American Bankers Association
Building Success. Together.

Nessa Feddis
Senior Vice President & Deputy Chief Counsel
Center for Regulatory Compliance
202 663 5433
nfeddis@aba.com

June 22, 2018

By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington DC 20552

Re: Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities
Docket No CFPB-2018-0012
83 Fed. Reg. 12881 (Mar. 26, 2018)

Dear Acting Director Mulvaney:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments and information to assist the Bureau of Consumer Financial Protection (Bureau or BCFP) in considering whether, consistent with its statutory authority to prescribe rules pursuant to the Federal consumer financial laws, the Bureau should amend the regulations or exercise the rulemaking authorities that it inherited from certain other Federal agencies.

ABA's approach throughout the Request for Information (RFI) process has been and will be to provide constructive feedback to the Bureau. With regard to rulemaking, our intent is that the Bureau adopt rules that are transparent, fully consistent with the law, and focused on promoting the financial interests of consumers in a strong, vibrant, and innovative market that encourages a variety of financial products and services that consumers want and value.

As a general matter, we encourage the Bureau to update regulations and related commentaries on a regular basis as issues and questions arise and markets evolve. Regulations that evolve with consumer needs and market developments, based on feedback from an interested public and relevant data, promote regulatory compliance and innovation. Ultimately, consumers benefit through lower prices and better and more choices.

The goal of our letter is not to identify every needed or possible regulatory change. We believe many will surface through more regular reviews. Rather, as requested in the RFI, we focus on a few important priorities, specifically, correction and clarification of fair lending standards under the Equal Credit Opportunity Act (ECOA) regarding disparate impact and modernization of disclosures in an electronic age. In addition, we offer recommendations for a number of other adjustments and clarifications to various regulations to promote compliance and correct impractical or inappropriate requirements.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend nearly $10 trillion in loans.

1. Correct and Clarify Fair Lending Standards Under ECOA

ABA and its members are strong advocates for fair lending and proper enforcement of the anti-discrimination laws. The banking industry strives to make credit available to all qualified borrowers and to treat all similarly-situated applicants and borrowers alike. Banks dedicate significant resources to fair lending, Community Reinvestment Act, and Home Mortgage Disclosure Act compliance to ensure that they fairly and equitably serve the credit needs of the communities they serve.

Despite our industry's strong record of fair lending compliance, the prior Administration and the Bureau's Office of Fair Lending aggressively applied a controversial legal theory, disparate impact, to assert that banks violated the ECOA and its implementing regulation, Regulation B. More problematic, Bureau examiners and enforcement lawyers often used statistics not just to identify *possible* illegal discrimination—particularly where there was no intent to engage in illegal discrimination; too often they relied on statistics alone as *proof* of illegality.

Yet, with the exception of a 2013 Bulletin on Fair Lending, which announced the Bureau's intent to apply the legal doctrine of disparate impact to enforce compliance with the ECOA and Regulation B,[2] the Bureau has provided little guidance to banks that seek to prepare for disparate impact exams.[3] Instead, Former Director Richard Cordray admonished lenders generally to parse the Bureau's consent agreements to gain insight into the legal theories the Bureau was asserting[4] and the statistical methodologies it was relying on to assert illegal discrimination.

Creation of rules by means of novel, changing, and vague enforcement theories undermines a primary goal of the fair lending laws — expanding credit opportunity and availability. Where the costs or compliance risks of the new enforcement theories are high or lenders are unable to discern from enforcement actions just what are the latest compliance expectations, lending becomes more standardized and defensive and less flexible to meet the variety of consumer needs. Some programs and services are discontinued. Indeed, fear of fair lending violation claims based on disparate impact theories has limited innovation and caused banks to retreat from using "alternative data" to qualify for credit people who may not qualify using traditional underwriting data.

These problems can largely be addressed by reforms that focus on addressing genuine illegal activity, identified by intent to violate fair lending standards. To that end, we urge the Bureau to be guided by the framework and "cautionary principles" pronounced by the Supreme Court in *Texas Department of Housing*

---

[2] Bureau of Consumer Fin. Protection ("Bureau"), CFPB Bulletin 2012-04 (Fair Lending), Lending Discrimination, 1 (Apr. 18, 2012).

[3] *See, e.g.*, Bureau, CFPB Exam Procedures: Auto Finance Examination Procedures, 6 (June 2015), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201506_cfpb_automobile-finance-examination-procedures.pdf ("If examiners identify concerns related to ECOA, they should consult with the Offices of Fair Lending and Supervision Policy, as those issues, except as specifically described herein, are beyond the scope of these procedures."); Bureau, CFPB Supervision and Examination Manual, Equal Credit Opportunity Act (Oct. 2015), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf (Exam procedures focus primarily on disparate *treatment* analysis and direct examiners that have concerns that a policy or practice of an institution may have disparate impact on a prohibited basis to refer to the Appendix of the Interagency Fair Lending Exam Procedures (IFLEP) "or consult with agency supervisory staff for further guidance." The IFLEP Appendix, in turn, offers some guidance on the questions examiners should ask and information they should review, but also direct examiners to seek assistance from supervisory staff/managers before proceeding.).

[4] "Indeed, it would be 'compliance malpractice' for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly." Bureau, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association (May 9, 2016), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/.

and Community Affairs v. Inclusive Communities Project, Inc.[5] That decision sets forth the current legal standards under the Fair Housing Act by acknowledging that disparate impact is recognizable under the Act *but* under very important safeguards against abuse. Although the Court's analysis of the legitimacy of disparate impact under the Fair Housing Act (FHA) does not apply to ECOA — an appropriate limitation given the material textual and historical differences between the two statutes[6] — the Court offered important instructions on the application of liability under a disparate-impact theory, establishing the following standards for analysis of a disparate impact claim:

1. A statistical imbalance is not enough to establish a *prima facie* case; a plaintiff must satisfy a "robust causality requirement" between a specific policy or practice and the statistical disparity to "protect defendants from being held liable for racial disparities they did not create;"[7]
2. A valid business or policy purpose rebuts a *prima facie* case;[8] and
3. Before rejecting a business justification for a challenged practice, the court must find that the *plaintiff* has demonstrated that there is an "available alternative…practice that has less disparate impact and serves the [entity's] legitimate needs."[9]

The Supreme Court is clear that the standards articulated in its decision are critical to preventing abusive claims of discrimination. It specified that only "artificial, arbitrary, and unnecessary" practices should trigger liability under the FHA,[10] to ensure that "regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[11] The Court also endorsed the role of private discretion in lending decisions by statements such as, "[e]ntrepreneurs must be given latitude to consider market factors,"[12] and "[c]ourts should avoid interpreting disparate impact liability to be so expansive as to inject racial considerations into every housing decision."[13]

Accordingly, ABA urges the Bureau to confirm in updated exam procedures and, working with the prudential regulators, revise the interagency "Policy Statement on Discrimination in Lending" (April 15, 1994) to provide that any consideration of disparate impact claims in both the supervisory and enforcement context will be governed by standards consistent with the Court's framework. We recommend the following two key principles:

1. The Bureau will give initial focus to enforcing fair lending requirements under a disparate treatment paradigm.
2. Within the context of disparate treatment, statistical and other analysis may help to identify indicators that disparate treatment may be occurring, such as where there is demonstrable evidence that the lender is applying an artificial, arbitrary, and unnecessary barrier in its credit granting process with intent to engage in illegal discrimination. In using such analysis, it is important to apply the burden-shifting framework and associated cautionary standards established by *Inclusive Communities*.

This way, the Bureau will make fair lending directives clear by recognizing current law consistent with the Supreme Court ruling, and, most importantly, place proper emphasis on the true objective of the fair

5 *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).
6 *See* Buckley Sandler LLP, *Disparate Impact under FHA and ECOA: A Theory Without a Statutory Basis* (July 13, 2012) (available at http://www.aba.com/Compliance/Documents/DisparateImpactWhitePaper.pdf).
7 *Id.* at 2512.
8 *Id.* at 2514.
9 *Id.* at 2524.
10 *Id.*
11 *Id.* at 2518.
12 *Id.* at 2523.
13 *Id.* at 2524.

lending laws, ensuring that lenders extend credit to prospective borrowers based on their qualifications and that similarly qualified individuals are treated alike.

In a related vein, ABA urges the Bureau to address — ideally on an interagency basis — standards for agency referrals to the Department of Justice (DOJ) consistent with the Supreme Court's framework. There should be consensus and transparency regarding what constitutes under FHA a "pattern or practice" of discrimination based on a theory of disparate impact liability, consistent with the decision of the Supreme Court, that warrants a referral from a federal agency, including the Bureau, to DOJ. Moreover, the standards should require facts establishing a *prima facie* case as a predicate to referral.

Finally, to recognize the Supreme Court's articulation of the need for care when using disparate impact theory, ABA strongly recommends that the Bureau incorporate in examination procedures the Supreme Court's admonishment that when courts do find liability under a disparate impact theory, their remedial orders must be consistent with the Constitution. "Remedial orders in disparate-impact cases should concentrate on the offending practice that arbitrarily operates invidiously to discriminate on the basis of race." The Supreme Court also noted, "Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions."[14] Therefore, exam procedures should clearly direct supervisory and enforcement staff to tailor carefully any remediation to correct only the offending practice through race-neutral means.

2. Modernize Disclosure Requirements to Keep Pace with Evolving Communication Modes and Consumer Preferences

The Bureau should modernize the disclosure requirements under the Federal consumer protection laws for which it has rulemaking authority to recognize and incorporate electronic media and its potential for improving disclosures, consumer experiences, and consumers' understanding of financial products. Specifically, the Bureau should use its authority to address unnecessary impediments to electronic disclosures posed by conditions in the Electronic Signatures in Global and National Commerce Act (ESIGN) and engage experts in evolving communication technologies to develop appropriate standards for electronic disclosures.

Consumer financial laws rely heavily on disclosure as a cornerstone of consumer protection. However, disclosure requirements typically contemplate a disclosure written on paper that is handed or mailed to consumers so that they can retain it. Disclosures are usually provided prior to or contemporaneous with transaction consummation so that consumers can make an informed choice. In some cases, specific information is required to be more prominent than other information or to appear in specified relation to other information. Some requirements are mandated by statute, others are a function of the implementing regulations. In many cases, the statutes provide for the issuance of model disclosure forms, which appear to contemplate a paper-based written disclosure system.

Consumer financial transactions, like other consumer communications, are increasingly being conducted electronically. Transactions are conducted online and disclosures displayed on a screen in a manner that can generally replicate paper disclosures. More recently, communication is moving to smaller screens on tablets or cell phones. In addition, interactive technologies offer a means of delivering information that is more consumer-friendly than paper-based disclosures. By presenting key terms of information in summary form and including links to additional information, consumers can access information more quickly and efficiently in an interactive electronic format than they can with paper disclosures. This is particularly true where disclosures are lengthy or detailed.

[14] *Id.*

Electronic communications are both more convenient and more readily accessible and re-accessible than paper communications. For financial institutions, electronic disclosures offer cost savings that can be passed on to consumers in the form of more competitive pricing and better services.

Yet, current requirements for written disclosures, including the formatting and presentation requirements, impede the advancement of efficient electronic disclosures. Though some regulations permit electronic disclosures under certain conditions, more is needed. For example, with some exceptions, the regulations reference the standard under ESIGN. That statute only allows electronic disclosures to satisfy statutory or regulatory requirements for *written* disclosures, if the consumer has consented to receive electronic disclosures in a manner that reasonably demonstrates that the consumer can access the subject information in the electronic form that will be used.[15]

In many cases, uncertainty about the requirement that consumers “reasonably demonstrate” that they can access information in the electronic form stifles the ability of banks to take advantage of ESIGN. While the impediment posed by the reasonable demonstration requirement may be minimal in on-line transactions where the customer is already communicating electronically, the application of the reasonable demonstration requirement to face-to-face transactions is more uncertain. For example, is it reasonable to assume that the customer has access to the internet because the customer provides an email address? Do customers have to demonstrate that they can navigate the internet to find online disclosures? Can the demonstration be done with the financial service providers’ equipment? ESIGN does not answer these and other questions. Accordingly, ESIGN does not achieve its statutory objective of preventing legal requirements from impeding electronic communications.

Although the ultimate solution to modernizing disclosure requirements may require amendment of ESIGN, we believe that the Bureau can make significant progress towards modernizing disclosure requirements under its existing authorities. We believe that the Bureau has the authority to allow information that must be provided “in writing” to be provided on a screen, which would address the impediments of ESIGN’s “reasonable demonstration” requirement in most, if not all, of the consumer financial laws for which it has rule writing authority. First, the phrase “in writing” does not denote paper, but letters and words that may be read through any medium. Thus, the statutes’ requirements that disclosures be “in writing” do not mandate paper disclosures or preclude electronic disclosures. Second, most of the statutes give the Bureau discretion to make adjustments “as necessary to effectuate the purposes of the statute” to “facilitate compliance therewith.”[16]

Indeed, the Bureau has already used that authority to exempt from ESIGN’s requirements certain written disclosures. For example, §1026.5(a)(2)(ii) of Regulation Z (Truth in Lending Act) provides —

> The disclosures required by sections 1025.60, [written disclosures required for credit card applications and solicitation] 1026.40 [written “early” disclosures required for home equity lines of credit], and 1026.16 [written advertisement requirements] may be provided to the consumer in electronic form *without regard to the consumer consent or*

[15] 15 U.S.C. § 7001(c)(1)(C)(ii) (2012).

[16] The rule writing authority in the Truth in Lending Act provides that “The Bureau shall prescribe regulations to carry out the purposes of this subchapter…[S]uch regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. (15 USC §1604(a) emphasis added)

Similarly, the rule writing authority in the Electronic Fund Transfer Act provides that “Regulations prescribed hereunder may contain such classifications, differentiations, or other provisions, and may *provide for such adjustments* and exceptions for any class of electronic fund transfers or remittance transfers, as in the judgment of the Bureau are necessary or proper *to effectuate the purposes of this title*, to prevent circumvention or evasion thereof, or *to facilitate compliance therewith*.” 15 U.S.C. § 1693(b)(c) (emphasis added).

> *other provisions of the E-Sign Act in the circumstances set forth in those sections*. (emphasis added)

Similarly, §1030.3(a) of Regulation E (Electronic Fund Transfer Act) provides —

> The disclosures required by 1030.4(a)(2) [deposit account disclosures provided upon consumer request] and 1030.8 [deposit account advertisements] may be provided to the consumer in electronic form *without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those section*. (emphasis added)

See also §1005.18(b)(1)(ii)(D) of Regulation E[17] and §1002.4(d)(2) of Regulation B (ECOA)[18] for additional examples.

In addition, the Bureau may use its discretionary authority to make adjustments to "effectuate the purpose" of the statutes to allow oral and recorded disclosures in lieu of written disclosures. In light of the proliferation of interactive oral communications through Siri, Alexa, and other devises, oral communications are an increasingly viable and effective means of delivering disclosures and promoting consumer understanding.

Further, even where electronic disclosures are permitted, the explicit and implicit formatting requirements in existing regulations make delivery of electronic disclosures through commonly used communication channels risky, because the requirements for those communication channels are uncertain — and even inappropriate — depending on the medium. For example, some of the formatting requirements simply do not work effectively on the small screen of a phone. Though the Bureau has made some efforts to accommodate electronic formats, such as the advertising rules in Regulation Z that allow certain required information to be accessible by link (one click away), significant impediments remain.

As noted, the effective elimination of the reasonable demonstration requirement for electronic disclosures is achievable in the near term through a notice and comment rule writing process. However, further modernization of disclosure requirements to allow them to work effectively with tablet and phone-based screens, as well as recorded communications, is a more challenging, but critically important, undertaking. Mobile phones and tablets that have the ability to access *and* to store information are becoming increasingly prevalent; therefore, disclosure requirements and model forms that work with these devices would greatly facilitate the transition to electronic financial services. Currently, the potential for regulatory sanction or private litigation serves as a deterrent to delivering required disclosures in new formats, discouraging fintech companies and traditional financial services providers from creating new means of delivering financial services that consumers value.

In order to adapt disclosure requirements to the rapidly evolving developments in communications, we recommend that the Bureau undertake a ground up review of formatting and related presentation requirements that may not be suited for emerging communications technologies, and we further recommend that the Bureau develop alternative standards that can be used for different modes of communications. These alternatives — which should be accorded safe harbor status — have the potential to streamline and improve the communication of critical information to consumers, including the

---

17 "If a financial institution does not provide the long form disclosure inside the prepaid account packaging materials…it may provide the long form disclosure pursuant to this paragraph in electronic form *without regard to the consumer notice and consent requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act* (E-Sign Act)." (emphasis added)

18 "Where the disclosures under §§1002.5(b)(1), 1002.5(b)(2), 1002.5(d)(1), 1002.5(d)(2), 1002.13, and 1002.14(a)(2) accompany an application accessed by the applicant in electronic form, these disclosures may be provided to the applicant in electronic form on or with the application form, *without regard to the consumer consent or other provisions of the E-Sign Act*." (emphasis added)

potential to tailor the disclosure to an individual consumer. For example, a credit card account holder who is consistently a transactor has little or no interest in rate information, while that information may be paramount for a regular revolver, and the information presented to each should be tailored accordingly.

We strongly encourage the Bureau to seek outside experts in evolving communication technologies to help develop appropriate standards. While the Bureau, working with industry and consumer representatives, can identify the disclosure content, options for the presentation of that content should be informed by experts in the delivery of information to consumers through electronic media.

To date, financial services disclosures have focused primarily on static disclosures presented to them in a written document that is assumed that consumers will read and absorb. New technologies allow for an interactive communication process where consumers can pick and choose the information that is important to them. Modernized electronic disclosure requirements should allow financial services providers to take advantage of these capabilities.

3. Clarify that Data Aggregators Are Service Providers for Purposes of Regulation E

Technology has facilitated the creation of an unprecedented amount of consumer financial data that offer opportunities to improve consumers' understanding and control of their finances and financial products. ABA supports customers' ability to access and share their financial data in a secure, transparent manner that they control. However, the Bureau should fill regulatory gaps to address liability, privacy, and security concerns.

The Bureau should clarify that data aggregators (entities that aggregate financial data from accounts at different institutions) are "service providers" under Regulation E (Electronic Fund Transfer Act) and liable for unauthorized electronic fund transfers that exceed the consumer's liability under that regulation.

Under §1005.14 of Regulation E, a person who provides an electronic fund transfer service to a consumer is generally subject to Regulation E, with certain modifications, if the person (1) issues an access device that the consumer can use to access the consumer's account held by a financial institution and (2) has no agreement with the account-holding institution regarding such access.

Data aggregators that permit consumers to initiate electronic fund transfers from accounts held at financial institutions that do not have an agreement with the financial institution are "service providers," under Regulation E, as they issue "access devices"[19] that may be used to permit electronic fund transfers to and from the account. As service providers, they are subject to the liability for unauthorized transactions under Regulation E as well as certain other provisions.

Imposing liability for unauthorized transactions under these circumstances is appropriate and fair. The data aggregator is in the best position to control for the risk of unauthorized transactions conducted through its system. In contrast, the financial institution holding the account has no relationship with the data aggregator and no knowledge of and no power over the data aggregator's security system. This approach is consistent with payment system laws, which generally assign liability to the party that is in the best position to avoid a loss and manage the risk of a loss. Indeed, it is for these reasons that Regulation E assigns liability to service providers.

Moreover, other provisions related to service provider responsibilities support classifying data aggregators as service providers under Regulation E. These include requirements related to error resolution, disclosures, the prohibition against the issuance of unsolicited access devices, and change in

[19] Under Section 1005.2(a) of Regulation E, "Access device means a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers."

terms notices.

ABA believes that data aggregators providing electronic fund transfer services are service providers under Regulation E. To avoid any ambiguity, we urge the Bureau to confirm this in the regulation or official commentary.

4. Clarify that Data Aggregators Are Subject to GLBA

The Bureau should clarify that data aggregators are "financial institutions" subject to the data and privacy protection requirements of the Gramm-Leach-Bliley Act of 1999 (GLBA) that apply to financial institutions under the Federal Trade Commission's (RTC) Safeguards Rule and under the Bureau's Regulation P. Financial data should be consistently protected regardless of where the data originated, where they are transferred, and the type of company using or storing them.

Financial data have always been accorded special status. To illustrate, the Fair Credit Reporting Act (FCRA), limits accessibility and use of consumer reports such as credit reports. Under FCRA, only those with a "permissible purpose" are permitted to access information contained in consumer reports. For example, entities may obtain credit reports only if the consumer has requested credit, has an existing credit account, or if the report is needed in connection with a business transaction the consumer has initiated.

Recognizing the sensitivity of financial information, Congress enacted provisions in GLBA that impose on financial institutions an "affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."[20] Specifically, GLBA requires financial institutions to develop, implement, and maintain a comprehensive information security program to (1) ensure the security and confidentiality of customer records and information, (2) protect against any anticipated threats or hazards to the security or integrity of such records, and (3) protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer. In addition, GLBA's privacy provisions, with certain exceptions, prohibit financial institutions from disclosing customers' nonpublic personal information to nonaffiliated third parties unless they comply with various notice and opt-out requirements. In addition, customers must receive notices that clearly describe the financial institution's policies and practices to protect the confidentiality and security of that information.

Banks take seriously their responsibilities to their customers to maintain the highest level of security, privacy, and control over their financial assets and transactions. Consumers trust that their financial data are being protected and handled appropriately. This trust is critical to the functioning of the financial system and is the reason banks dedicate tremendous resources to safeguarding financial data.

Current practices in the data aggregation market, however, may leave consumers exposed and may create risk that undermines this trust. Consumers today may — often unknowingly — be choosing to exchange their desire for technology-driven convenience for increased potential of catastrophe, by handing over the keys to their financial vault. When consumers share their login credentials with an aggregator, they are giving the aggregator *carte blanche* access to their accounts and financial data, including information about their financial history, income, life savings, and retirement accounts. Yet, consumers do not get adequate information or control over what information is being taken, how long it is accessible, and how it will be used in the future. Indeed, consumers may unknowingly grant access

[20] 15 U.S.C. § 6801(a) (2012).

without realizing the full ramifications and possible insufficient protections associated with that authorization.

Moreover, consumers often are unaware of the differences in the legal and supervisory standards applicable to bank and nonbank participants in the financial services marketplace. Once the bank information is shared, it leaves a secure bank environment, where it is accorded longstanding legal protections, and it is released into the data services market where it is accorded no more special status than data created through a consumer's use of a social media platform.

The Bureau should use its existing regulatory authorities to close regulatory gaps and ensure that consumer financial data are accorded baseline security and privacy protections regardless of where the data reside. Under GLBA Title V, Subtitle B, both the FTC and the prudential banking agencies have adopted regulations that require steps to safeguard customer data. The FTC Safeguards Rule[21] (which applies to nonbanks) only sets out the standards. It stops short of the important federal banking agencies' requirements that institutions notify customers as quickly as appropriate after a breach to allow them to take steps to protect themselves in the event that their information may have been compromised. At a minimum, banks must assess the nature and scope of the incident and the information systems and customer data that may have been accessed. Banks also must take appropriate steps to control the incident and prevent further unauthorized access and to notify regulators and customers as appropriate. Furthermore, banks are subject to regular examination of their information security practices. Those found noncompliant with GLBA privacy and safeguards rules must become compliant or incur monetary penalties and public cease and desist orders.[22] This regular oversight ensures that appropriate resources are allocated to protect consumer financial data. Significantly, those safeguards do not apply to the nonbanks subject to the FTC Safeguards Rule, a fact most consumers are unlikely to appreciate. We urge the Bureau to work closely with the FTC to address this gap.

Congress used an intentionally robust and expansive definition of "financial institution" in GLBA, which encompasses "any institution the business of which is engaging in financial activities as described in [the Bank Holding Company Act of 1956, §4(k).]"[23] This definition includes not only banks but, as interpreted by the Board of Governors of the Federal Reserve, also encompasses any entity that provides data processing, data storage, and data transmission services for financial data.[24] In other words, GLBA clearly applies to data aggregators. Accordingly, ABA strongly urges the Bureau to exercise its authority under GLBA to ensure that consumer financial data retain their protected status throughout the data's lifecycle, ensuring consumers' data are protected consistently regardless of where the data originated, where they are transferred, and the type of company using or storing the data.

Ensuring that data aggregators are subject to GLBA and the data security requirements of the FTC's Safeguards Rule may not eliminate all regulatory gaps, in large part because the FTC does not *examine* for

---

21 Standards for Safeguarding Customer Information, 16 C.F.R. § 314 (2002).

22 Further illustration of the special status of financial information is the Fair Credit Reporting Act (FCRA), which limits accessibility and use of consumer reports such as credit reports. Under FCRA, only those with a "permissible purpose" are permitted to access information contained in consumer reports. For example, entities may obtain credit reports only if the consumer has requested credit, has an existing credit account, or if the report is needed in connection with a business transaction the consumer has initiated.

23 15 U.S.C. § 6809(3) (2012).

24 12 U.S.C. § 1843(k) (2012). *See* 12 C.F.R. § 380.8(b)(3)(N)(1) (2013) (Providing data processing, data storage and data transmission services, facilities (including data processing, data storage and data transmission hardware, software, documentation, or operating personnel), databases, advice, and access to such services, facilities, or databases by any technological means, if the data to be processed, stored or furnished are financial, banking or economic.).

compliance and instead relies on consumer complaints to identify problems. However, the Bureau can address this gap, in part, by identifying those data aggregators that are "larger participants" subject to the Bureau's supervision and examination authorities.

In addition, the Bureau should make clear that data aggregators fall within the purview of Regulation P and are required to provide disclosures to consumers about how data aggregators collect, store, safeguard, and share their data. Filling this critical gap will ensure that consumers understand how their data are collected, used, and shared and get the same disclosures other financial institutions supply. It would provide the needed transparency to help consumers make appropriate decisions and help them understand how their data are being used. In today's environment, they lack that critical knowledge.

5. Clarify RESPA's Anti-kickback Provisions

Since the transfer of Regulation X (which implements the Real Estate Settlement Procedure Act or RESPA) from the Department of Housing and Urban Development to the Bureau, the Bureau has amended the regulation's disclosure and servicing elements but has not addressed RESPA's Section 8 anti-kickback provisions (Section 8).[25] ABA recommends that the Bureau devote resources to review Section 8's anti-kick-back provisions, including the existing rule, recent orders (including private consent orders), and guidelines and update the regulation as appropriate.

Section 8 and its implementing Regulation X, Section 1024.14, generally prohibit fees and kickbacks incident to or part of real estate settlement services involving certain mortgages. However, neither have been updated to reflect the migration of the mortgage business to the internet and on-line settings, nor do they take into account the extensive regulatory changes to mortgage disclosure and origination promulgated pursuant to the Dodd-Frank Act. Coupled with the Bureau's history of questionable RESPA interpretations, applying Section 8 to new modes of business and communication in an electronic world significantly increases compliance challenges and legal risks. Considering the importance of Section 8 to the regulation of settlement services and the fact that violators are subject not only to significant potential fines, but imprisonment,[26] it is critical that the Bureau modernize these sections of the regulation to ensure requirements are clear and that they do not inappropriately impede innovation and progress in the developing digital world. In short, the rule's complex exemptions, uncertain and outdated provisions, and broad definitions create a regulatory structure that does not accommodate or anticipate the business and technological advancements reflected in today's environment. As a result, virtually every payment connected to a mortgage settlement must be closely examined for legality and compliance under Section 8 — with no assurance of compliance. Every new bank mortgage product, every step to enhance mortgage-related digital capability, and every relationship with third-party market partners is entangled in the vague and uncertain requirements of Section 8. These legal uncertainties include:

- **Hyperlinks and "Click-Throughs"—** It is not clear whether hyperlinks and click-throughs are "referrals" subject to payment restrictions under Section 8. Typically, hyperlinks connect readers to an outside page or resource. The link includes a reference to images or words on the page, and the reader accesses the page by clicking, tapping, or hovering on the item. It is, however, the reader who chooses to be "transported" via the hyperlink. In these cases, it is not clear whether the electronic transportation is a referral and whether the presence of the hyperlink on a page, in itself, constitutes an action directed to a person that affirmatively influences the selection of a service.

- **Leads vs. Referrals —** The Bureau should clarify how internet leads should be treated under Section 8. Typically, internet leads are initiated by the consumer completing a form or application and requesting to be contacted. Such leads often involve consumers who are currently shopping

[25] 12 C.F.R. §§ 1024.14 and 1024.15.
[26] 12 U.S.C. § 2607(d)(1) (2012).

for a loan or residence. It is not clear whether such leads should be classified as referrals under Section 8 and whether varying fact patterns would change the outcome.

- **Endorsements —** Endorsements generally refer to testimonials that promote or vouch for a product. The Bureau should clarify when endorsements of a mortgage-related product are considered to be steering or referring under Section 8 and when they qualify as general advertising.

- **Website Operators —** The Bureau should clarify whether website operators that collect and distribute information about consumers are making referrals and whether these entities may complete applications pursuant to compensation arrangements.

- **Facility —** The Bureau should clarify what a "facility" is in the internet setting and whether access to an operator's website constitutes a "facility" or a "good" for which the website operator may be compensated in addition to the compensation it receives for services it performs.

- **Marketing Agreements —** The Bureau should provide direction on how to analyze the legality of compensation paid to real estate professionals for *bona fide* marketing and advertising service given the growth and variety of such agreements.

- **Consumer Discounts —** The Bureau should make clear if and when a consumer discount is a "thing of value" to a referral source. One recent Bureau consent order[27] claimed that a discount to a consumer may be a "thing of value" given to a referral source and thus illegal under Section 8. However, classifying a consumer discount in this manner seems inconsistent with RESPA's purpose to reduce consumer costs.

These are only a few examples of the ambiguity and legal concerns surrounding Section 8 compliance. ABA urges the Bureau to seek public comment on the impact of RESPA's anti-kickback provisions on consumers, market innovation, and real estate finance operations. This request is particularly urgent in light of the ongoing changes in technology and resulting adjustments in consumer expectations.

6. Modify Provisions of Regulation Z Regarding Credit Cards

We recommend the following changes to provisions of Regulation Z related to credit cards, to promote consumer choice and convenience and to clarify compliance requirements.

Simplification of change in terms notices for balance transfers initiation by electronic means

The Bureau should extend Regulation Z's exception to the change in terms notice requirement (that is applied to balance transfer term changes for transfers initiated by check) to transfers initiated by electronic means. Currently, card issuers may charge a previously undisclosed annual percentage rate (APR) or fee for a balance transfer (without a 45-day advance change in terms notice) only if they deliver a "check that can be used to access the account." Card issuers must provide the new terms on or with the check.[28]

The regulation should be updated to reflect today's increasing digital and real-time environment and apply the exception to electronically initiated transfers so that consumers may take advantage of beneficial offers immediately and conveniently — with the pertinent information provided at the relevant time. There is no reason to apply the exception only to an increasingly obsolete access channel.

---

27 See *David Eghbali,* 2016-CFPB-0011 (May 25, 2016) (consent order) (available at: https://files.consumerfinance.gov/f/documents/201605_cfpb_consent-order-david-eghbali.pdf).

28 12 C.F.R. § 1026.9(c)(2) cmt. 4 (2011).

Exception to limitations on increasing rates and fees

The Bureau should revise Regulation Z to allow credit card issuers to increase rates and fees on a credit card account *at a customer's request* in *limited* situations, even if the increase occurs within the first year of the account and without regard to the advance change in term notice requirement. While Regulation Z's prohibition against raising fees in the first year and the change in terms notices are important consumer protections, they delay *customer initiated* changes and potentially increase customer costs, for example, when customers seek to upgrade to a product they find more attractive and suitable. As long as the new terms are clear and conspicuous, customers should be permitted to exercise those choices without delay.

To illustrate, Regulation Z's prohibition on increasing fees in an account's first year[29] in certain circumstances prevents customers from "trading up" to a product that provides benefits (such as richer rewards) but is subject to a higher annual fee or APR. In these circumstances customers who open Card A within a year of a launch of a pricier but more rewards-rich Card B are unable to "product trade" due to Card B's higher annual fee or APR, even though the trade-off for the higher annual fee is attractive and rational from the customer's perspective. To obtain Card B, those customers would have to apply for and open a second account (with a different account number) and potentially pay two annual fees. Consumers could avoid the inconvenience and costs of multiple cards if the regulation made an exception to the prohibition against raising fees in the first year in cases where the customer *requests* the product trade.

The advance change in term notice requirement poses similar inconvenience and potential costs when customers want to trade up (regardless of how long the account has been open). Where a material term is changing, customers may have to wait 45 days to trade up, potentially incurring an additional annual fee and losing opportunities for preferred rewards or other desired features.

Consumers would also benefit from a limited exception to the general prohibition against increasing rates in order to merge multiple cards into a single card in the most efficient and least costly fashion. For example, assume a customer has two cards. Card A has a 16% APR and $50 annual fee. Card B has 12% APR and a $100 annual fee. The customer wishes to concentrate transactions on Card B, because the customer prefers that card's lower APR and cash-back rewards to Card A's travel awards. In order to maximize the lower purchase APR and preferred rewards and retain the combined credit limits, the customer could pay down the Card A balance — which might not be possible immediately — close the account, and then apply and hope for a credit line increase on Card B. However, the customer would continue to pay annual fees on both cards until Card A balances were paid off and must manage two accounts until Card A is closed. In the alternative, the bank could allow the customer to merge the two accounts into a single account with a combined credit limit and two balances, Card A's balance (which would not increase — no additional transactions could be made on Card A after the cards are combined) subject to the 16% rate and Card B's balance subject to the 12% rate, which would also be the purchase rate on the combined account. Pursuant to Regulation Z, payments exceeding the minimum amount would apply to the balance with the higher rate. Customers would also only pay an annual fee on one account.

While the second option is more streamlined and potentially cheaper and more convenient for customers, Regulation Z's requirements for advance notice of the change in terms means customers must wait 45 days and potentially pay an additional annual fee — even though the customer previously had agreed to Card B's APR and annual fee.[30] Moreover, the simplified compliance and ability to retain the original APR on the balance being transferred gives card issuers more incentive to offer the customer

---

[29] *Id.* at 1026.55(b)(3).

[30] Card issuers do not allow balance transfers between their own accounts, as transferring a balance from one account to an account with a higher balance would appear to circumvent the general prohibition against increasing interest rates.

more choices and convenience,[31] including the potential for consumers to select electronically and from a menu of cards and terms and feature choices. The option becomes more attractive if customers are able to merge multiple cards in a real-time, simple fashion.

Simplification of disclosure of late fees increases to match permissible fee safe harbor

Pursuant to §1026.52(b)(ii) of Regulation Z, the Bureau sets the maximum permissible penalty fee (under the safe harbor) and adjusts the permissible amount based on the Consumer Price Index (CPI). If the CPI and the late fee happen to decrease, issuers are prohibited from charging a fee that exceeds this lower amount. However, if the CPI and the maximum fee increase, issuers may only charge the new higher permissible fee after giving customers 45 days advance notice. Given the costs associated with the change in terms notice requirements and the fact that consumers cannot opt-out of the change, card issuers should be able to send a notice, e.g., on the billing statement, advising customers of the change without having to comply with the rigid change in terms formatting and timing requirements.

Form of disclosures for advertisement for credit to purchase goods or services

Section 1026.16(b)(2) of Regulation Z requires that advertisements for credit to finance the purchase of goods or services that state a periodic payment amount must also disclose (1) the total of payments and (2) the time period to repay the obligation. Those latter two disclosures must be "equally prominent" to the periodic payment amount.

Although neither the regulation nor Commentary to this specific section provides further clarification of the meaning of "equally prominent," Commentary elsewhere provides a safe harbor and states that information that is the "same type sized" is deemed to be equally prominent.[32] However, sellers of goods offering financing often want to highlight the total price of the goods and financing, for example, if the financing is free. They have limited space, are focused on selling the item, and want to make consumers aware that the total price is the same — whether or not the consumer chooses to finance.

For these reasons, we recommend that the Commentary clarify that the safe harbor for this specific section allows the total of payments and time period to repay to be equal to or larger in size than the periodic payment, so long as the three numbers are within 75% of each other in size.

Reduction on burden when reopening customer accounts

Card issuers report that customers who close a credit card account frequently change their mind and seek to reopen the account shortly after closure. However, before the account may be reopened and used, the card issuer must again verify that the customer meets the ability to pay requirement[33] and provide new account opening disclosures[34] even if no terms have changed. The requirements are unnecessary and costly, cause delay, and may prevent customers from reopening accounts.

The Bureau should modify §§1026.5(b) and 1026.51 of Regulation Z to allow card issuers to reopen an account without having to comply with the ability to repay rule (if the credit line is not increased) or having to provide new account disclosures (if no terms have changed) when a customer request is received within a short period of time after the account was closed (e.g., 30 days).

---

[31] While the card issuer must provide the advance change in terms notice if the customer wishes to transfer a balance with a *higher* APR to a card account with a *lower* APR, it is not required to do so in the opposite situation, i.e., where a balance subject to a lower APR is transferred to an account subject to a higher APR.

[32] For example, see Section 1026.16(d) cmt. 5(ii).

[33] 12 C.F.R. § 1026.51.

[34] *Id.* at 1026.5(b).

Ability to collect reauthorized payments

While investigating a customer's claim that a purchase was unauthorized, creditors may be unable to determine that the purchase was authorized, and they credit the account. After expiration of the time allowed to resolve the billing error, however, the customer may acknowledge the purchase and withdraw the claim. In this situation, Regulation Z prohibits creditors from charging the account for the purchase.[35] Section 1026.13 of Regulation Z should be amended to permit creditors to reverse a credit involving an unauthorized transaction claim after the time period allowed for resolving the claim has passed if the customer acknowledges that the purchase was in fact authorized.

Clarification of permissible penalty fees

Section 1026.52(b)(2) of Regulation Z prohibits a card issuer from imposing a penalty fee "that exceeds the dollar amount associated with the violation." For purposes of returned payment fees, the permissible maximum amount is the "amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer."

This provision raises questions about the permissible amount if (1) a payment is returned before the payment due date in a cycle, and (2) no payment was due in the cycle before the cycle in which the payment was returned (e.g., the payment was returned in the first month of a new account or on an account that had previously been inactive). The Commentary should clarify that in this situation, the maximum returned payment fee should be the minimum periodic payment due in the billing cycle in which the payment is returned.

7. Streamline Privacy Notice Requirements of Regulation P

Title V, Subtitle A of the Gramm-Leach-Bliley Act (GLBA) and Regulation P, which implements GLBA, mandate that financial institutions provide their customers with annual notices regarding those institutions' privacy policies. If financial institutions share certain consumer information with particular types of third parties, the annual notices must also provide customers an opportunity to opt out of the sharing.

Regulation P generally requires financial institutions to send privacy notices each year, even if the institution's practices have not changed and it only shares information on the limited basis as delineated in the statutory and regulatory exceptions.[36] In response to the Bureau's 2012 RFI on Regulatory Streamlining Priorities, ABA and others called for elimination of the wasteful and burdensome annual re-notification under these circumstances. In October 2014, the Bureau responded by amending the regulation; however, rather than streamlining Regulation P by eliminating the unnecessary annual notice, the Bureau *added* an alternative delivery method, permitting financial institutions to provide their privacy notices on their websites if they meet certain conditions.[37] As ABA predicted, as a practical matter, the alternative delivery method is not used because of the provision's complexity and restrictions.

In response to continuing complaints about the costly and unnecessary annual disclosure, on December 4, 2015, *Congress* amended the GLBA to add a new section 503(f)[38] and provide the sensible exemption. The provision was self-effecting; however, anecdotal evidence indicates that some financial institutions continue to send annual privacy notices in order to comply with the Bureau's regulation.

---

35 *Id.* at 1026.13(c)(2).

36 For example, under §502(e) of GLBA and §§1014 and 1014 of Regulation P, financial institutions may share information for processing transaction a consumer requests, to comply with a consumer's request, pursuant to a court order, to protect against fraud, and to comply with other regulatory mandates.

37 79 Fed. Reg. 64,057 (Oct. 28, 2014).

38 Fixing America's Surface Transportation Act (FAST Act), Pub. Law 114–94, § 75001 (2015).

On July 11, 2016, the Bureau published proposed amendments to Regulation P to implement this GLBA provision,[39] but in the intervening two years the Bureau has taken no further action to implement this simple, straightforward amendment. We urge the Bureau to finalize the proposed rule to eliminate the inconsistency between the statute and regulation and the waste and costs of sending unnecessary notices.

8. Eliminate Appraisal Notice When Loan Is Denied Prior to Deadline for Sending Notice

Section 1002.14(a)(2) of Regulation B requires creditors to mail or deliver to certain mortgage applicants, not later than the third business day after application receipt, a notice in writing of the applicant's right to receive a copy of all written appraisals developed in connection with the application. This provision is interpreted to require that the notice be sent even though the loan is denied prior to the end of the three-day period and no appraisal is obtained. This inconsistent notice confuses consumers, is unnecessary, and presents risk of inadvertent compliance violations. For these reasons, we recommend that the Bureau amend the regulation or the commentary to provide that notice is not required if the application is denied before any appraisal or valuation is obtained.

Conclusion

ABA appreciates the Bureau's leadership in efforts to examine existing regulations to identify opportunities to modernize and make them more transparent and flexible so as to promote efficiency and innovation. Such improvements benefit consumers through better products and services, more choices, and lower prices. We strongly recommend that the Bureau review and update regulations on a regular basis so that regulations evolve with the markets and consumer demand and preferences. In reviewing the inherited regulations, we urge the Bureau to focus on correcting and clarifying the fair lending standards under ECOA and modernizing disclosures to use technological advances to improve consumers' experience and understanding of financial products. In addition, we suggest a number of adjustments and clarifications to various regulations, which though less a priority are important to the goal of promulgating sensible regulations.

If you have any questions about these comments or would like to discuss any matter further, please contact Nessa Feddis at 202 663-5433 or nfeddis@aba.com.

Sincerely,

Nessa E. Feddis

Nessa E. Feddis
Senior Vice President & Deputy Chief Counsel for
Consumer Protection and Payments

[39] Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P), 81 Fed. Reg. 44,801 (July 11, 2016) (to be codified at 12 C.F.R. pt. 1016).