

Navigating an Ever-Changing Regulatory Landscape Amid the Covid-19 Pandemic

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Certainty was in short supply for much of 2020, but as the calendar turns to 2021, what has become clear is that mortgage lending will continue to feel the effects of the Covid-19 pandemic well into the new year.

While compliance generally tops the list of mortgage lending concerns, the long-tail effects of mortgage-specific provisions of the Coronavirus Aid, Relief and Economic Security Act of 2020 (CARES Act), as well as the overall industry response to the challenges presented by Covid-19, present new compliance challenges for both mortgage origination and servicing.

To meet these challenges, credit unions will need to double down on areas related to customer service, loss mitigation, fair lending and investor compliance, and they will need to keep a close watch on state legislative changes and regulatory actions.

The mortgage servicing landscape is undergoing its largest transition since the Great Recession. The CARES Act has brought tremendous changes in the way servicers conduct credit reporting, as well as process forbearances, foreclosures and evictions.

SERVICING COMPLIANCE

While navigating through the multitude of requirements issued by the agencies, GSEs, and states in support of CARES Act provisions since March, servicers are also looking to the future

and the potential litigation risks that will inevitably come to light.

While there is no stated private right of action under the CARES Act, there remains the potential for claims under Unfair, Deceptive & Abusive Acts or Practices (UDAAP). Servicers must ensure all loss mitigation evaluations are fully documented and all related policies and procedures are adhered to consistently. This ensures each borrower is evaluated similarly, unhampered by artificial barriers or prejudices or preferences, except when particular distinctions can be explicitly justified by defined guidelines. Fair servicing data analysis reviews should be conducted routinely.

Servicers should ensure files are adequately documented to support instances where forbearances have been

granted for less than the allowable 180 days, including capturing the borrower's specific request for the shortened period.

For post-forbearance workout plans, it will be critical to ensure there is clear documentation of each loss mitigation evaluation, offer and decision. Files must contain accurate documentation accounting for the post-forbearance loan balances, including any interest and escrows.

The CFPB enacted a new third anti-evasion rule under Regulation X, the Real Estate Settlement and Protection Act (RESPA), allowing servicers to evaluate applications for post-forbearance workout options based on incomplete applications.

Servicers exercising this option who fail to comply with the conditions for





CARES ACT

the exception face risks of a private right of action for attorney fees, out of pocket and emotional distress damages, plus up to \$2,000 statutory damages where there is a pattern or practice.

ORIGINATION COMPLIANCE

Mortgage lenders are not without their share of challenges. In a historically-low interest rate environment, lenders prepared for implementation of Fannie Mae and Freddie Mac's new adverse-market refinance fee of 0.5%, required for all refinance transactions with loan balances above \$125,000 and effective on Dec. 1, 2020.

The CFPB has been ac-

tive in enforcement, most notably with regard to the nine consent orders issued to lenders that use deceptive mailers to advertise VA-guaranteed mortgages. As part of the lender's risk and oversight, marketing reviews should be amended to ensure proper controls are in place to avoid these types of UDAAP implications.

HUD also issued a final rule revising the disparate impact standards in its 2013 rule, establishing a uniform standard for determining when a policy or practice has a discriminatory effect that violates the FHA. As part of a lenders fair lending program, lenders will want to ensure that each policy or practice serves a "valid interest."

JOINT COMPLIANCE CONCERNS

Mortgage lenders and servicers should also remain cognizant of states' efforts to create so-called mini-CFPBs.

Currently, Maryland, New York, New Jersey and Pennsylvania each have increased their consumer financial protection efforts, creating dedicated departments and refocusing existing resources to oversight.

California is the latest, with the rebranding of the Department of Business Oversight (DBO) to the Department of Financial Protection and Innovation (DFPI), effective January 1, 2021.

These state departments are tasked with ensuring licensed entities are not engaging in unlawful, unfair, deceptive or abusive acts or practices with respect to consumer financial products or services. As noted previously, strong fair lending policies and oversight



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programs are essential to remaining compliant.

As a direct result of the Covid-19 pandemic, lenders have seen an explosion of Remote Online Notarization (RON) state provisions, both permanent and provisional.

As the country adjusted to lockdowns and an embrace of remote work arrangements, RON has become a key tool for business continuity plans. As part of the lender's risk and oversight, reviews should be amended to include evaluation of these unique provisions, including adjusting the review for the multiple types of notarizations permitted.

CONCLUSION

With so much still in flux, few certainties exist for the coming year. What credit union mortgage lenders can rely on, however, is the emphasis on compliance that comes along

with periods of uncertainty.

Though it is not uncommon for the mortgage regulatory landscape to shift from year to year, the events of 2020 have accelerated and complicated mortgage compliance challenges to an unusual degree. As a result, credit unions must be more diligent and flexible than ever to ensure compliance with both temporary measures related to the pandemic and on-going compliance requirements. ▲

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