



MORTGAGE BANKERS ASSOCIATION

July 1, 2021

OFFICE OF THE COMPTROLLER OF THE
CURRENCY
Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E—218
Washington, DC 20219
[Docket ID OCC—2020-0049]

BOARD OF GOVERNORS OF THE FEDERAL RESERVE
SYSTEM
Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
[Docket No. OP-1743]

FEDERAL DEPOSIT INSURANCE
CORPORATION
James P. Sheesley
Assistant Executive Secretary
Attention: Comments-RIN 3064-ZA24
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
[RIN 3064-ZA24]

BUREAU OF CONSUMER FINANCIAL PROTECTION
Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552
[Docket No. CFPB-2021-0004]

NATIONAL CREDIT UNION
ADMINISTRATION
Melane Conyers Ausbrooks
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428
[Docket No. NCUA-2021-0023]

Re: Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, including Machine Learning

To the Agencies:

The Mortgage Bankers Association ("MBA")¹ appreciates the opportunity to comment on this Request for Information ("RFI") from the Office of the Comptroller of the Currency, Board of

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300

Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Bureau of Consumer Financial Protection (the "Bureau" or "CFPB"), and the National Credit Union Administration (collectively, the "Agencies") regarding financial institutions' use of artificial intelligence, including machine learning. Below we describe the benefits of artificial intelligence, including its capacity to expand access to credit. In addition, we offer suggestions for steps the Agencies could take to facilitate broader adoption of AI by providing clarity on how AI can be deployed in a manner that is consistent with the existing regulatory framework.

Overview

Artificial intelligence and related technologies, including machine learning (collectively, "AI"), have the potential to provide substantial benefits for participants in the mortgage lending industry and the consumers they serve. AI has particular potential in the area of credit underwriting where it can be combined with alternative or non-traditional data to expand access to affordable (and *sustainable*) mortgage credit. Despite these benefits, broad adoption of AI has been slowed by uncertainty surrounding how AI fits within a regulatory framework that was largely created before its development. MBA encourages the CFPB to clarify its expectations in a way that facilitates the responsible use of AI. Such clarity is particularly necessary with respect to fair lending and Equal Credit Opportunity Act's ("ECOA") adverse action notice requirements.

Uses and Benefits

Given its ability to rapidly evaluate large, diverse data sets, AI allows lenders to consider far more data than is possible with conventional underwriting models. With greater data capacity, lenders can more easily consider alternative data sources, which may include financial data (*e.g.*, cash flow histories, payment histories from housing rentals, cell phones, utilities, etc.) and non-financial data. Using enhanced processing power and ability to handle a broader pool of data, AI technologies can identify correlations between consumer data and credit risk that would not be captured by conventional underwriting processes. In this way, AI can be used to produce a more comprehensive underwriting assessment that has been shown to be a more accurate predictor of credit risk.²

The benefits of AI can also, if used correctly, make the financial system more inclusive. By using non-traditional data to evaluate the creditworthiness of applicants, AI can expand access to credit to consumers who fall outside traditional underwriting models. The potential benefits of this are significant. A study published by the CFPB in 2015 estimated 26 million Americans were

companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's web site: www.mba.org.

² Nikita Aggarwal, *Law and Autonomous Systems Series: Algorithmic Credit Scoring and the Regulation of Consumer Credit Markets*, Oxford Business Law Blog (Nov. 1, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/law-and-autonomous-systems-series-algorithmic-credit-scoring-and>.

“credit invisible,” meaning they lack traditional credit histories.³ A further 19 million consumers are considered un-scorable by conventional credit scoring models.⁴ According to the Bureau, data shows a correlation between race and whether a consumer is “credit invisible” or un-scorable.⁵ Given this correlation, AI can be seen as a valuable tool to narrow racial gaps in credit and home ownership.⁶

Along with expanding access to credit and promoting inclusion, AI has the potential to lower credit costs for consumers and improve consumer experience. In the underwriting phase, AI facilitates a more accurate credit risk assessment, which can help lenders make more efficient pricing decisions.⁷ In loan production, AI technology can be found in tools that provide workflow optimization, document verification, and fraud prevention.⁸ To the extent these improvements lower operational costs or reduce loan production times, they can result in consumer cost savings. Increased adoption of AI technology, and associated consumer cost savings, could result if the industry is provided more detailed regulatory guidance on key AI topics such as data contribution, data quality, testing and explainability.⁹

Finally, throughout the loan lifecycle, AI tools are used in various ways to enhance the consumer experience. Some examples include: AI tools that provide insights into customer preferences to

³ Ken Brevoort, Philipp Grimm & Michelle Kambara, Consumer Financial Protection Bureau, *Data Point: Credit Invisibles* (2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf

⁴ Patrice Alexander Ficklin & J Frank Vespa-Papaleo, *A report on the Bureau's Building a Bridge to Credit Visibility Symposium*, Consumer Financial Protection Bureau Blog (July 19, 2019), <https://www.consumerfinance.gov/about-us/blog/report-credit-visibility-symposium/>

⁵ The CFPB's 2015 study, *Data Point: Credit Invisibles*, found that 15 percent of African-Americans and Hispanic individuals are credit invisible, compared to 9 percent of Whites and Asians, and that 13 percent of African-Americans and 12 percent of Hispanics are unscorable compared to 7 percent of Whites.

⁶ The potential value of alternative data as a means to expand access to credit to historically underserved groups was shown in a 2013 study conducted by LexisNexis. The LexisNexis study used alternative data (e.g., educational history, professional certifications, property ownership) to derive credit scores for borrowers which were unscorable using conventional credit scoring models. The study found that “[d]epending on a lenders risk strategy, we see that between 6% and 23% of all applicants from underserved minority groups can be offered credit when alternative data is used as part of an underwriting strategy. Put differently as many as 1-in-4 of all minority applicants could transition from unscorable to scorable and can be eligible for reasonably priced credit.” Jeffrey Feinstein, *Alternative Data and Fair Lending*, LEXISNEXIS, at 7 (August 2013), <https://insights.lexisnexis.com/creditrisk/wp-content/uploads/2013/09/alternative-data-and-fair-lending-wp.pdf>

⁷ In a follow-up report detailing the results of the Bureau's first No Action Letter (NAL), the Bureau found that the NAL recipient's use of alternative data and AI modeling resulted in 27% more approvals and, on average, 16% lower APRs than would have been using conventional credit scoring. Patrice Ficklin & Paul Watkins, *An Update on Credit Access and the Bureau's First No-Action Letter*, Consumer Financial Protection Bureau (Aug. 6, 2019) <https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/>

⁸ See Margarete Biallas, Felicity O'Neill, *Artificial Intelligence Innovation in Financial Services*, Encompass, Note 85 (June 2020). <https://www.ifc.org/wps/wcm/connect/448601b9-e2bc-4569-8d48-6527c29165e8/EMCompass-Note-85-AI-Innovation-in-Financial-Services.pdf?MOD=AJPERES&CVID=nfuDUIG>

⁹ “Explainability” refers to the ability to explain how the AI system turns data inputs into outputs—i.e., the rationale behind the AI system's decision making.

create a more personalized experience; AI-driven chat bots, which can reduce customer wait times; and AI tools that identify customer's financial needs to assist in product match optimization and lender or servicer communication. AI also has potential in the servicing space, as lenders can deploy models to attempt to determine when early intervention might be appropriate to aid struggling borrowers *before* serious delinquencies occur.

Despite these benefits and the growing affordability of AI tools, AI adoption has been slower than might be expected.¹⁰ Part of this reluctance can be attributed to businesses' uncertainty over how the current regulatory framework would apply to the use of AI. As detailed below, additional clarity or efforts to modernize regulatory requirements would be particularly helpful in the areas of fair lending compliance and ECOA adverse action notification requirements.

Fair Lending Clarity

Lenders recognize that underwriting systems that rely on AI, like traditional credit underwriting systems, must satisfy applicable fair lending requirements. While these systems reduce the likelihood of face-to-face discrimination, they have the potential to introduce impermissible bias into the credit transaction in other ways. As frequently noted, AI presents a unique risk of relying on factors that are influenced by systemic and persistent differences driven by historical racism to produce an ostensibly "neutral" result. Similar concerns extend to other areas of the lending transaction, including marketing and loan servicing.

Mortgage lenders and servicers wish to use AI in a manner that is consistent with fair lending laws. Unfortunately, unlike conventional underwriting processes, where regulator expectations are relatively well known, there is uncertainty surrounding how regulators will apply fair lending laws to AI used in underwriting or other phases of the credit transaction. While the existing framework, including widely used practices with implicit regulator approval, are generally instructive, the unique characteristics of AI suggest more may be necessary. For example, the official interpretations to Regulation B provide instruction on periodic testing of conventional underwriting systems.¹¹ It is unclear how applicable this would be to dynamic underwriting systems, such as those that feature machine learning capabilities.

Given the considerable benefits of AI in all phases of the mortgage credit transaction, MBA encourages the Agencies, in particular the CFPB, to commit to helping the industry navigate fair lending risks associated with AI. As a threshold matter, MBA recommends that the Bureau explicitly permit lenders to adopt approaches that use AI in ways that expand credit access and

¹⁰ See Biallas & O'Neill, *Artificial Intelligence Innovation in Financial Services*, (June 2020); See also Adelyn Zhou, *Banks Eager For Artificial Intelligence, But Slow To Adopt*, *Forbes* (Jun 30, 2017), <https://www.forbes.com/sites/adelynzhou/2017/06/30/financial-services-industry-banks-artificial-intelligence-slow-adoption/?sh=6a6f087d4f8b>.

¹¹ 12 C.F.R. pt. 1002, suppl. I, § 1002.2(p)-2.

limit fair lending risks to the same or greater extent than existing models and techniques. Given its role as the fuel that powers AI systems, it is equally important that the Bureau to clarify its fair lending expectations regarding the use of alternative data.¹²

As previously explained, AI presents unique risks. It is therefore particularly important that the Bureau provide further guidance to assist the industry in managing these risks. For example, the industry would benefit from guidance on the appropriate standards for evaluating fair lending risk associated with disparate impact, including the statistical methods the Bureau finds acceptable for calculating what constitutes a *significant disparity* in data, as well as providing concrete guidance on both the applicable thresholds for determining which disparities are problematic and the situations in which lenders would (and would not) be expected to engage in a disparate impact analysis. In MBA's experience, lenders use varying thresholds when measuring statistical or practical significance. However, MBA is not aware of lenders using any thresholds that are based on official guidance from the Bureau or the Federal Reserve Board. Such guidance will assist lenders in their efforts to prevent credit discrimination.

Adverse Action Notification

Modernizing elements of ECOA's notice requirements for adverse actions would facilitate wider adoption of AI technologies. Under ECOA and its implementing rule, Regulation B, creditors must notify applicants regarding adverse actions taken in connection with credit applications. Such notice must include either a statement of specific reasons for the action taken or a disclosure of the applicant's right to request a statement of specific reasons. The statement of specific reasons must "indicate the principal reason(s) for the adverse action."¹³ If a credit scoring system is used in the decision-making, the CFPB's official staff commentary to Regulation B explains that "no factor that was a principal reason for adverse action may be excluded from disclosure."¹⁴ Implicit in ECOA's adverse action notification requirement is the idea that providing consumers with the reason(s) behind an adverse action will help consumers understand how to improve their credit profile.¹⁵

¹² See MBA's comments in response to the CFPB's 2020 *Request for Information on the Equal Credit Opportunity Act and Regulation B* (Docket No. CFPB-2020-0026) available at <https://www.regulations.gov/comment/CFPB-2020-0026-0115>.

¹³ 12 C.F.R. § 1002.9 (b)(2).

¹⁴ 12 C.F.R. pt. 1002, suppl. I, § 1002.9(b)(2)-4.

¹⁵ See CFPB's 2017 *Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process* which listed various potential consumer risks associated with the use of alternative data. "The more factors that are integrated into a consumer's credit score or into decisions in the credit process, or the more complex the modeling process in which the data are used, the harder it may be to explain to a consumer what factors led to a particular decision. This may be true for lenders, who are required to provide adverse action notices to consumers in certain circumstances, as well as for financial educators, who wish to improve consumers' understanding of the factors that impact their credit standing. These complexities make it more difficult for consumers to exercise control in their financial lives, such as by learning how to improve their credit rating." 82 Fed. Reg. 11,183, 11,187 (Feb. 21, 2017).

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For lenders utilizing AI underwriting systems, providing specific reasons for an adverse action can be particularly challenging if the creditor is expected to provide reasons that could be helpful for the consumer—*i.e.*, reasons that enhance the consumer's ability to improve their credit profile. Given AI's capacity to accommodate large, diverse datasets and its ability to identify previously unknown credit risk indicators within those datasets, an AI produced adverse action may be the result of factors that, at least to the consumer, appear meaningless. Further, as the AI system 'learns', the logic underpinning the underwriting decision evolves and the weight assigned to various data points may change. In this way, a factor that was significant to a creditor's adverse action—potentially even the principal reason for an adverse action—on one day, may be less relevant in the future.

The CFPB attempted to address concerns regarding AI and ECOA's adverse action requirement in its 2019 Fair Lending Report. The report explained that the ECOA's adverse action requirements had "built-in flexibility that can be compatible with AI algorithms[.]"¹⁶ The same report confirmed that a creditor need not use "any particular set of reasons" and that an adverse action notice "need not describe how or why a disclosed factor adversely affected an application[.]" While MBA appreciates the Bureau's guidance, we believe additional clarity is needed. Specifically, we encourage the Bureau to release additional sample notices that could be used for an AI-derived adverse action, a scenario that is not covered by the current sample notices. The sample notices should cover a broader range of factors, particularly those factors which commonly contribute to adverse actions by AI underwriting systems.

Our members appreciate the opportunity to share our thoughts and suggestions to encourage the responsible use of AI to improve mortgage credit access and affordability. Please contact me at pmills@mba.org or my colleague Justin Wiseman at jwiseman@mba.org with any questions you may have about these comments.

Sincerely,



Pete Mills
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Residential Policy and Member Engagement
Mortgage Bankers Association

¹⁶ CFPB 2019 Fair Lending Report, 85 Fed. Reg. 27396.