

PUBLICATION UPDATE

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FEDERAL FAIR LENDING AND CREDIT PRACTICES MANUAL

Publication 4758 Release 19 March 2017

HIGHLIGHTS

Highlights

- This release updates the Federal Fair Lending and Credit Practices Manual, Revised Edition, with compliance guidance for recent changes in a wide range of fair lending laws and regulations.
- Please see below for details regarding new and updated material included in this release.

Home Mortgage Disclosure Act

CFPB Addresses Expanded HMDA Information About Ethnicity and Race in 2017. On September 29, 2016, the Consumer Financial Protection Bureau published a notice pursuant to the Equal Credit Opportunity Act concerning the collection of expanded Home Mortgage Disclosure Act information about ethnicity and race in 2017. Under the new HMDA reporting rule, finalized in October 2015, financial institutions covered by HMDA are required

to permit applicants to self-identify using disaggregated ethnic and racial categories beginning January 1, 2018. CFPB Sends Warning Letter About Complying with HMDA Reporting Requirements. On October 27, 2016, the Consumer Financial Protection Bureau sent warning letters to 44 mortgage lenders and mortgage brokers stating that they be in violation of the Home Mortgage Disclosure Act for failing to meet certain requirements regarding collecting, recording, and reporting mortgage lending data. In October 2015, the CFPB issued a final rule amending Regulation C that carried out the Dodd-Frank Act’s amendments to HMDA to expand the scope of data required to be collected and reported, changed the scope of HMDA’s coverage of both institutions and transactions, and adopted new processes for disclosing data. (See Chapter 1.)

Community Reinvestment Act

Interagency Q&As Regarding CRA Issued. On July 15, 2016, three federal bank-

ing agencies published final revisions to “Interagency Questions and Answers Regarding Community Reinvestment.” The Q&A document provides additional guidance to financial institutions and the public on the agencies’ Community Reinvestment Act regulations. The agencies last published the Q&As in full on March 11, 2010. The guidance clarifies nine of the 10 proposed Q&As, revises four existing Q&As for consistency, and adopts two new Q&As. (*See* Chapter 2.)

FDIC Affordable Housing Guide Addresses CRA Implications. On September 15, 2016, the Federal Deposit Insurance Corporation released an Affordable Mortgage Lending Guide for community bankers. The guide is the first in a new series, covering federal and government-sponsored entity programs from the Federal Housing Administration, the Department of Agriculture, the Department of Veterans Affairs, the Community Development Financial Institutions Fund, Fannie Mae and Freddie Mac. The guide provides financial institutions with a one-stop resource to gain an overview of a variety of program resources, compare different programs and their Community Reinvestment Act implications, and help identify the next steps for program participation. (*See* Chapter 2.)

Fair Housing Act

HUD Issues Guidance on Fair Housing Protections for People With “Limited English Proficiency”. On September 15, 2016, new “Limited English Proficiency” guidance was issued by the Department of Housing and Urban Development. The guidance addresses how the Fair Housing Act applies to claims of housing discrimination brought by people because they do not speak, read, or write English proficiently. The guidance spells out how various legal approaches, including discrimina-

tory effects and disparate treatment, apply in FHA cases. (*See* Chapter 3.)

HUD Formalizes Legal Standards for Harassment Under the FHA. On September 14, 2016, the Department of Housing and Urban Development published a final rule amending its fair housing regulations to formalize standards for use in investigations and adjudications involving allegations of harassment on the basis of protected classes. The courts and HUD have long considered harassment based protected classes to be prohibited under the Fair Housing Act, but standards for assessing harassment claims had previously not been formalized in regulation. (*See* Chapter 3.)

Disparate Impact Case Dismissed Upon Remand. On August 26, 2016, the U.S. District Court for the Northern District of Texas dismissed a lawsuit brought under the Fair Housing Act alleging that the Texas Department of Housing and Community Affairs and its officers had engaged in prohibited racial discrimination in its allocation of low income housing tax credits in the Dallas metropolitan area. The district court’s decision came after the Supreme Court remanded the case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, to the lower court upon deciding that disparate impact claims are cognizable under the FHA, but that a higher standard should be applied in determining disparate impact liability. (*See* Chapter 3.)

Mystery Shoppers Used for First Time in Charging Bank with Redlining. On June 29, 2016, Consumer Financial Protection Bureau and the Department of Justice sanctioned a bank for discriminatory mortgage lending practices that harmed African Americans and other minorities in the Memphis, Tennessee area, in violation of

both the Fair Housing Act and the Equal Credit Opportunity Act. It was the first time the CFPB has used “mystery shopping” to support an allegation of discrimination. (See Chapter 3.)

Reverse Redlining Produces FHA Lawsuit. On June 27, 2016, a federal jury in Brooklyn, New York found that a bank had violated the Fair Housing Act, as well as the Equal Credit Opportunity Act, and New York City Human Rights Law by aggressively marketing toxic mortgages to Black and Latino homeowners with poor credit—a practice known as “reverse redlining.” (See Chapter 3.)

Equal Credit Opportunity Act

CFPB Uses “Testers” to Uncover ECOA Violations. On July 25, 2016, the Consumer Financial Protection Bureau reached settlement with a bank on violations of the Equal Credit Opportunity Act and the Fair Housing Act. CFPB’s complaint was supported by the use of “testers” who went to several bank branches to inquire about mortgages. African-American testers allegedly experienced cases of BancorpSouth loan officers treating them less favorably than white testers. (See Chapter 5.)

CFPB Addresses Credit Discrimination on Basis of Gender Identity and Sexual Orientation. On August 30, 2016, the Director of the Consumer Financial Protection Bureau addressed the question of whether his agency views credit discrimination on the bases of gender identity and sexual orientation as forms of sex discrimination prohibited under the Equal Credit Opportunity Act. The Director’s views were offered in a letter that responded to an inquiry made by the heads of Services & Advocacy for GLBT Elders. (See Chapter 8.)

Bank Sanctioned for Racial Disparities Arising from Allowing Loan Officers to

Adjust Auto Loan Interest Rates. On September 28, 2016, the Department of Justice fined a bank for engaging in a pattern or practice of discrimination on the basis of national origin. DOJ alleged that the bank violated the Equal Credit Opportunity Act by charging higher interest rates to Hispanic borrowers than to similarly situated non-Hispanic borrowers on vehicle-secured consumer loans. DOJ said the discrimination occurred because the bank gave its employees broad, subjective discretion to adjust interest rates upward or downward by approximately three percentage points, which was not based on the borrower’s credit risk. (See Chapter 9.)

Fair Credit Reporting Act

OCC Issues New Handbook on Student Lending. On May 9, 2016, the Office of the Comptroller of the Currency issued a new booklet to its Comptroller’s Handbook, entitled “Student Lending.” One of the laws mentioned by the OCC that student lenders should be aware of is the Fair Credit Reporting Act. The OCC noted that banks often use third-party servicers to service their loans. If so, management must also ensure that its third-party servicers adhere to the FCRA and that credit bureau reports are requested only if there is a permissible purpose to request it under the FCRA. (See Chapter 10.)

“Injury in Fact” Class Action Standard. On May 16, 2016, the U.S. Supreme Court ruled, in a 6-2 decision, that plaintiffs seeking to bring class actions in federal court must demonstrate concrete and particular “injury in fact” in order to have standing. The case, *Spokeo v. Robins*, was brought by a man charging that a consumer reporting agency violated the Fair Credit Reporting Act when it published false information about him. (See Chapter 11.)

Fair Debt Collection Practices Act

CFPB's Mortgage Servicing Rule Includes FDCPA Compliance Safe Harbors. On August 4, 2016, the Consumer Financial Protection Bureau issued a 900-page final rule amending its mortgage servicing rules. Concurrent with the final rule, the CFPB issued an interpretive rule under the Fair Debt Collection Practices Act relating to servicers' compliance with certain mortgage servicing provisions. While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan. The interpretive rule clarifies the interaction between certain provisions of the FDCPA and the mortgage servicing rules and provides a safe harbor from liability for servicers acting in compliance with specified mortgage servicing rules. (See Chapter 14.)

Major Auto Title Lender Hit for Abusive Debt Collection Practices. On September 26, 2016, the Consumer Financial Protection Bureau announced an enforcement action against one of the country's largest auto title and personal loan lenders for luring consumers into costly loan renewals by presenting them with misleading information about the deals' terms and costs. The CFPB also charged the lender with using unfair debt collection tactics that illegally exposed information about debts to borrowers' employers, friends, and family. (See Chapter 14.)

FDCPA Requires Subsequent Debt Collectors to Send Validation Notices. On July 20, 2016, the U.S. Court of Appeals for the Ninth Circuit ruled on the "the initial communication" requirement of the Fair Debt Collection Practices Act. The court held that the phrase "the initial communication" refers to the first communication sent by

any debt collector, including collectors that contact the debtor after another collector already did. In other words, if there are multiple debt collectors that try to collect a debt, each one must send the required notice after its first communication with the alleged debtor about the debt. (See Chapter 14.)

Unfair or Deceptive Acts or Practices

CFPB Fines Bank \$10 Million for Illegal Overdraft Practices. On July 14, 2016, the Consumer Financial Protection Bureau announced that it had ordered a major bank to pay a \$10 million fine for illegal overdraft service practices, including marketing and enrolling consumers in an "Account Protector" overdraft service for ATM and one-time debit card transactions, and charging consumers \$35 per overdraft. The CFPB noted that in 2010, "federal rules took effect prohibiting banks and credit unions from charging overdraft fees on ATM and one-time debit card transactions unless consumers affirmatively opt in. If consumers don't opt in, banks may decline the transactions because of insufficient or unavailable funds, and can't charge an overdraft fee." (See Chapter 15.)

Illegal Credit Card Add-on Products Continue to Bring Enforcement Action. On August 25, 2016, the Consumer Financial Protection Bureau fined a large Nebraska bank over \$30 million for illegal practices with credit card add-on products. According to the CFPB, the bank deceptively marketed debt cancellation add-on products to consumers and illegally billed for credit monitoring services that consumers did not receive. Credit card add-on products have become a major source of regulatory enforcement actions in recent years. (See Chapter 15.)

Online Payday Lender Seeking to Use Tribal Law Loses UDAAP Case. On Au-

gust 31, 2016, the Consumer Financial Protection Bureau scored an important legal victory in a case that centered on the agency's 2014 allegation that a payday lender engaged in unfair, deceptive, and abusive acts and practices in a lending scheme that sought to avoid state usury laws through the use of an online lender formed under a tribal jurisdiction. The decision has implications for online lenders and others that require borrowers to loan contracts created in states or territories or jurisdictions with high or non-existent usury laws. (*See* Chapter 15.)

Consumer Financial Protection Bureau and Fair Lending

CFPB Proposes Rule Limiting Arbitration Agreements. On May 3, 2016, the Consumer Financial Protection Bureau issued a proposed rule governing the use of arbitration agreements in resolving disputes over a financial product or service. The proposed rule would affect many consumer protection laws, including the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act. (*See* Chapter 16.)

CFPB Issues New Compliance Proce-

dures for Reverse Mortgage Servicing. On October 31, 2016, the Consumer Financial Protection Bureau issued updated examination procedures for reverse mortgage loan servicing. The reverse mortgage servicing loan procedures reflects the new mortgage servicing rules that became effective in 2014. Among the laws addressed in the scope of the guidance are the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and unfair, deceptive, and abusive acts or practices. (*See* Chapter 16.)

CFPB Proposes Rule to Regulate "Payday" Loans. On June 2, 2016, the Consumer Financial Protection Bureau issued a 1,341-page proposed rule to provide consumer protections for certain kinds of short-term, high-interest loans, typically referred to as "payday" loans. Under the proposed rule, it would constitute an abusive and unfair practice for a lender to make a covered loan without reasonably determining that the consumer has the ability to repay the loan. The proposal also would require that a lender reasonably determine that the consumer has the ability to repay the loan. (*See* Chapter 16.)

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Publication 4758 Release 19

March 2017

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