Table of Contents

Section 2 Summary

The Consumer Financial Protection Bureau (CFPB) has committed to Congress, to employ robust enforcement of fair lending laws as a key part of their effort to identify and act on opportunities to focus on consumers in underserved communities, while vigorously pursuing racial and economic justice. The CFPB is actively working to protect individuals, small businesses, and communities from discrimination, by holding institutional and individual bad players accountable, and ensuring robust and comprehensive ameliorative remedies for violations of the laws under their authority.

There are two primary anti-discriminatory laws that define the requirements of fair lending compliance, the Equal Credit Opportunity Act and the Fair Housing Act.

Equal Credit Opportunity Act

The CFPB has rule making authority of the Equal Credit Opportunity Act (ECOA), which requires those who extend credit to make it equally available to all creditworthy consumers, thereby prohibiting discrimination in all types of credit, including both consumer and commercial.

Fair Housing Act

The Fair Housing Act is enforced by the Department of Housing and Urban Development (HUD) and is a civil rights law that makes discrimination in housing illegal. The Fair Housing Act protects people from discrimination when renting, or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing related activities.

Also included in this Guide is a section dedicated to unfair, deceptive, and abusive practices (UDAAP). Although not technically considered a fair lending law, and generally a UDAAP examination is separate and apart from a fair lending examination; the CFPB examination objective correlates consumer UDAAP risk with potentially discriminatory acts or practices.

2.1 Coverage

ECOA

The ECOA, which is implemented by Regulation B, applies to all creditors. Regulation B applies to all persons who, in the ordinary course of business, regularly participate in the credit decision, including setting the terms of the credit.

Section 3 Requirements

3.1 ECOA

The ECOA and its implementing Regulation B, prohibit creditors from discriminating against any applicant with respect to any aspect of a credit transaction:

- On the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)
- Because all or part of the applicant's income derives from any public assistance program
- Because the applicant has in good faith exercised any right under the Consumer Credit Protection Act

> In relation to age discrimination there are special rules and protections for elderly applicants — those age 62 or older. As long as applicants 62 or older are treated at least as good as applicants younger than 62, age discrimination has not occurred.
>
> Marital status can be considered in only three ways. The applicant is
>
> • Married
>
> • Separated, or
>
> • Unmarried (divorced, never-been-married, or widowed)

The ECOA and Regulation B prohibit discrimination in any aspect of a credit transaction including loan modifications. [Sample Client] violates the statute and regulation when discriminating against borrowers on a prohibited basis in approving or denying loan modifications.

Examples of loan modifications that are extensions of credit include, but are not limited to, the right to defer payment of a debt by capitalizing accrued interest and certain escrow advances, reducing the interest rate, extending the loan term, and/or providing for principal forbearance.

> In keeping with the broad reach of the ECOA's prohibition, the regulation covers [Sample Client] activities before, during, and after the extension of credit.

Advertising

[Sample Client] is prohibited from making any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage, on a prohibited basis, a reasonable person from making or pursuing an application.

Please note, for purposes of this Guide, only relevant sections of the interagency fair lending examination procedures are included. For access to the full Interagency Fair Lending Examination Procedures refer to Appendix 3, Interagency Fair Lending Examination Procedures; and the Interagency Fair Lending Examination Procedures - Appendix.

3.7 Unfair, Deceptive, or Abusive Acts and Practices

Unfair, deceptive, or abusive acts and practices (UDAAPs) can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for [Sample Client] to engage in any unfair, deceptive or abusive act or practice.

Within their fair lending risk assessment process or in the development of new products or services, [Sample Client] must carefully access products that combine features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm to the consumer associated with the product. Overall, [Sample Client] must have processes in place to routinely complete the following:

- Review the core principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services
- Assess practices for any potential risk of being identified as unfair, deceptive, or abusive

3.7.1 Unfair Acts or Practices

An act or practice is unfair when the following occur:

- It causes or is likely to cause substantial injury to customers;
- The injury is not reasonably avoidable by consumers; and
- The injury is not outweighed by countervailing benefits to consumers or to completion.

3.7.1.1 Substantial Injury to Consumers

Substantial injury usually involves monetary harm. Monetary harm includes, for example, costs or fees paid by consumers as a result of an unfair practice.

An act or practice by [Sample Client] that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.

Foregone monetary benefits or denial of access to products or services, like that which may result from discriminatory behavior, may also cause substantial injury.

3.7.1.3 Injury Must Not be Outweighed by Countervailing Benefits to Consumers

To be unfair, the act or practice must be injurious in its net effects — that is, the injury must not be outweighed by any offsetting consumer or competitive benefits that also are produced by the act or practice. Offsetting consumer or competitive benefits of an act or practice may include lower prices to the consumer or a wider availability of products and services resulting from competition.

Costs that would be incurred for measures to prevent the injury also are taken into account in determining whether an act or practice is unfair. These costs may include the costs to [Sample Client] in taking preventive measures and the costs to society as a whole of any increased burden and similar matters.

> Example: Refusing to release a lien after consumer makes final payment on a mortgage.
>
> The Federal Trade Commission (FTC) brought an enforcement action against a mortgage company based on allegations, described below, that the company repeatedly failed to release liens after consumers fully paid the amount due on their mortgages.
>
> Substantial injury. Consumers sustained economic injury when the mortgage servicer did not release the liens on their properties after the consumers had repaid the total amount due on the mortgages.
>
> Not outweighed by benefits. Countervailing benefits to competition or consumers did not result from the servicer's alleged failure to appropriately service the mortgage loan and release the lien promptly.
>
> Not reasonably avoidable. Consumers had no way to know in advance of obtaining the loan that the mortgage servicer would not release the lien after full payment. Moreover, consumers generally cannot avoid the harm caused by an improper practice of a mortgage servicer because the servicer is chosen by the owner of the loan, not the borrower. Thus, consumers cannot choose their loan servicer and cannot change loan servicers when they are dissatisfied with the quality of the loan servicing.

3.7.2 Deceptive Acts or Practices

A representation, omission, act, or practice is deceptive when the following occur:

- The representation, omission, act, or practice misleads or is likely to mislead the consumer.
- The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances.
- The misleading representation, omission, act, or practice is material.

Appendix 2 Best Practices

In recent years the Consumer Financial Protection Bureau (Bureau) has assessed the mortgage origination and servicing operations of several supervised entities for compliance with applicable Federal consumer financial laws. Examinations of these entities identified violations of the ECOA (Regulation B), the Fair Housing Act, Fair Debt Collection Act (FDCPA), Real Estate Settlement Procedures Act (RESPA) (Regulation X), Truth in Lending Act (TILA) (Regulation Z), as well as deceptive acts or practices prohibited by the Consumer Financial Protection Act.

The Bureau reports these findings in a Supervisory Highlights publication; below are applicable excerpts specific to areas where fair lending was cited as an issue within mortgage origination and servicing operations.

4.3 Mortgage Origination

4.3.1 Deceptive Waiver of Borrowers' Rights in Loan Security Agreements

Regulation Z states that a "contract or other agreement relating to a consumer credit transaction secured by a dwelling … may not be applied or interpreted to bar a consumer from bringing a claim in court pursuant to any provision of law for damages or other relief in connection with any alleged violation of Federal law." In light of this provision, examiners previously concluded that certain waiver provisions violate the Consumer Financial Protection Act's (CFPA) prohibition on deceptive acts or practices where reasonable consumers would construe the waivers to bar them from bringing Federal claims in court related to their mortgages.

Examiners identified a waiver provision in a loan security agreement that was used by certain entities in one state. The waiver provided that borrowers who signed the agreement waived their right to initiate or participate in a class action.

> Examiners concluded the waiver language was misleading, and that a reasonable consumer could understand the provision to waive their right to bring a class action on any claim, including federal claims, in federal court. The misrepresentation was material because it was likely to affect whether a consumer would consult with a lawyer or otherwise initiate or participate in a class action involving a federal claim in relation to the loan transaction. Thus, examiners concluded that the waiver provision was deceptive.

In response to these findings, the entities removed the waiver provision from the loan security agreements and sent a notice to affected consumers rescinding and voiding the waiver.

One or more lenders also are improving compliance management systems, including board and management oversight, monitoring and/or audit programs, and handling of consumer complaints.

4.4 Mortgage Servicing

4.4.1 Overcharging Late Fees

Examiners found that servicers engaged in unfair acts or practices by assessing late fees in excess of the amounts allowed by their loan agreements. Specifically, where loan agreements included a maximum permitted late fee amount, the servicers failed to input these late fee caps into their systems. Because the systems did not reflect the maximum late fee amounts permitted by their loan agreements, the servicers charged the maximum allowable late fees under the relevant state laws, which frequently exceeded the specific caps in the loan agreements.

The servicers caused substantial injury to consumers when they imposed these excessive late fees. Consumers could not reasonably avoid the injury because they do not control how servicers calculate late fees and had no reason to anticipate that servicers would impose excessive late fees. Charging excessive late fees had no benefits to consumers or competition.

Examiners concluded that servicers also violated Regulation Z by issuing periodic statements that included inaccurate late payment fee amounts, since they exceeded the amounts allowed by the loan agreements. In response to these findings, servicers waived or refunded late fee overcharges to consumers and corrected the periodic statements.

4.4.2 Repeatedly Charging Consumers for Unnecessary Property Inspections

Mortgage investors generally require servicers to perform property inspection visits for accounts that reach a specified level of delinquency. Generally, servicers must complete these property inspections monthly. To satisfy this requirement, servicers hire a third party that sends an agent to physically locate and view the property. The servicers then pass along the cost of the property inspection to the consumer, with fees ranging from $10 to $50.

Examiners found that in some instances a property inspector would report to servicers that an address was incorrect, and that the inspectors could not locate the property because of this error. Despite knowing that the address was incorrect, the servicers repeatedly hired property inspectors to visit these properties. Examiners found that