Questions that were not included in the transcript of the comments made by ARD Beshara.

QUESTION: HMDA and Fair Lending Examinations—Please talk about the FDIC's thresholds for HMDA data accuracy. How is accuracy measured? What are the thresholds for requiring data to be scrubbed and resubmitted? What are the timing implications on resubmitting data relative to the release of data for public purposes? Are Fair Lending Examinations being delayed if HMDA data is inadequate?

ANSWER: Accuracy: The accuracy standards are determined based upon the number of reportable applications on an institution's HMDA LAR: institutions with 100-500 reportable applications, institutions with over 500 reportable applications, and institutions with fewer than 100 reportable applications. The error/omission tolerances are smaller for institutions in the larger band since the impact of any errors/omission on their part would have a larger impact on aggregate data. Accuracy thresholds are established for omissions, total errors, and key data field errors.

Correction/Resubmission Thresholds: When examinations reveal high error/omission rates institutions are required to correct the subject LARs. Corrected HMDA LARs for the two most recent calendar years should be resubmitted to the FRB, if still within appropriate time parameters (which are described below). For errors and omissions on LARs beyond the most recent two years, as needed for a Fair Lending or CRA review, institutions are required to correct, review, and verify the data. Institutions should then maintain the corrected data for public disclosure, as required by HMDA.

Resubmission Timeline: Institutions are required to re-file corrected HMDA LARs for the two most recent calendar years. However, the FRB will generally not accept resubmitted data after

October 31st of the calendar year following the initial submission year. For example, an institution files its 2009 data in 2010 – so the resubmission deadline would be in 2011.

Fair Lending: Can fair lending examinations be delayed due to inadequate HMDA data? Yes, since accurate data is necessary for Fair Lending examinations, this portion of the compliance examination will be suspended should significant error or omission rates be revealed. Once the banks have reviewed and corrected the HMDA data, the examiners will return to the institution to revalidate the data and, if deemed accurate, complete the Fair Lending portion of the examination. In addition, if a CRA evaluation is being conducted along with the compliance examination, it would also be suspended until the HMDA data is corrected and revalidated. Let me clarify also, that should the fair lending focus be on non-HMDA lending activities there would be no delay while the HMDA is corrected and re-filed.

QUESTION: Can you provide the do's and don'ts of gathering Government Monitoring Information (GMI) and HMDA reporting?

ANSWER: With this question we were unclear if the guidance being requested is for two separate activities, i.e. GMI collection and HMDA reporting and the related do's and don'ts for each or if this is a single issue where GMI is gathered and used in HMDA data.

GMI is required in some cases and prohibited in others.

Do's:

- Follow the guidance in Reg B Section 202.5 which provides guidance on when collection of certain information is permissible and when it is prohibited. Additionally Section 202.13 provides guidance on when and what information should be requested specifically for monitoring purposes

- In cases where prohibited information might be inadvertently collected (photo IDs) to verify identity it is recommended that this information be requested after the credit decision and retained in a location outside the credit file.

Don’ts:

- Don’t use restricted information to evaluate applicants or customers when not allowed under Regulation B.

For HMDA Collection we would encourage you to review your credit operations to ensure that strong HMDA procedures are in place for any department that could receive a HMDA reportable loan application, with particular attention paid to commercial loans secured by residences when they are refinanced. Also review your pre-approval or pre-qualification programs to see if their structure qualifies as a “pre-approval program” under HMDA guidelines. Your monitoring procedures should ensure that covered applications are recorded accurately on the Loan Application Register. The <u>Guide to HMDA Reporting</u> published each year by the FRB and, posted on the FFIEC website, is a great resource for your staff. It is important that the individuals completing the LAR can also perform adequate monitoring. Persons who misunderstood data report requirements will not recognize those errors during monitoring reviews.

QUESITON: FCRA Section 615(a)(2); if a bank uses ChexSystem's "QualiFile" scores solely for the purpose of making decisions whether or not to open a <u>deposit</u> account (no credit or loan products), does the QualiFile score and related information has to be disclosed on the adverse action notice if the bank takes adverse action in connection with a deposit account?

ANSWER: Section 603(k)(1)(B)(iv) broadly covers all actions or determinations adverse to the interests of the consumer made in connection with an application made by, or a transaction initiated by, the consumer. Denying a consumer a deposit account based on information in a credit report would fall under this definition of adverse action. Furthermore, Sections 603(d) and (f) define consumer report and consumer reporting agency, respectively. Since ChexSystems assembles and evaluates consumer credit information for the purpose of furnishing credit reports to third parties for monetary compensation, it is a consumer reporting agency and would fall under applicable provisions of FCRA. There are different regulatory requirements depending on if the bank is acting as a "furnisher" of credit information (Section 623(a)(7) which applies to nationwide credit reporting agencies Equifax, Experian and TransUnion), or whether the bank is a "user" of credit report information (Section 615(a)). With respect to "users" of consumer reports, any party who takes adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report must provide to the consumer <u>orally, in writing or electronically</u>:*

Notice of the adverse action;

- The name, address, and telephone number of the Consumer Reporting Agency (CRA) (toll-free number in the case of a nationwide CRA);
- A statement that the CRA did not make the decision to take the adverse action and is unable to provide specific reasons for the action; and
- Notice of the consumer's rights to obtain a free file disclosure from the CRA, and to dispute with a CRA the accuracy or completeness of any information in a consumer report furnished by the CRA.

Effective July 21, 2011, the party taking adverse action must also disclose:

1). A numerical credit score used in making the credit decision;

2). the range of possible scores under the model used;

3). up to 4 key factors that adversely affected the consumer's credit score (or up to 5 if the number of inquiries is a key factor);

4). the date on which the credit score was created; and

5). the name of the person or entity that provided the credit score.

Banks should confirm that ChexSystems recently issued guidance that their QualiFile Score (ChexSystems Consumer Score) is a credit score and users of reports containing a QualiFile Score could be subject to the new FCRA adverse action notice requirements.

QUESTION: When we have questions related to HMDA or any other regulatory matters, what is the best source to contact when we need a quick answer? At times there are discrepancies between information in HMDA help and in responses from the examiners?

ANSWER: The FRB continues to provide guidance through HMDA Help@ FRB.gov As to other regulatory matters, for those regulations which have transferred to the CFPB, you can obtain a list of the transferred regulations at consumerfinance.gov and contact them for guidance. Also, you can contact your local FDIC office.

Difference in opinions should be raised to the New York Regional Office.

QUESTION: Escrow analysis covering both short year and annual analysis?

ANSWER: In October 1994 HUD issued a final rule changing the accounting method for escrow accounts called aggregate accounting. Regulatory guidance on escrows is located in RESPA-Section 3500.1. A bank is allowed to collect an initial amount to establish the escrow account equal to the amount due since the last payment-until the initial payment date and 1/6 of estimated total annual payments from escrow account (a two month cushion). The bank is restricted from collecting more than 1/12 of the total annual payments (monthly). For example: Property taxes are escrowed and the annual tax bill is $1,200.00 and paid in June and December. The borrower closes the loan with a first loan payment due in November and the bank escrows for the taxes. The bank is allowed to collect 1/12 of the annual payment on a monthly basis which would be $100.00. The bank would request (1)$400 as the taxes were paid in June and they would need July, August, September and October and (2)$200 (the two month cushion) which would be $600.00 for an initial escrow balance.

If the bank requires escrow and maintains the servicing of the loan it must conduct an annual escrow analysis and provide the borrower(s) with an annual escrow statement. It must be submitted to the borrower within 30 calendar days of the initial computation year. The analysis is performed to ensure there are sufficient funds to pay for the escrowed items going forward. The annual statement must include the escrow account history, projections for the next year, the current mortgage payment and portion going into escrow, last year's mortgage payment and portion that went into escrow, total amount paid into the escrow account the past year, amounts paid from the account for each escrowed item, balance in account at the end of the period, explanation of how surplus, shortage or deficiency will be handled and if applicable, reason(s) why estimated low monthly balance (on last escrow statement) was not reached.

Short-year analyses, typically done when new items are required to escrowed, i.e. flood insurance, loan servicing has been transferred or loan pay-off funds have been received, must be completed and provided within 60 calendar days of the trigger event. This covers the same information as required by the annual statement. The bank or new servicer is still restricted on use of the "aggregate analysis" and on the amount to be collected to establish the account.

After the annual or short year analyses and either surplus or shortage occurs, the bank must do the following:

Surplus:

Refund to the borrower if surplus $50.00 or more

Credit against the next year escrow payment if less than $50.00

Shortage (negative balance in the future) of less than 1 month's escrow payment:
May allow the shortage

May require the borrower to repay the shortage amount within 30 days

May require the borrower to repay the shortage amount in equal monthly payments over at least a 12 month period

Shortage of more than 1 month's escrow payments:
May allow the shortage

May require the borrower to repay the shortage in equal monthly payments over at least a 12 month period

Deficiency (negative balance exceeding 1 month's escrow payments

May require borrower to pay additional monthly deposits to the account to eliminate the deficiency

May allow the deficiency

May require the borrower to repay the deficiency in two or more equal monthly payments

Deficiency is less than 1 month's escrow account payment
May require the borrower to repay the deficiency within 30 days

May allow the deficiency

May require the borrower to repay the deficiency in two or more equal monthly payments.

Question: If an institution has a full overdraft protection program (i.e., that includes overdraft protection for items other than ATM and one-time debit card transactions), does the institution need to be concerned because they charge an OD fee for force-placed transactions to customers that opted-in vs. customers that did not opt-in?

ANSWER: Generally speaking, a bank that offers an Overdraft Protection Plan ("ODP") routinely pays for ATM/POS overdrafts other than required-pay transactions and charges an overdraft fee. These institutions typically will not have a problem because the customer will have opted into a true ODP. Thus, providing customers the opt-in notice would not be misleading because the bank has a true ODP for the customer to opt in - that is, the payment of overdrafts is not limited to "required pay" transactions. However, we have had situations where a bank offered one ODP solely for check and ACH transactions and another for ATM/POS transactions but failed to alert customers that they had to be enrolled in the check ODP in order to have routine ATM/POS transactions covered even if the customer signed an opt in form for the ATM/POS program. Providing the model opt-in form under these circumstances is misleading because customers are led to believe that both their routine ATM/POS and required pay transactions will be covered when only the required pay transactions will be covered. We have been directing banks falling under this scenario to provide adequate notice to consumers before offering them the model opt-in form.

Question: If an institution has an Overdraft Protection Program that only covers ATM and one-time debit card transactions (does not cover checks, ACH or other items), does the institution need to be concerned because they charge an OD fee for force-placed transactions to customers that opted-in vs. customers that did not opt-in?

ANSWER: No. The bank is permitted to charge customers who opt-in to the ODP for "required pay" transactions.

Question: What actions do you recommend financial institutions take so that they are not found in violation of UDAP with this issue?

ANSWER: If a bank has an OD program that pays ATM/POS transactions other than required pay transactions, the bank should be sending its customers the model opt-in form in order to charge for these transactions. However, if the bank has some limitation on paying these transactions even when it has a true OD program, (e.g., a requirement that the customer also be enrolled in the bank's check/ACH OD program in order to have the ATM/POS transactions covered) then the bank must provide its customers with adequate notice, so that the customer understands what additional requirements must be met in order to have ATM/POS (other than required pay) transactions covered.

If a bank does not have an OD program that pays ATM/POS transactions beyond required pay transactions, then the bank should not send its customers the model opt-in form because there is no OD program for customers to opt in to. The bank also should not charge customers for the required pay transactions, because doing so would violate Regulation E. Where a No Pay Bank has sent its customers the opt-in form banks should advise those customers who did opt in that the bank does not have an OD program for ATM/POS transactions. In addition, these banks should no longer provide opt-in forms to consumers at account opening because the bank does not have an ODP for the consumer to opt in to.

Question: Are examiners still citing financial institutions on this issue?

ANSWER: If bank management of a No Pay bank ceases or agrees to cease charging OD fees to consumers in the required pay context then UDAP violations are not being cited. If bank management does not agree to terminate charging such fees or does not commit to terminating such practice then UDAP violations will be cited.

Question: When will further guidance be issued on this issue?

The FDIC is committed to working with the industry to identify a solution to this issue. Senior FDIC officials have been meeting with the various trade associations to discuss this issue.

Question: Could you provide a definition of complaints that a financial should be tracking? Could you provide guidance on how the FDIC will review our processes for tracking oral complaints and responding to oral complaints?

ANSWER: The FDIC believes that all complaints should be tracked as they can provide meaningful insight to an institution regarding their products, services, marketing and other matters that, if addressed, can prevent the institution from facing legal, reputational, financial or supervisory risks. We have seen instances where one complaint can cause an institution to face severe financial and supervisory consequences. For example one customer complained about the interest calculation on a loan and the bank determined that in fact they were not complying with interest rate disclosures or the note itself and they corrected it for that individual but not for others having the same issue. They faced a large restitution amount, a formal enforcement action and sizeable civil money penalty.

As to oral complaints, examiners would look at your overall complaint process. How do you train tellers/customer service representatives to recognize complaints and how to handle? Oral complaints or questions can provide an institution the ability to see where there may be disclosures or marketing materials that are not clear and concise. A pattern of complaints on a product or service would let the institution know that there is an issue as to how information is being is disclosed to the consumer. Developing a methodology for handling oral complaints would be another way to handle consumer protection risks at the institution.

Question: Provide an explanation of Regulation D Section 1004.4—Requirements for alternative mortgage transactions, particularly, 1004.4(b) Renegotiable rates for renewable balloon-payment mortgages. Do I understand it correctly that unless the bank commits to renew a loan at maturity, it cannot increase or decrease the interest rate if and when the borrower requests for a renewal or extension of the loan at maturity?

ANSWER: A renewable balloon-payment mortgage is generally a transaction in which payments are based on an amortization period and a large final payment is due after a shorter term, but the borrower has the option to renew the transaction at specified intervals throughout the amortization period at the interest rate offered by the creditor at the time of renewal. To rely on AMTPA's preemption provision, creditors making such transactions must provide a written commitment to renew the transaction at specified intervals throughout the amortization period. Under the terms of the written commitment, the creditor <u>may negotiate an increase or decrease in the interest rate at renewal</u>.

It is believed that a written commitment is necessary to ensure that balloon-payment mortgages made under AMTPA are provided responsibly. However, based on safety and soundness and other considerations, creditors should not be required to renew the loan in certain limited circumstances. Accordingly, the CFPB has adopted exceptions to the renewal requirement based on the exceptions in 12 CFR 226.5b(f)(2), which permit a creditor to terminate a home-equity line of credit and demand payment of the outstanding balance. The CFPB has modified the § 226.5b(f)(2) exceptions to ensure that a creditor generally cannot decline to renew a balloon-payment loan under § 1004.4(b) unless there has been a material change in circumstance.

Therefore, § 1004.4(b) provides that the creditor is not required to renew the transaction if: (1) Any action or inaction by the consumer materially and adversely affects the creditor's security for the transaction or any right of the creditor in such security; (2) there is a material failure by the consumer to meet the repayment terms of the transaction; (3) there is fraud or a willful or knowing material misrepresentation by the consumer in connection with the transaction; or (4) Federal law dealing with credit extended by a depository institution to its executive officers specifically requires that as a condition of the extension the credit shall become due and payable on demand, provided that the creditor includes such a provision in the initial agreement.

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