees (2023), https://www.consumercomplianceoutlook.org/2023/second-issue/compliance-spotlight/.
[20] *See* 12 C.F.R. § pt. 302 (App. A).

II. The FIL and Revised FIL Constitute Unauthorized Rulemaking in Violation of the Administrative Procedure Act

Despite the FDIC's characterization of the FIL and Revised FIL as supervisory guidance, they are legislative rules that should have gone through notice-and-comment rulemaking because they established a binding norm, limited the FDIC's discretion, and imposed new obligations on banks. However, the FDIC did not go through the required notice-and-comment process and, in fact, does not have authority to define specific acts or practices as unfair or deceptive. Instead, Congress vested the Federal Trade Commission and CFPB with this authority.[21] All of the above leads one to the inescapable conclusion that the FDIC violated the APA when it issued the FIL and Revised FIL.[22]

As discussed in ABA's white paper, *Effective Agency Guidance,*[23] the APA mandates that legislative rules go through the notice-and-comment process.[24] The touchstone of a legislative rule is that it imposes "legally binding obligations" on regulated entities.[25] The "binding" nature of a legislative rule can be determined if the agency action leaves the agency with no discretion[26] or "creates new rights or imposes new obligations on regulated parties . . . ."[27] And before an agency may issue a final legislative rule, the agency must issue a proposal, provide an opportunity for the public to provide written comment, and then respond to the comments submitted when issuing the final rule.[28]

Against this standard, the FIL and Revised FIL clearly are legislative rules. Consider first that, prior to 2021, the FDIC did not subject the Representment NSF Fee practices of banks under the FDIC's supervision to negative scrutiny. As described above, the FIL and Revised FIL impose new obligations on banks and, on this basis alone, the actions are legislative rules.

Moreover, in the Revised FIL, the FDIC established a binding norm by prescribing the actions that supervised institutions must take regarding Representment NSF Fees to avoid being cited for a "deceptive" act or practice. The FDIC stated that it "expects" financial institutions to "[t]ake full corrective action" to remedy allegedly inadequate disclosures and that, if there is a "likelihood of substantial consumer harm," the agency will require a "lookback review" and that the bank provide restitution to impacted customers.[29]

The Revised FIL limited the FDIC's discretion in assessing banks' Representment NSF Fee practices by obligating the agency to enforce the terms of the Revised FIL. The Revised FIL

---

[21] *See* 15 U.S.C. § 57a(a)(1)(B) (providing FTC with UDAP rulewriting authority); 12 U.S.C. § 5531(b) (providing Bureau with UDAAP rulewriting authority). The FDIC has UDAP enforcement authority over the banks it supervises, *see* 12 U.S.C. § 1818, but does not have authority to define specific unfair or deceptive acts or practices.
[22] *See* 5 U.S.C. § 706(2)(C) (providing that a reviewing court shall hold unlawful any agency action that is in excess of the agency's statutory authority).
[23] ABA, *Effective Agency Guidance*, *supra* note 4, at 4.
[24] 5 U.S.C. § 553(b) & (c).
[25] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, C.J.); *see also Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 & 946 n.4 (D.C. Cir. 1987) (per curiam) (holding that "if a statement has a present-day binding effect, it is legislative").
[26] *See Cmty. Nutrition Inst.*, 818 F.2d at 946.
[27] *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015).
[28] 5 U.S.C. § 553(b) & (c).
[29] FDIC, Revised FIL, *supra* note 3, at 3 & 4 n.4. The FDIC suggests, but does not state, that the lookback period is two years. *Id.* at 4 n.4.

states that the "supervisory response *will* focus on identifying re-presentment related issues and *ensuring* correction of deficiencies and remediation to harmed customers, when appropriate."[30] Further, the FDIC "will evaluate appropriate supervisory or enforcement actions" against banks that have not strengthened their Representment NSF Fee disclosures, based on the new rules established in the Revised FIL.[31] ABA members have reported that their examiners believe the FIL (and, subsequently, the Revised FIL) leave examiners with no discretion. An examiner must cite a bank for a deceptive practice if the bank recently strengthened its disclosure in a manner that suggests the bank believes its prior disclosure was inadequate under the FDIC's new interpretation of Representment NSF Fee disclosure requirements.

As discussed in *Effective Agency Guidance*, the FDIC, as a financial services regulator, must take special care when issuing guidance. Participants in highly regulated industries like banking "often face overwhelming practical pressure to follow what a guidance document 'suggests.'"[32] Banks are subject to regular supervision and consider it important to avoid disagreements with examiners. Thus, banks reasonably viewed the FIL as binding on them.[33]

All of the above makes clear that the FIL and Revised FIL established a binding norm, limited the FDIC's discretion, and imposed new obligations on banks under the threat of supervisory or enforcement action. Therefore, they are legislative rules that should have gone through the APA notice and comment process but did not, presumably because the FDIC did not have statutory authority to issue a UDAP rule. Therefore, the FDIC must rescind the FILs.

If the FDIC seeks to issue guidance that advises FDIC-supervised banks about the agency's supervisory expectations regarding Representment NSF Fees, the agency should describe the facts and circumstances that could increase the risk that a bank's practices could be deemed deceptive or unfair under existing law. However, the guidance may not go beyond the requirements of existing rules or otherwise create new obligations for supervised banks.

III. The FDIC's Failure to Seek Public Comment Not Only Violated the APA, It Meant the Agencies Did Not Address the Operational and Practical Issues Presented by the Policy Change

As noted in *Effective Agency Guidance*, when issuing guidance—particularly guidance that articulates the agency's interpretation of regulatory requirements and describes how it will exercise enforcement discretion—the agency should seek comment.[34] If the FDIC had sought comment prior to proposing a change in its approach to Representment NSF Fees, the agency would have learned that merchants—not banks—are best positioned to control whether and when a transaction is resubmitted for payment. The FDIC also would have learned that identification of a represented transaction required the development of a core-provided solution, underscoring the need for a sufficient implementation period. A request for comment on the proposed policy

[30] *Id.* at 3 (emphasis added).
[31] *Id.* at 4.
[32] ABA, *Effective Agency Guidance*, *supra* note 4, at 5 (quoting Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. Reg. 165, 174 (2019)).
[33] *See* ABA, *Effective Agency Guidance*, *supra* note 4, at 5-6. As we stated in the white paper, our concerns with guidance that banks view as effectively binding on them is "not merely a theoretical concern; 'Operation Choke Point' leveraged regulatory guidance from the FDIC to pressure banks to stop providing services to business in legal industries that were disfavored by regulators. Many banks, not wanting to upset their regulators, complied." *Id.* at 6.
[34] *See id.* at 3-4 & 11-14.

change also would have given the FDIC the time to consider adopting model disclosures and the opportunity to test draft disclosures with consumers.

a. Merchants—Not Banks—Are in the Best Position to Control Whether and When a Transaction Is Resubmitted for Payment

If the FDIC published draft guidance and requested comment prior to issuing the FIL, industry would have urged the agency to consider the broader regulatory framework governing how banks must process transactions submitted to them by merchants. This framework is underpinned by two critical facts. First, banks are obligated to process transactions and either pay or return the transaction in accordance with the laws and rules applicable to the type of payment presented to the bank. Second, merchants—not banks—control whether and when a transaction is resubmitted. Had the FDIC sought comment, it could have considered these factors when determining whether to impose additional obligations on banks with respect to represented transactions.

When a transaction is returned to a merchant by the payor's bank, it is the merchant—not the bank—who decides whether to resubmit the transaction, the timing of that resubmission (e.g., resubmission after one day, two days, or another period of time), and the amount of the payment to re-present. ABA members report that merchants typically resubmit transactions three days after initial presentment, but this time period can vary substantially. Consistent with the rules established by the organization that governs the Automated Clearing House Network (NACHA), a bank treats each resubmission as a new item for processing purposes. Banks are required under NACHA rules, as well as under the bank's deposit agreement with its customer, to pay or decline payment transactions presented by a merchant.[35]

Other bank regulators have determined that the merchant is in the best position to control whether and when the transaction is resubmitted for payment. With respect to check transactions, the Federal Reserve requires the merchant, not the bank, to "obtain a consumer's authorization for each transfer"[36] – i.e., for each check submitted for payment – and to "provide a notice" if the check will be submitted as an ACH transaction[37] or if the merchant seeks to collect a returned check fee from the consumer if the check is returned unpaid.[38] Similarly, in the context of payments made to satisfy payday loans, the CFPB under then-Director Richard Cordray acknowledged that the entity submitting the transaction for payment (the payday lender) is in the best position to control whether and when a transaction is resubmitted.[39]

The FDIC did not reference this regulatory framework and the interplay between that framework and the agency's proposed policy change regarding represented transactions. If the FDIC had

---

[35] *See* 2023 Nacha Operating Rules & Guidelines, § 3.3 (providing timing requirements for banks to make credits and debits available to customers).
[36] 12 C.F.R. § 1005.3(b)(2)(ii).
[37] *Id.*
[38] *Id.*, § 1005.3(b)(3).
[39] Payday lenders seek payment on a payday loan by cashing the borrower's check. When the borrower has insufficient funds in his or her bank account, the check is returned to the payday lender, and the borrower may be assessed an NSF fee. To reduce the number of these NSF fees, the CFPB issued a rule that prohibited the lender from attempting to withdraw payment on the loan (i.e., cash the borrower's check) after two unsuccessful withdrawal attempts. The CFPB thus imposed obligations on the entity that had control over whether and when the transaction would be resubmitted (the lender), not on the financial institution that received the transaction (the bank). *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472 (Nov. 17, 2017).

sought comment, it might have considered whether the FDIC's concerns with Representment NSF Fees were better addressed by examining merchant representment practices than by limiting when banks may charge Representment NSF Fees.

b. Compliance With the FILs Required Considerable Time for the Development of Core-Provided Solutions and the Review and Revision of Disclosures

When the FDIC published the FIL, a bank had no way to know with certainty that a transaction had previously been presented for payment using a core provider's off-the-shelf solution. Yet, the FIL (and, subsequently, the Revised FIL) stated that banks risked being cited for an unfairness violation if they continued to charge Representment NSF Fees. If the FDIC had sought comment, it would have learned this fact and that the development of solutions to identify these transactions would take a considerable period of time. Indeed, the core providers did not begin providing solutions until spring 2023—nearly two years after the FDIC first began scrutinizing banks' Representment NSF Fee practices.

The rules, procedures, and practices that govern how ACH and check transactions are submitted and processed are complex. Put simply, this framework was not designed to allow banks to consistently identify represented transactions.[40] As of the date of this letter, many banks still do not have access to core products that allow the bank to systematically identify represented transactions. And even when a core-provided product is available, the merchant must have coded the transaction properly for the core's product to accurately identify the transaction. In addition, the bank may need to have an employee review each NSF transaction to confirm that a fee is assessed or not assessed as appropriate. Because the FIL was issued without advance notice and the opportunity for comment, the FDIC did not consider the costs that the FIL would impose on banks and whether those costs are justified.

The FDIC did not acknowledge the complex and highly technical framework for identifying and processing transactions described above. Accordingly, the FDIC provided no implementation period for the FIL, and banks had limited ability to comply with the FIL's expectations until the cores provided solutions two years later (beginning in spring 2023). If the FDIC had requested

---

[40] With respect to ACH transactions, NACHA's rules require originators of an ACH transaction to populate the company/entry description field with the value "RETRY PYMT" in any re-initiated transaction. We understand that one purpose of the use of this phrase "RETRY PYMT" is to allow the bank to identify resubmitted transactions. However, bankers reported that, at the time of the FIL's issuance, it was not functionally possible for banks to run alerts against the description field to identify a resubmitted transaction using standard transaction processing technology developed by the core processors.

Moreover, the bank's identification of a transaction as a representment is predicated on the merchant properly coding the transaction as "RETRY PYMT." Merchants use a long list of codes to label transactions, including re-initiated transactions, and merchants do not consistently use one code to signal that an ACH item is being resubmitted. For example, a merchant may use the code "ACH return" to signal a resubmitted item, a customer's return of the good or service purchased, or a "bad" transaction.

With respect to check transactions, the magnetic ink character recognition (MICR) line on the check provides the check number. Therefore, the bank could search manually for specific check numbers to determine if a check had previously been presented for payment. However, bankers report there was (and continues to be) no automated means to identify resubmitted checks. In addition, a check can be resubmitted as an ACH transaction, which makes it more difficult for the bank to determine whether the item has been presented previously when it is resubmitted as an ACH.

comment on draft guidance, stakeholders could have explained these challenges and presumably the FDIC would have given industry a reasonable implementation period. Similarly, had the FDIC invited comment, banks would have advocated for model disclosures under Regulation DD, which could have been developed through consumer testing to ensure their effectiveness.

IV. The FDIC Should Not Have Applied New Expectations Retrospectively

A central failing of the FIL and Revised FIL is that the FDIC applied its new expectations regarding Representment NSF Fees retrospectively.[41] In short, the FDIC applied its new expectation to past conduct that, at the time of the conduct, had not been subject to any regulator criticism. In some cases, banks that had already ceased charging Representment NSF Fees at the time of its examination were advised they would nonetheless be cited for a UDAP violation for their past practices.

This approach is inherently unfair to supervised banks because they have no advance notice of the alleged illegality of their actions. Therefore, banks had no opportunity to change their course of conduct – i.e., to work with its core provider to update disclosures or cease charging Representment NSF Fees – to conform with the FDIC's new expectations.

We urge the FDIC not to announce new expectations regarding a financial institution's conduct – whether through guidance, rulemaking, or another agency action – and then criticize the institution for past practices that complied with the agency's expectations in place during the time period when the conduct occurred. Instead, when setting new supervisory expectations, agencies should propose the new expectation, seek feedback (comment) from regulated entities on the new expectation (including potential costs and implementation challenges of the new expectation), and then finalize the new expectation. Once the new expectation is finalized, regulated entities should be provided with sufficient time to modify their policies and procedures to align with the new expectation.

Conclusion

The FDIC has established binding rules for banks without statutory authority, and without undergoing the APA's rulemaking process. The FDIC also has applied the new expectations created by these policy actions retrospectively, citing banks for UDAP violations for conduct that conformed to then-existing agency expectations and, in some cases, requiring the bank to provide restitution to impacted customers over a lookback period.

If the FDIC had sought comment before taking this action, it would have understood and presumably would have addressed the significant operational and practical issues presented by its policy change. We urge the FDIC to use guidance only as a means to clarify existing law, not establish new law. We also urge the FDIC to seek comment prior to issuing guidance in the

---

[41] Notably, the Federal Reserve has applied its similar expectations prospectively only, and not retrospectively. When the Federal Reserve issued its Compliance Spotlight in fall 2023, ABA members who are supervised by the Federal Reserve reported that the agency was not citing banks that were currently in examinations for unfairness UDAP violations for charging Representment NSF Fees. According to these banks, the Federal Reserve stated that it will cite banks for an unfairness UDAP violation only if, at the time of the Federal Reserve's future examination of the bank, the bank has not ceased charging Representment NSF Fees.

future. Following these recommendations will lead to the issuance of more durable, effective guidance.

Sincerely,

Jonathan Thessin
Vice President/Senior Counsel
Consumer & Regulatory Compliance
Regulatory Compliance and Policy

American Bankers Association®

Hallee Morgan
VP & Sr. Counsel
Regulatory Compliance & Policy
hmorgan@aba.com

February 12, 2024

Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

RE: CFPB Advisory Opinion: Consumer Information Requests to Large Banks and Credit Unions

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 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

[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] 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] ABA, Effective Agency Guidance (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.
[5] *See* 5 U.S.C. § 553.

recently published guidance documents. Our goal is to provide constructive feedback on the legal and 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

Banks are highly responsive to customer requests and committed to delivering excellent customer service. The American banking industry is extremely competitive,[6] and banks compete on both price and customer service to attract and retain customers. Unsurprisingly, the evidence shows bank customers are overwhelmingly satisfied with their banks. In ABA's 2023 national survey, 94% of surveyed consumers rated their bank's customer service as "excellent," "very good" or "good," and 84% said they are "very satisfied" or "satisfied" with their primary bank.[7] As part of their efforts to fulfil customers' requests, some banks charge modest fees when those requests generate unusual or avoidable costs. For example, they might charge a fee to cover the costs associated with printing or mailing paper copies of records a consumer could access online for free, providing balance information over other banks' ATM networks, or providing duplicate copies of documents the bank previously sent the consumer.

In October 2023, presumably as part of the Biden Administration's coordinated campaign against fees,[8] the CFPB issued an "advisory opinion" on subsection 1034(c) of the Dodd-Frank Act; it was the first time the CFPB issued guidance on that provision since it was enacted in 2010. Subsection 1034(c) is a straightforward directive that banks and credit unions with over $10 billion in assets respond to customers' requests for information.[9] The CFPB's advisory opinion, however, goes far beyond the statute, including prohibiting charging fees for the additional costs of responding to certain customer requests and regulating how banks provide customer service.[10]

---

[6] *See e.g.* ABA et al., Letter to Bureau of Consumer Financial Protection regarding Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services 4 (Apr. 11, 2022), available at https://www.aba.com/advocacy/policy-analysis/fees-imposed-by-providers-of-consumer-financial-products; Francisco Covas & Paul Calem, Five Important Facts About the Competitiveness of the U.S. Banking Industry, Bank Pol'y Inst. (Feb. 24, 2022), available at https://bpi.com/five-important-facts-about-the-competitiveness-of-theu-s-banking-industry/.

[7] ABA, National Survey: U.S. Consumers Remain Happy with Their Bank, Competitive Financial Services Marketplace (Oct. 9, 2023), https://www.aba.com/about-us/press-room/press-releases/consumer-survey-consumers-happy-and-competitive (publishing the results of a national consumer survey conducted by Morning Consult on behalf of ABA).

[8] White House Press Release: Biden-Harris Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees (Oct. 11, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203 (2010), codified at 12 U.S.C. 5534(c).

[10] *See generally*, CFPB Advisory Opinion: Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023).

Although the CFPB frames its advisory opinion as interpreting 1034(c), that provision is silent regarding fees, customer service, and other issues. The advisory opinion imposes new prohibitions and standards that are not expressed or implied in text of the statute and are inconsistent with the agency's interpretation of other laws.

The CFPB also failed to seek public comment before publishing the advisory opinion. Putting aside the fact that the advisory opinion exceeds the CFPB's statutory authority, we note that it creates substantive legal obligations, which should have been issued through notice-and-comment rulemaking under Administrative Procedure Act. This process would have required the CFPB to articulate the basis and purpose of the new requirements and would have given all interested members of the public advance warning and the opportunity to question the facts and conclusions relied upon, to identify vague and contradictory statements and to offer important information about implementation challenges and potential unintended consequences.

By issuing the advisory opinion without the benefit of this process, the CFPB has exacerbated regulatory uncertainty. Our members have important questions about what the advisory opinion requires. Moreover, because it appears to require banks to needlessly duplicate the information they provide customers, the advisory opinion generates little consumer benefit. And because the advisory opinion will make it more expensive to provide consumer bank accounts, it will make it more difficult for many Americans to access basic banking services.

A. The 1034(c) Advisory Opinion is Ultra Vires

The CFPB's advisory opinion exceeds the Dodd-Frank Act's narrow directive that banks with over $10 billion in assets comply with customers' requests for information, and instead creates new law.

Subsection 1034(c) is short and simple, consisting of two sentences. The first sentence requires banks with more than $10 billion in assets to comply with certain consumer requests for information:

> A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 shall, in a timely manner, comply with a consumer request for information in the control or possession of such covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including supporting written documentation, concerning the account of the consumer.[11]

The second sentence of 1034(c) sets forth exceptions for certain categories of information.[12] Subsection 1034(c) simply requires covered banks to give customers account information upon request and in a timely manner.[13] Despite this simple and unambiguous directive, the CFPB has

[11] 12 U.S.C. 5534(c).
[12] The exceptions are for (1) confidential commercial information, (2) information collected for the purpose of preventing or detecting fraud, money laundering, and other unlawful conduct, (3) information required to kept confidential under other laws, or (4) any nonpublic or confidential information.

interpreted the statute to prohibit charging fees to respond to requests for information[14] and to regulate customer service issues including telephone hold times and automated online support.[15]

Nothing in the statutory text prohibits (or authorizes the CFPB to prohibit) banks from engaging in any activity, including charging fees. Nor does this or any other provision of the Dodd-Frank Act permit the CFPB to dictate how banks provide customer service, including telephone response times or website chat assistance. And, in the 14 years since Congress enacted the Dodd-Frank Act, the CFPB has not previously interpreted subsection 1034(c) to impose the substantive requirements and prohibitions the CFPB has now discovered in the statute.[16]

If Congress had intended to prevent banks from charging fees for the costs of responding to information requests, it would have expressly prohibited this, as it did in the Real Estate Settlement Procedures Act.[17] And if Congress had intended for the CFPB to regulate fees for these services it would have said so expressly, as it did in portions of the Truth in Lending Act.[18] In fact, when Congress has been silent on fees in other consumer disclosure statutes, the CFPB has interpreted this to allow banks to charge fees.[19]

The CFPB argues 1034(c) prohibits conditions that "unreasonably impede" customers from receiving covered information.[20] However, this standard is not articulated in statute, nor does the CFPB cite any precedent for it. And, by opting to create a blanket presumption that almost any fee is prohibited, the CFPB appears to be less focused on ensuring access to information and more focused on pursuing the White House's campaign against fees generally.[21]

---

[14] Advisory Opinion at 11. ("That likely includes charging fees (1) to respond to consumer inquiries regarding their deposit account balances; (2) to respond to consumer inquiries seeking the amount necessary to pay a loan balance; (3) to respond to a request for a specific type of supporting document, such as a check image or an original account agreement; and (4) for time spent on consumer inquiries seeking information and supporting documents regarding an account.")

[15] Advisory Opinion at 11-12. ABA and other trade associations previously submitted a letter to CFPB regarding its unauthorized overreach of authority in targeting customer service. https://www.aba.com/-/media/documents/comment-letter/clcustomerservicerfi20220822.pdf?rev=f30cdbf3c68b4d4e93a6bdbeba63adba.

[16] When issuing an RFI seeking information on customer service, purportedly relating to the CFPB's authority to enforce 1034(c) RFI's release, Director Chopra stated the CFPB is "taking steps to ensure the legally enshrined right to obtain basic customer service." CFPB, CFPB Launches Initiative to Improve Customer Service at Big Banks (Jun. 14, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-initiative-to-improvecustomer-service-at-big-banks/.

[17] *See* 12 U.S.C. § 2605(k)(1) ("A servicer of a federally related mortgage shall not . . . charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section").

[18] *See* 15 U.S.C. § 1665d (Expressly stating that credit card late fees must be "reasonable and proportional," and setting forth factors for making such a determination).

[19] For example, Section 161(b)(2) of the Truth in Lending Act, which CFPB interpreted to allow lenders to charge a fee for documentation of extensions of credit, and Section 264(b) of the Truth in Savings Act, which CFPB interpreted to allow depository institutions to charge a fee for providing check copies. *See* Ballard Spahr Mortgage Banking Update, CFPB Issues Advisory Opinion on Fees Charged by Large Banks and Credit Unions to Respond to Information Requests, (Oct. 19, 2023).
, https://www.ballardspahr.com/insights/alerts-and-articles/2023/10/19-mortgage-banking-update.

[20] Advisory Opinion at 9.

[21] *See e.g.,* White House Press Release: Biden-Harris Administration Announces Broad New Actions to Protect Consumers From Billions in Junk Fees (Oct. 11, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.

Regardless, the CFPB has not demonstrated that fees "unreasonably impede" access to information. The advisory opinion states it would violate 1034(c) to charge a fee to request account information, apparently contemplating only one exception, i.e. for duplicative requests. The CFPB asserts that it should interpret the statute to contain this general prohibition because even a small fee is an unreasonable impediment for some who would be unable to afford it and others who would be deterred by it.[22] However, there is no evidence suggesting consumers are routinely unable to access account information because some banks charge a fee to recover the cost of providing unusual services. Indeed, the CFPB typically points to consumer complaints in support of policy action, but none has been cited here.

In fact, banks work extraordinarily hard to ensure their customers are informed and in control of their accounts. Banks uniformly provide consumers free, 24/7 access to account information through online and mobile banking, answer questions by telephone, online chat, and in bank branches, and they provide detailed information through regular statements and comprehensive disclosures. While some banks charge modest fees to respond to requests for information that require unusual expenses or time-consuming research, banks already provide consumers with free, easy, and convenient access to relevant information about their accounts.

B. The CFPB's Advisory Opinion Was Promulgated Without Required Notice and Comment

The CFPB's advisory opinion imposes substantive legal obligations and should have followed the rulemaking procedures required by the Administrative Procedure Act (APA). The APA requires agencies to promulgate substantive legal requirements through notice and comment rulemaking.[23] This is an essential good governance measure Congress requires of agencies to promote transparency, due process, and public accountability when exercising delegated legislative power. Notice and comment rulemaking allows the public to provide feedback *before* rules take binding effect and requires the agency to consider their substantive concerns and explain its decisions. Critically, it also ensures the agency has important information about policies *before* they become binding rules, including the expected effects on regulated entities and on consumers. Nothing less satisfies the due process clause of the US Constitution.

As explained in ABA's white paper,[24] courts generally distinguish between legislative rules on the one hand, and interpretive rules and guidance documents on the other, by looking at whether the rule or document at issue binds the public, or confers rights or imposes legal obligations beyond existing statutes and regulations.[25] As contemplated by the APA, interpretive

[22] Advisory Opinion at 10.
[23] *See* Administrative Procedure Act, 5 U.S.C. §§ 553, 551(4).
[24] ABA, Effective Agency Guidance (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.
[24] *See* 5 U.S.C. § 553.
[25] *See Brown Exp., Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) ("Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952)); *see also id*. at 702 ("[W]hen a proposed regulation of general applicability has a *substantial* impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided." (citation omitted)).

rules advise and guide the public; they do not bind it.[26] When the document itself purports to bind the public, regardless of whether the issuing agency styled the document guidance or legislative rule, courts will treat it as a legislative rule that must go through notice-and-comment in order to comply with the requirements of the APA. However, some documents are styled as guidance and do not purport to bind the public, but courts nevertheless determine that they should be considered legislative rules because of their practical effect.[27] For example, if a guidance document limits the discretion that agency employees can exercise, that lack of discretion can have an effect on the public such that the guidance document is actually a legislative rule.[28] If a "so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law."[29]

Although the CFPB characterizes its advisory opinion as merely interpreting subsection 1034(c), it has the hallmarks of a legislative rule. As discussed above, the advisory opinion goes beyond a mere interpretation of statutory text and establishes substantive prohibitions and standards. Indeed, the advisory opinion announced an intention not to seek monetary relief before February 1, 2024,[30] which could be read as a tacit admission that the Bureau recognizes it is announcing a new, binding, legal rule and is giving regulated entities time to comply.

Even if the CFPB had the authority to promulgate these new requirements under 1034(c), it should have done so through notice-and-comment rulemaking as required by the APA. Notice and comment could not have cured the statutory overreach. But it would have given the agency greater information on the costs and challenges of implementing the advisory opinion as written. Because the CFPB did not solicit public comment, banks have many unanswered questions about how to implement the advisory opinion.

C. Guidance Should Clarify the Law, But the Advisory Opinion Increases Legal Uncertainty

ABA's members welcome guidance that provides regulatory clarity and helps banks understand how to follow the law. Unfortunately, the 1034(c) advisory opinion does not resolve

---

[26] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) ("An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means." (emphasis in original)).
[27] *Lewis-Mota v. Secretary of Labo*r, 469 F.2d 478, 481–82 (2d Cir. 1972) ("[T]he label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact.").
[28] *Cf. Texas v. United States*, 86 F. Supp. 3d 591, 670–71 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015) (DHS memo relating to administration of program "virtually extinguished" any agency discretion, and therefore it had "binding effect" on the public, "[i]n stark contrast to a policy statement that does not impose any rights and obligations and that *genuinely* leaves the agency and its decisionmakers free to exercise discretion." (internal quote marks omitted) (emphasis in original)).
[29] *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).
[30] While ABA appreciates the CFPB's intent to give banks implementation time, it will be difficult for banks to meet the compliance date of Feb 1, 2024. There is still widespread uncertainty about what the advisory opinion requires. Banks need time to obtain further clarity from the CFPB about how to implement the advisory opinion and to make any needed changes to their compliance programs, fees, and operational processes.

uncertainty, but it raises new questions. This uncertainty exacerbates the operational challenges and costs of certain new requirements articulated in the advisory opinion.

i. Timeliness

The advisory opinion does not clarify how the agency will assess whether banks' responses are timely under 1034(c). Because 1034(c) does not establish a specific time limit to respond, the CFPB states it will consider the complexity of the request and difficulty of responding, and likely will not consider it to conflict with any corresponding deadlines in other applicable Federal laws.[31] The opinion does not provide parameters for, or examples of, what timeline is reasonable.

Critically, the CFPB does not clarify how the CFPB will evaluate covered entities' compliance and whether this will affect their recordkeeping requirements. If the CFPB demands that covered banks create records of response times for its examiners to review, this would create significant new compliance costs and burdens. Tracking and recording information about response times would require intensely manual processes. Most covered banks do not have software that allows them to track response times or log information showing the complexity of the information request and difficulty of responding. Doing so would require not only creating new software or modifying existing programs, but also ongoing staff time inputting detailed information about each request and response. To avoid this disproportionate burden, the CFPB should have clarified that banks do not need to track this information.

ii. Form of response and duplicative information

The advisory opinion makes confusing statements about the form in which covered banks must provide information to customers. The advisory opinion correctly notes that Congress did not require banks to provide customers' information in a specific form under subsection 1034(c), in contrast with section 1033 where Congress specified that banks must provide certain information electronically.[32] And, the CFPB's sole example of a reasonable fee is when a consumer "repeatedly requested and received the same information," which is focused on the information and not the form in which it is received.[33]

It seems evident, therefore, that under 1034(c) a bank should be able to charge a fee to provide information it already provided the consumer in a different form. For example, if a bank's policy is to respond to covered requests only in electronic form, 1034(c) would not require the bank to also print and mail the information. If the bank can altogether refuse to send the information on paper, *a fortiori*, it cannot be "unreasonable" for the same bank to offer to send it on paper and charge a fee to cover printing and mailing costs.

However, the advisory opinion confuses matters by saying it would violate 1034(c) to charge a fee for account information "through whichever channels the bank uses to provide information to consumers."[34] The CFPB also says 1034(c) allows the consumer to request information they have already received on required disclosures and statements, including

[31] Advisory Opinion at 12-13.
[32] Advisory Opinion at 8-9.
[33] Advisory Opinion at 11.
[34] Advisory Opinion at 10.

"account information that appears on periodic statements or on online account portals, such as the amount of the balance in a deposit account, the interest rate on a loan or credit card, and information regarding transactions or payments involving an account," and "copies of past periodic statements."[35] This apparently contradictory language could be read to indicate the bank cannot charge a fee to provide information through any usual channel, even if it already made the same information available in a different form.

The CFPB should have made it unambiguously clear that a bank does not have to provide requested information in a particular form if it is already available to the customer in another form.

iii. Receipt

The text of 1034(c) requires covered financial institutions to "comply with a consumer request" for certain information,[36] however, the advisory opinion characterizes 1034(c) as giving consumers "a right to request and receive account information that falls within the scope of the provision."[37] This characterization introduces uncertainty. The plain text of the statute does not establish a strict liability standard. It addresses the financial institution's obligation to comply with a request, not the consumer's receipt of the information. However, the wording of the advisory opinion suggests that even if a bank sends information in response to a consumer's request, the CFPB may hold the bank liable if the consumer does not receive the information. It does not state whether the CFPB will presume the consumer has received information the bank sends, similar to consumer financial regulations such as Regulation Z.[38] The advisory opinion should have clarified that the bank is only responsible for sending the information, or expressly adopted a presumption of receipt.

i. Customer service calls

The advisory opinion states that other conditions may "unreasonably impede" consumers' access to covered information depending on the facts and circumstances," including "excessively long wait times to make a request to a customer service representative."[39] As noted, the CFPB lacks statutory authority to regulate customer service. ABA appreciates that the CFPB acknowledged reasonableness depends on the circumstances, but the advisory opinion should have expressly acknowledged wait times reasonably may vary, including for reasons outside of banks' control(for example, in the event of a natural disaster like the recent COVID pandemic, an unexpected technical problem affecting bank software, or a host of other circumstances). In such circumstances, banks may face a sudden increase in customers contacting customer service, or a sudden reduction in capacity to respond. The CFPB should have clarified that it will not hold banks liable for wait times in unusual circumstances.

[35] Advisory Opinion at 6-7, *see also id.* n. 16.
[36] 12 U.S.C. 5534(c).
[37] Advisory Opinion at 9.
[38] *See* 12 C.F.R. § 1026.20(e)(5)(iii).
[39] Advisory Opinion at 11.

D. The New Cost Burdens Will Likely Drive Up the Price of Basic Bank Accounts

The regulatory confusion and uncertainty generated by the advisory opinion will likely increase the cost of basic banking services.

Printing and mailing paper statements, providing balance information over other banks' ATM networks, conducting complex research, and other activities impose costs in the form of personnel hours, materials, postage, software investments, and core provider services. The CFPB has not considered the cost burden associated with providing these services without assessing a fee.

As previously discussed, banks currently offer their customers a variety of means to access account information, which banks have factored into the cost of providing accounts. The pandemic accelerated the adoption of online and mobile banking, and consumers continue to prefer digital banking, even after the height of the pandemic.[40] Online and mobile portals allow customers to access information about their accounts on an ongoing basis, including balances, transactions, prior monthly statements, check images, and more. In fact, most of the information referenced in the advisory opinion is already provided to consumers free of charge, either on statements and disclosures at account opening and periodically thereafter, or electronically via online and mobile banking.

Additionally, consumers will have access to extensive information about their accounts when the CFPB finalizes its rule to implement Section 1033 of the Dodd-Frank Act. The proposed rule imposes new obligations on banks to provide information about consumers' accounts through specific electronic means.[41] The proposed 1033 rule would also prohibit banks from charging reasonable fees to provide this information through these means.[42] The 1034(c) advisory opinion appears largely to apply to information consumers will soon be able to access under the 1033 rule.

While the advisory opinion identified a single "limited circumstance[]" in which the CFPB might consider it reasonable to charge a fee – for duplicative information requests – this will likely do little to offset covered banks' costs. As discussed previously, most covered banks do not have systems to track customers' information requests. Further, it is not clear whether a request to provide the same information in a different form would be considered duplicative (as discussed above), or even how many duplicate requests the bank must receive before it can charge a fee.

Adding further, duplicative obligations through the advisory opinion will not provide additional consumer benefits. But it will increase the costs associated with all consumer accounts, including basic checking and savings accounts. If banks cannot charge a reasonable fee

[40] *See e.g.* ABA, National Survey: Bank Customers Turn to Mobile Apps More Than Any Other Channel to Manage Their Accounts: COVID-19 accelerated move toward digital banking channels (October 25, 2021), https://www.aba.com/about-us/press-room/press-releases/bank-customers-turn-to-mobile-apps-more-than-any-otherchannel-to-manage-their-accounts# (publishing the results of a survey by Morning Consult on behalf of ABA, finding that during the pandemic the frequency of digital channel use increased, while branch banking fell, and that consumers were still using mobile apps more than any other channel to manage their bank accounts.)
[41] CFPB, NPRM on Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct 31, 2023).
[42] *Id.* at 979 (proposed § 1033.301(c)).

for these increased costs generated by some customers they will have to be absorbed by all customers, increasing the price of consumer bank accounts and reducing access to banking.

Conclusion

ABA urges the CFPB to rescind the advisory opinion, strike its new substantive requirements, narrow it to the scope of 1034(c), and reissue it as proposed guidance that invites all stakeholders to comment on the issues identified and any additional concerns. If you have questions about our comments, please contact Hallee Morgan at hmorgan@aba.com.

Sincerely,

Hallee Morgan
VP & Senior Counsel, Regulatory Compliance and Policy
American Bankers Association

Rod J. Alba
Senior Vice President
Real Estate Finance, Mortgage
ralba@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 operational issues presented, the benefits and costs, and to identify interpretive questions that

[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] 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] *See* 5 U.S.C. § 553.

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 February 13, 2023, without consultation with stakeholders, the Bureau released an Advisory Opinion (AO)[6] to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 provisions[7] to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, or Digital Mortgage Comparison-Shopping Platforms (DMCSP). Prior to this advisory opinion, the only guidance on which platform operators and the lenders that use them could rely was a 1996 Statement of Policy by the U.S. Department of Housing and Urban Development (HUD) on computer loan origination systems (CLOs).[8] And until publication of the AO, it was unclear whether the CFPB would defer to HUD's 1996 interpretation or to the informal advisory opinions issued by HUD in the 1980s and 1990s related to lead generation.

The AO affirms the relevancy of HUD's 1996 Statement of Policy but seeks to clarify provisions applicable to operators of digital mortgage comparison platforms with regard to specific practices that the Bureau believes violate RESPA's prohibitions against the payment of fees for the referral of real estate settlement services.

ABA appreciates the CFPB's efforts to clarify some of the risks arising from digital mortgage shopping platforms, which have become increasingly important lead generation tools for mortgage originators. ABA applauds the Bureau's intent, as expressed in press releases accompanying the AO's release, to protect Americans from "double dealing on digital mortgage comparison-shopping platforms," and to guard against digital platforms that appear to be objective lender comparisons but in practice may illegally refer consumers via referral fees.[9]

We caution, however, that parts of the advisory opinion are inconsistent with RESPA and Regulation X. Our comments describe these inconsistencies and urge the CFPB to solicit additional public feedback to ensure that stakeholders have adequate opportunity to raise additional issues or questions about the AO. This letter advances the following main issues raised by the AO:

---

[6] 88 FR 9162 (February 13, 2023)
[7] 12 U.S.C. 2607(a). Regulation X, 12 CFR 1024.14, generally implements RESPA section 8 prohibitions.
[8] HUD, Statement of Policy 1996-1: Computer Loan Origination Systems (CLOs), 61 Fed. Reg. 29,255 (June 7, 1996).
[9] See Press Release: *CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms* at https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-mortgage-borrowers-from-pay-to-play-digital-comparison-shopping-platforms/, February 7, 2023.

- The AO sets forth compliance advice that that is inconsistent with longstanding legal interpretations. This raises uncertainty in compliance, existing contractual arrangements, and mortgage lending practices.
- The AO's scope of coverage is unclear, which introduces uncertainty in mortgage operations across all channels and media.
- The AO offers no implementation runway, and therefore poses immediate compliance and legal risk for mortgage stakeholders.
- The anti-kickback regulations are outdated. ABA recommends that the Bureau devote broader attention to reviewing and reforming the entirety of RESPA's Section 8 provisions. The regulations must be modernized to effectively function in the context of new technologies, and this must be done through an Administrative Procedures Act (APA) rulemaking, which invites comments from all interested stakeholders.

A. The Advisory Opinion Conflicts With Previous Legal Interpretations

Although the AO asserts that it builds on guidance previously issued by the Department of Housing and Urban Development (HUD), the AO alters accepted and long-standing tests used to determine whether a Section 8 violation exists. Under existing RESPA regulations, a person may not give or accept anything of value pursuant to an agreement or understanding for referral of real estate settlement service business involving covered mortgage loans.[10] In the new advisory opinion, the Bureau interprets the application of this provision by articulating a three-part test to determine whether digital mortgage platforms violate RESPA. Specifically, the CFPB indicates that an operator of a Digital Mortgage Comparison-Shopping Platform is deemed to receive a prohibited referral fee in violation of RESPA section 8 when:

(1) the Digital Mortgage Comparison Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform;
(2) that non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and
(3) the Operator receives a payment or other thing of value that is, at least in part, for that referral activity.[11]

This description effectively re-casts the existing and well-established test for determining whether there is a violation of Section 8(a) of RESPA, and it does so in a way that confuses compliance calculations under RESPA. A comparison of the AO's test with existing articulations of the law underscores these changes. Longstanding HUD regulations and interpretations have described Section 8(a) as prohibiting any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally related

[10] See 12 CFR § 1024.14(a).
[11] 88 FR at 9164.

mortgage loan.[12] Agencies and legal experts parse this standard as requiring analysis of three well-established elements:[13]

a) First, there must be a referral of settlement service business, defined as "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service…"[14]
b) Second, there must be a payment of a "thing of value" in return for the referral of business, meaning moneys, advances, funds, special loans, services, discounts, commissions, or other consideration.[15]
c) Finally, the payment must be made pursuant to an agreement or understanding, formal or informal, to provide a thing of value in exchange for the referral.[16] [17]

The new test set forth in the AO is noticeably different than HUD's legacy three-part test above—the two tests are articulated differently and emphasize different factors in the analysis. More importantly, the new articulation under the AO appears to give rise to legal presumptions that will vary outcomes in determinations of whether Section 8 violations exist. We discuss these points here—

Non-neutrality factor: The AO identifies "non-neutrality" of information as an explicit element in the determination of a RESPA violation. Note that this "non-neutral" standard is not in any way mentioned in HUD's legacy three-prong analysis. Under the previous HUD articulation, "non-neutrality" is an evidentiary factor only—regulators could, where appropriate and necessary, analyze "neutrality" to determine whether there was "affirmative influencing" of consumers that could amount to a "referral."[18] In the AO, however, "non-neutrality" is listed as

---

[12] *See* 12 U.S.C. 2607(a). HUD interpretive articulations of this standard appear in multiple statements of policy, including—*Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation* (61 F.R. 29264 at 29264 (June 7, 1996)); *Statement of Policy 2001–1: Clarification of Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)* (66 F.R. 53052 at 53055 (October 18, 2001)).

[13] CFPB describes this three-part test in recent on-line guidance entitled *"Real Estate Settlement Procedures Act FAQs."* The Bureau's FAQ analysis lists the three elements and adds that the transaction must be "incident to or part of a real estate settlement service." *CFPB Real Estate Settlement Procedures Act FAQs,* RESPA Section 8(a) – Question 1, posted at https://files.consumerfinance.gov/f/documents/cfpb_respa_frequently_asked_questions.pdf. *See also* Federal Deposit Insurance Corporation, (March 2021). Consumer Compliance Supervisory HIGHLIGHTS, Page 6. https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2021.pdf ("In general, a RESPA Section 8(a) violation would occur if: 1) there is the payment or acceptance of a fee, kickback, or thing of value; 2) there is an agreement to refer settlement services; and 3) there is an actual referral."); Spencer Bunting, Holly, "The Rules of the RESPA Road: Compliant Strategic Alliances, *The Review of Banking & Financial Services,* Vol. 36, No. 5 (May 2020), page 53-54.

[14] 12 C.F.R. § 1024.14(f)

[15] 12 C.F.R. § 1024.14(d).

[16] 12 C.F.R. § 1024.14(e).

[17] For a very succinct articulation of this legal test, see FDIC's summary in compliance training materials stating that the "elements of a violation" are—"1. Payment or transfer of a thing of value, 2. Pursuant to an agreement or understanding to refer settlement service business, 3. Resulting in an actual referral. See *Understanding and Mitigating RESPA Section 8(a) Risks*, FDIC, posted at www.fdic.gov/news/events/otherevents/2019-11-19-ny-respa-industry-call.pdf.

[18] HUD's 1996 statement of policy, formally adopted as guidance by the Bureau on September 1, 2023 (chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_RESPA_Other_Applicable_Documents-HUD.pdf), states that "HUD *may* scrutinize non-neutral displays of

an actual element, not mere evidence of that factor. Under this new standard, the first step in determining whether a Section 8 violation exists in DMCSPs hinges on affirmatively identifying factors such as variations in the order of institutions listed in the platform, the hue or color of the lettering, prominence and different text sizes, or discrepancies in the completeness of information provided on the participants. This change is material, particularly considering its interaction with the second factor, steering, described below.

Steering Effect: The second element of the three-part test set forth in the AO asserts that the non-neutral presentation must be found to have a "steering effect." This too differs from the HUD-articulated legal test under Section 8. The newly articulated test sets a much lower bar because a steering "effect" is not the same as actual steering. Under the AO, an "effect" can be very slight and still qualify as steering; on the other hand, HUD's longstanding interpretations define "referral" as "affirmatively influencing" the selection of a settlement service.[19] The apparent softening of this standard means that under the AO, *any* difference in the appearance or listing order of a comparison-shopping platform can qualify as a "referral." The new test can sweep in even slight "influence" factors that can be easily or inadvertently triggered. ABA believes that this change effectively shifts the burden of proof in RESPA investigations, with significant repercussions on how the law will apply, particularly in the context of digital comparison-shopping platforms. As further discussed below, lenders and operators will bear the burden of *actually demonstrating* "neutrality" for purposes of assuring compliance.

Payment: The final element of the AO's test states that to violate RESPA, there must be a payment that is "at least in part" for the referral activity. This articulation again varies from previous HUD guidance. Under this new articulation, any payment over levels considered "reasonable" or "fair" will be deemed to be an illegal referral fee. Importantly, this new iteration under the AO's three-part test lacks a crucial balancing element that is present in HUD's three-prong test, which requires that the payment be made pursuant to an *agreement or understanding* to exchange money (or anything of value) for the referral. The "legal analysis" section of the AO touches on this element, but completely omits any meaningful discussion of it, offering only scant explanations that an express agreement can just be presumed if "enhanced non-neutral" placements are received.[20] The legal analysis section also offers, without explanation, that an agreement or understanding can just be established through a "pattern and practice" of conduct. How a pattern or practice should be demonstrated on a DMCSP is not described. The AO's explanations regarding agreement or understanding to refer are simply lacking and insufficient and raise the specter that plaintiffs and examiners are no longer required to demonstrate the existence of an actual contract or agreement to engage in a referral fee scheme. If this is what the Bureau intended to achieve, the change would constitute more than mere interpretive guidance; it constitutes an alteration of RESPA—which only Congress, not the CFPB, can make.

As reported by our members, recent CFPB examination and enforcement approaches seem to reflect this unauthorized change in the law. Our members inform that examiners often begin

---

information on settlement service providers and their products because favoring one settlement service provider over others *may* be affirmatively influencing the selection of a settlement service provider" (emphasis added).61 F.R. 29255 at 29258.

[19] See 12 CFR § 1024.14(f)

[20] 88 FR at 9166.

compliance examinations with a "fair market value" assessment of mortgage-related charges, including the cost of leads purchased from third parties. In these examinations, often outside of the context of any referral activity, banks are expected to affirmatively demonstrate that mortgage-related fees and charges actually meet "fair market" standards and that charges are "reasonably related" to the value of those services. Examiner inquiries generally disregard the fact that certain services may fluctuate in value depending upon the circumstances, market, and needs of an individual bank. This emerging regulatory expectation, which forces banks to prove "pricing reasonableness," is far from the intent or objective of the RESPA statute. As clearly stated in RESPA's legislative history:

> [T]here should be no question that [Section 8] does not in any way authorize a civil suit nor subject … anyone who provides settlement services to civil or criminal penalties if the homebuyer believes that the charge made to him is in excess of the reasonable value of the services rendered. What is subject to civil and criminal penalties is if the person rendering the settlement service gives or splits a portion of the fee he receives with someone else and the person receiving the payment provides no legitimate service in return.[21]

Notwithstanding this clear Congressional intent confirming that RESPA is not a rate-setting statute, customary fees charged or paid by a bank are today commonly subject to a *de-facto* requirement that the institution produce evidence and analysis of reasonable value or otherwise be subject to the hazy civil and criminal standards under these provisions.

Conclusion: Putting all this together, if a listing is deemed to be "non-neutral," it constitutes a "referral" that could then be tied to an excessive charge, regardless how slight the excess may be, and therefore be considered a violation. Stated differently, the AO changes existing interpretations and effectively transforms "non-neutrality" in product presentations into referrals, and via regulatory presumptions, will be deemed violations of Section 8. The legal and compliance risks imposed by the legal inferences created in this AO are significant. We predict that lenders increasingly will fall into breach inadvertently, incurring civil penalties from unintentional blunders arising from innocuous behavior such as platform operators informally tweaking programs or altering certain details in listings and presentation pages. In light of the lack of clarity presented by the AO, member banks are now reporting significantly increased burdens in compliance reviews because every arrangement they currently have with any digital platform has to be paused and re-assessed under the novel and hazy factors defined in the AO.

We offer two illustrative examples—

- Bank ZZ enters into an arrangement with a digital platform to list and advertise loan products in 10 states. Some states are rural and others have metro areas of significant proportions. The platform will select lenders pursuant to a few consumer preference points, and will rotate lender names on the listing so as not to always list any one lender first. The platform will list institutions in different colors depending on the logos and

[21] 120 Cong. Rec. 29442-43 (Aug. 20, 1974).

other considerations. These simple facts present compliance risks under RESPA. Note that a "non-neutral" presentation is a per-se "referral" under the AO, so the "listing order" or the lettering hues will raise the risk of an affirmative influence that can steer a consumer. This means, therefore, that the price paid for the services across each of the 10 regions where the platform advertises can trigger a RESPA violation. The bank will have to assure that prices it pays for this service vary across all regions because fair market values will differ, and the bank will not want to be considered to have "over-paid" the going market rate. Since the bank must, in this situation, assume that a referral of business exists, then any inaccurate pricing variation across any of the regions becomes the element that completes the RESPA violation.

- YYY National Bank enters an online mortgage platform that charges $2,500 to join and lists all service providers equally and neutrally. For the Memorial Day holiday each year, the platform makes donations to national charities for veterans. The platform also allows institutions to donate to these charities. YYY National Bank makes a $2,000 donation and in appreciation, the mortgage platform places the bank into a "Gold Circle" of supporters. Gold Circle donors receive a special "thank you" on the website in gold letters. Despite the fact that the bank's contributions to veterans are not for "referral" activities, the contribution has the effect of giving the bank to an "enhanced placement" (i.e., a "gold" display), which could constitute a non-neutral listing that could, in turn, have a steering effect.

Depository institutions place a very high priority on RESPA compliance and devote considerable resources to assure adherence to all applicable laws and interpretive rulings. As noted in ABA's white paper, banks are under pressure to comply with agency guidance that articulates the agency's view of statutory and regulatory requirements, particularly when violations carry significant civil and criminal penalties.[22] As described above, the AO appears to reflect considerable change in the test for determining whether a Section 8 violation has occurred. Therefore, we call on the Bureau to rescind and revise the AO and reissue it for comment from all segments, including lenders, borrowers and settlement service providers.

B. The Scope of the Advisory Opinion is Unclear.

It is difficult to determine how broadly this AO is intended to apply. The Bureau states that this "Advisory Opinion *focuses* on digital platforms that include information or features that enable consumers to comparison shop for mortgages and other settlement services… ."[23] On the other hand, the AO also states broadly that the AO "applies to any 'person' to which RESPA section 8's prohibitions apply."[24]

The preamble to the AO devotes some discussion to the intended coverage of the advisory, and unfortunately, the broadly worded statement cited above conflicts with the preamble description

[22] Section 8 breaches are punishable by fines and possible prison terms of up to one year, or both. RESPA imposes civil damages up to three times the amount of the improper charges paid, and plaintiffs are entitled to reasonable attorney's fees and costs if they prevail. Class actions are available. 12 USC 2607(d)(1) and (2).
[23] 88 FR 9162, 9163 (emphasis added).
[24] *Id.* at 9164.

and obscures its precise coverage. ABA is concerned that the over-inclusive language quoted above could be interpreted by some examiners to make the AO applicable *to all* mortgage transaction settings, even if the Bureau did not contemplate this result. Such over-inclusions will lead to considerable confusion. For instance, if a local business distributes *paper flyers* listing mortgage and settlement companies available in that neighborhood, would such non-digital communication be subject to this AO as well? We fear that extending the AO to all real estate finance settings will have a negative impact on the marketplace as the definitions for "steering," "referring" or "compensating" will vary depending on the setting in which they occur.

We urge the Bureau to clarify, via re-issuance and solicitation for comments, that the AO applies only to DMCSP settings.

C. The Bureau Should Specify and Amplify Implementation Timeframes

The AO was published in the *Federal Register* on February 13, 2023 with an effective date of the same day, February 13, 2023.[25] When the Bureau proposes a new revised AO for comment, we ask that the Bureau propose an effective date that provides industry with a reasonable opportunity to comply. We recommend that the Bureau propose a minimum 12-month compliance timeframe to allow institutions to analyze business relationships and internal operations, and make appropriate changes.

While we anticipate that the comment process will bring about certain changes and clarifications to the AO, any final product advancing interpretive change is likely to require review of internal practices and revisions to existing and future contractual agreements with third parties. The range of tasks affected cannot be achieved overnight, and will require thorough consultations with legal experts, consultants and other industry partners. In fact, the AO cautions that matters covered by the opinion "may implicate other Federal and State laws and regulations."[26] The AO lists such important provisions as UDAAP, Truth in Lending Act, Equal Credit Opportunity Act, Telemarketing Sales Rule, Federal Trade Commission Act, among others. In instances such as this, where the Bureau admonishes the industry on the application of an array of laws to particular market activities, our banks view it as an absolute responsibility to thoroughly analyze all such provisions in accordance with the advice contained in the advisory. These reviews require extended periods for analysis and, where needed, program accommodations.

To fully illustrate the tasks and burdens posed by this new interpretation, we point to a very recent FDIC *Consumer Compliance Supervisory HIGHLIGHTS,* dated March 2023.[27] This article lists indicators of risk in mortgage-related third-party arrangements and advises the industry on risk-mitigating activities to help in complying with RESPA Section 8 requirements, including:

---

[25] *Id.* at 9162.
[26] *Id*. at 9169.
[27] See U.S. Federal Deposit Insurance Corporation, *Consumer Compliance Supervisory HIGHLIGHTS* (March 2023) (available at [Consumer Compliance Supervisory HIGHLIGHTS March 2023 (fdic.gov)])

- Training staff on RESPA Section 8, including the differences between a permitted lead and an illegal referral (including a warm transfer).
- Understanding the programs that lenders are involved with, how the programs function, and how the cost structure works.
- Developing policies and procedures that provide guidance to comply with regulatory requirements and management's expectations with regard to lead generation programs.
- Requiring loan officers to annually certify applicable relationships to ensure that the bank is aware of the arrangements used by loan officers to generate loans and that these arrangements have been vetted and controls put in place for associated risks.
- Monitoring lead generation activities regularly to ensure compliance with the bank's policies and procedures, and regulatory requirements.

Simply put, these tasks cannot be achieved overnight.

In light of the above, and in addition to our request that the CFPB propose an AO that includes a 12-month compliance timeframe, ABA further recommends adequate interagency communication and coordination on these important consumer protection initiatives. Agencies must achieve better synchronizations between interpretive guidance and examination expectations pertaining to RESPA Section 8 provisions. Well-coordinated implementation expectations and proper timeframes will benefit industry and consumers alike.

D. ABA Requests Broader Rulemaking on Section 8 Provisions

Neither the RESPA statute nor the regulations have been updated to reflect the migration of the mortgage business to today's new technologies and the Internet. Moreover, RESPA's anti-referral fee provisions do not take into account the extensive regulatory changes implemented pursuant to the Dodd-Frank Act that prescribed amplified consumer protections. Today, there are considerable risks and challenges in applying RESPA's Section 8 provisions to new modes of business and communication in the electronic world. We call on the Bureau to initiate a broader rulemaking process that modernizes Regulation X, even beyond the "comparison-shopping platforms" identified in this AO.

ABA believes that our request to streamline and clarify Regulation X will affirmatively spur innovation and encourage the adoption of new technology, to the clear benefit of consumers. RESPA rules contain complex exemptions, unclear provisions, and inadequate definitions that have created a regulatory structure that fails to accommodate or anticipate business and technological advancements. As a result, virtually every payment connected to a mortgage settlement must be closely examined for legality under RESPA Section 8 —with no assurance of achieving full compliance. Every new bank mortgage product, every measure taken to augment mortgage-related digital capabilities, and every relationship with third-party partners become entangled in the vague and uncertain requirements of RESPA's Section 8.

An example that illustrates the lingering confusion that disincentivizes innovation involves determining whether "hyperlinks" or "click-throughs" constitute "referrals." Typically, hyperlinks connect readers to an outside page or resource. The link may include a reference to images or words on the page, which the consumer accesses by clicking, tapping, or hovering on the item. It is, however, the consumer who chooses to be "transported" via the hyperlink, and often, it is not clear whether that electronic 'transportation" constitutes a referral or whether the presence of the hyperlink on a page, *in se*, constitutes an action directed to a person that affirmatively influences the selection of a service. This type of interpretive uncertainty discourages highly regulated banks from offering the digital marketing and delivery services consumers increasingly want and seek.

ABA calls on the Bureau to initiate consultation and research on the impact of RESPA's anti-kickback provisions on consumers, market innovation, and real estate finance operations, and based on those results, to initiate notice-and-comment rulemaking to broadly update Regulation X.

Conclusion

ABA supports the CFPB's focus on harm to consumers involving digital platforms that feign the appearance of objectivity or that illegally refer customers to lenders based on kickbacks. Depository institutions are negatively affected by these uncompetitive practices, and we believe all market players must be as closely regulated as banks. As described above, however, the apparent reconfiguration of long-standing regulatory guidance, and the absence of clarity in certain aspects of the new AO, will create a regulatory environment where banks are likely to exit digital platforms to avoid the legal risks. This exit would be a very negative outcome, as market competition will dwindle, and consumers will be denied the benefit of products offered by well-regulated institutions.

In addition, the Bureau must recognize that the optimal outcome of this regulatory endeavor is to create clear and durable rules that promote consumer protection while accommodating demands of efficient mortgage loan production and economic growth. To achieve these goals, regulators must confer with mortgage lenders and settlement service providers and understand operational burdens, impacts, and constraints. We look forward to working together towards the objective of achieving well-regulated markets that function and provide capital at peak levels.

For more information on these comments and recommendations, please contact Rod J. Alba, Vice President and Senior Regulatory Counsel, at Ralba@aba.com.

Sincerely,

Rod J. Alba
Senior Vice President
Real Estate Finance, Mortgage
Regulatory Compliance & Policy

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
Senior Vice President
Fair and Responsible Banking
Regulatory Compliance and Policy

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] is writing to express concerns with a recent Joint Statement issued by the Consumer Financial Protection Bureau and the Department of Justice regarding consideration of an applicant's immigration status in credit decisions.[2]

Before commenting on the Joint Statement, we wish to state that we appreciate 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."[3] 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."[4]

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*,[5] this is sometimes the result of a failure to follow either the mandatory process of the Administrative Procedure Act (APA),[6] 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,

---

[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] Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers Under the Equal Credit Opportunity Act, October 12, 2023, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-justice-department-issue-joint-statement-cautioning-that-financial-institutions-may-not-use-immigration-status-to-illegally-discriminate-against-credit-applicants/
[3] https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs/
[4] Id.
[5] Am. Bankers Ass'n, Effective Agency Guidance (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.
[6] 5 USC §§ 551-559.

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 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.

Comment on the Joint Statement on Immigration Status

On October 12, 2023, without notice or consultation with industry, the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ) issued a Joint Statement (the Joint Statement) about "potential civil rights implications of a creditor's consideration of an individual borrower's immigration status under the Equal Credit Opportunity Act (ECOA)." The Joint Statement also discusses other federal and state civil rights laws that broadly prohibit discrimination against individuals based on immigration status. ABA's comments are focused on the Joint Statement as it pertains to ECOA.

Banks are in the business of lending and want to make loans to qualified applicants, including immigrants, within the bounds of the law and prudent, responsible banking. Their credit policies regarding loans to noncitizens have been developed in reliance on Regulation B and its Official Commentary, which have not been revised in relevant part in decades. While we welcome guidance that clarifies existing law in this regard, and the agencies may have intended the Joint Statement to clarify ECOA's prohibition on discrimination, instead the statement has resulted in confusion.

The agencies correctly note that ECOA prohibits discrimination based on certain prohibited bases, including race and ethnicity. They note immigration status may "overlap with" race and ethnicity, or may be a proxy for those prohibited bases, and that creditors may not use immigration status to discriminate against applicants on prohibited bases. The agencies acknowledge that Regulation B and the Official Commentary permit a creditor to consider an applicant's immigration status to determine the creditor's rights and remedies regarding repayment and/or to avoid violating anti-money laundering laws. However, the statement otherwise selectively quotes the rule and commentary, while making sweeping statements about consideration of immigration status that only raise questions and confusion.

For the reasons discussed below we urge the agencies to withdraw the Joint Statement and re-propose it for public comment.

The Joint Statement Incorrectly Conflates an Applicant's Ability to Repay with a Creditor's Rights and Remedies

The agencies accurately state that Regulation B permits creditors to consider immigration status to determine "the creditor's rights regarding repayment," but they leave out the full text of Regulation B section 1002.6(b)(7) and its commentary, which indicates that creditors may be legitimately concerned about their ability to collect on a loan made to a noncitizen:

> A creditor may consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditors *rights and remedies regarding repayment*.

The commentary explains that:

> [An] applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment. Accordingly, the creditor may consider immigration status and differentiate, for example, between a noncitizen who is a long-time resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa.[7]

Instead of quoting and acknowledging these provisions addressing a creditor's ability to collect on a debt to a noncitizen, the agencies confuse things by asserting that if a noncitizen has a strong credit score and undefined "credit qualifications," then a refusal to lend for other reasons (e.g., relating to collection) may be unlawful:

> For example, if a creditor has a blanket policy of refusing to consider applications from certain groups of noncitizens regardless of the credit qualifications of individual borrowers within that group, that policy may risk violating ECOA and Regulation B. This risk could arise because some individuals within those groups may have sufficient credit scores or other individual circumstances that may resolve concerns about the creditor's rights and remedies regarding repayment.

This example is not clarifying; it is confusing because it suggests that a borrower's ability to repay can trump a creditor's consideration of its rights and remedies for repayment. Yet, the rule and Official Commentary expressly permit consideration of rights and remedies.

The CFPB's blog post accompanying the Joint Statement adds to the confusion between an applicant's ability to repay and a creditor's rights and remedies:

> The CFPB has heard feedback from advocates and consumers that some immigrant borrowers – including those protected under the Deferred Action for Childhood Arrivals (DACA) program – have been denied credit cards, auto loans, student loans, and other credit based on their immigration status. Immigrant consumers and entrepreneurs have shared their experiences of being turned away by financial institutions *despite having*

[7] Comment 1002.6(b)-7.

> *strong personal financial circumstances – including credit history, income, or other factors – that may resolve concerns about their ability to repay loans.*[8]

The CFPB's example focuses on an applicant's ability to repay, but that is only part of a creditor's legitimate evaluation of a loan application. If the applicant exhibits an ability to repay, but nevertheless defaults and leaves the United States, the creditor may not be able to collect on the debt. That is no doubt why the Commentary expressly permits a creditor to differentiate between a permanent resident and a person who may be in the United States for a limited time, on a student visa.

Although the Joint Statement provides that it "is for informational purposes only" and "does not impose any legal requirements," confusion between the Joint Statement and the Official Commentary is concerning.[9] Banks reasonably rely on the Commentary when drafting their policies and procedures as the Commentary provides a safe harbor from ECOA liability.[10] As we have stated in other letters to the CFPB regarding guidance that is inconsistent with Official Commentary, the CFPB cannot override the Official Commentary's safe harbor through a document like the Joint Statement.

The Joint Statement's Reference to "Blanket" Policies Needs Clarification

The agencies warn creditors about overbroad policies, but they do not provide an example of the type of "blanket" policy they disfavor. The Commentary clearly permits a creditor to differentiate between citizens and permanent residents on the one hand, versus temporary visa holders and other noncitizens on the other. Is such a policy a "blanket" policy that the agencies discourage? In the absence of more information, the Joint Statement simply causes confusion.

The Agencies Incorrectly Suggest That Immigration Status is a Prohibited Basis

Other concerns with the statement include how the agencies restate the rule and commentary. It is understood that if immigration status is used as a proxy for race or national origin, then the creditor violates the prohibition on discrimination based on race or national origin. .However, the agencies confuse things in how they discuss immigration status. For example, the Joint Statement asserts that ECOA "does not expressly prohibit" consideration of immigration status. That is correct, but it should also be noted that ECOA does not *impliedly* prohibit consideration of immigration status.

---

[8] *Protecting Immigrant Access to Fair Credit Opportunities,* Sonia Lin, Oct. 12, 2023 (emphasis added), available at https://www.consumerfinance.gov/about-us/blog/protecting-immigrant-access-to-fair-credit-opportunities/

[9] Joint Statement at 1.

[10] *See* 15 USC § 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).

Indeed, the Official Commentary states that a refusal to lend because an applicant is not a US citizen is not "per se" discrimination. Yet, the agencies do not even acknowledge or discuss this comment. Banks understand that immigration status cannot be used as a proxy for protected characteristics. But the agencies should not confuse things by suggesting that immigration status itself is a prohibited basis under ECOA.

The Agencies Should Consider How the Joint Statement Aligns with Other Federal and State Law and Policy

The agencies do not acknowledge other policies that may limit a lender's ability to extend credit to noncitizens. For example, the Small Business Administration limits some of its loan programs to citizens and permanent residents.[11] Some states prohibit certain noncitizens from specified countries from buying real estate.[12] The agencies need to address how their concern with "blanket" policies can be reconciled with these different directives, in any guidance they issue to the lending industry.

For these reasons, we urge the agencies to withdraw the Joint Statement and re-propose it for public comment. Thank you for considering our comments. If you have questions about this letter, please contact Kitty Ryan at kryan@aba.com.

Sincerely,

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

Cc: Kristen Clarke, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

[11] U.S. Small Business Administration (SBA). "Affiliation and Lending Criteria for the SBA Business Loan Programs." 88 FR 21074. April 10, 2023.https://www.federalregister.gov/documents/2023/04/10/2023-07173/affiliation-and-lending-criteria-for-the-sba-business-loan-programs

[12] *See, e.g.,* a recently enacted law in Indiana, which prohibits citizens of China, Iran, North Korea, Russia, and other countries designated by the Governor from purchasing or leasing land adjacent to a military base. Indiana P.L. 118–2023; S.E.A. No. 477