

March 4, 2005

Ms. Orla Beth Peck  
Supervisor of Credit Unions  
Department of Financial Institutions  
P.O. Box 146800  
Salt Lake City, Utah 84114-6800

Re: Disparate Impact Discrimination Inquiry.

Dear Ms. Peck:

You have asked if a lender's practice of routinely adding an amount to the debts of a loan applicant who does not report any housing expense is likely to result in a "disparate impact," a result federal antidiscrimination law prohibits. We think this practice could result in a disparate impact on younger applicants.

Federal antidiscrimination rules prohibit lenders from using age to determine whether to provide credit to an applicant. 12 C.F.R. §202.4(a). A policy that is facially neutral as to age or another prohibited factor, such as race, color, religion, national origin, sex, or religion, may constitute illegal discrimination if it results in a disproportionately adverse impact on a protected class of applicants, despite the absence of intent to discriminate. Official Commentary, 12 C.F.R. Part 202 Supp. I, §202.6(a)-2. A policy that has a disparate impact is prohibited unless it meets a legitimate business need that cannot reasonably be achieved through means that are less disparate in their impact. *Id.*

The fair lending rules generally prohibit discrimination against any person based on age, although a program that provides relatively more favorable treatment of older individuals may be permissible. See, e.g., Official Commentary, 12 C.F.R. Part 202 Supp. I, §208.6(b)(2)-2 (relating to the impact of credit scoring systems on persons older than age 62). The Official Commentary provides, moreover, that a credit scoring system can establish a category for persons in their twenties or younger with attributes that are predictive for that age group. *Id.*

In evaluating an individual applicant's income in a "judgmental system," age or age related information may be considered only in evaluating other pertinent elements of creditworthiness. Official Commentary, 12 C.F.R. Part 202 Supp. I, §202.6(b)(2)-3; 12 C.F.R. §202.2(t) (definition of "judgmental system of evaluating applicants means any system . . . evaluating the creditworthiness . . . other than an empirically derived, demonstrably and statistically sound, credit scoring system"). The Official Commentary permits a creditor to evaluate each component of income separately and permits discounting or disregarding any

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portion of income that is considered unreliable. Official Commentary, 12 C.F.R. Part 202 Supp. I, §202.6(b)(5)-3-i-B.

Accordingly, a lender may consider the circumstances surrounding an individual applicant's lack of housing expense and may determine the facts in a particular case warrant an adjustment. We believe, however, a blanket policy of adding an amount to every applicant's debts to compensate for the absence of a stated housing expense is improper and could result in illegal discrimination under the federal fair lending rules.

Sincerely,

Sheila A. Albin  
Associate General Counsel

GC/RPK:bhs  
04-0936