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The Regulatory Landscape of the Mortgage Origination Industry

Keeping abreast of regulatory compliance issues is a crucial component of doing business in the mortgage origination industry. This article offers a background and retrospective on several of the regulations and relevant enforcement entities involved in legal and compliance issues pertaining to residential mortgages.

History of the Regulatory Landscape of the Mortgage Origination Industry

The U.S. residential mortgage loan market is subject to the laws and regulations of numerous state and federal agencies. The regulatory framework for mortgages evolved over time to, *inter alia*, protect consumers from deceptive and predatory lending practices¹ and insulate the mortgage market from financial risks.² Large parts of the existing regulatory code came into being in the 1960s and 1970s with the passage of the Federal Truth In Lending Act (TILA), which regulates consumer credit,³ and the Real Estate Settlement Procedures Act (RESPA), which regulates disclosure of lending information to mortgage borrowers.⁴ Several federal agencies manage and enforce the modern mortgage and consumer credit regulations.

Foremost among the federal agencies regulating consumer credit is the Consumer Financial Protection Bureau (CFPB). The CFPB was created in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),⁵ a sweeping law passed in the wake of the 2008 financial crisis that, among other things, resulted in changes to the disclosure forms for

¹ See "The Bureau." *Consumer Financial Protection Bureau*. <<https://www.consumerfinance.gov/about-us/the-bureau/>> (accessed July 14, 2021).

² Emmons, William R. "The Past, Present, and Future of the U.S. Mortgage Market." *Federal Reserve Bank of St. Louis* (July 1, 2008). <<https://www.stlouisfed.org/publications/central-banker/summer-2008/the-past-present-and-future-of-the-us-mortgage-market>> (accessed July 14, 2021).

³ "CFPB Consumer Laws and Regulations: Truth in Lending." *Consumer Financial Protection Bureau* (June 2013). <https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_tila-combined-june-2013.pdf> (accessed July 14, 2021) at TILA 1.

⁴ "CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act." *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf> (accessed July 14, 2021) at RESPA 1.

⁵ "Building the CFPB." *Consumer Financial Protection Bureau* (July 18, 2011). <https://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf> (accessed July 14, 2021) at 8.

mortgage lending.⁶ Currently, the CFPB oversees consumer financial markets with the goal of ensuring that the prices, risks, and terms of deals are clear up front so that consumers can fully understand their options before committing.⁷

In addition to the CFPB, there are other federal agencies that oversee and enforce consumer protection regulations related to lending or mortgages. The U.S. Department of Housing and Urban Development (HUD) enforces fair lending practices that make it illegal to discriminate in mortgage transactions.⁸ The Federal Trade Commission (FTC) targets firms that make deceptive mortgage and credit relief offers.⁹ The United States Department of Justice (DOJ) brings civil and criminal actions against parties that engage in consumer fraud and other deceptive practices.¹⁰ Additionally, numerous state agencies, such as the New York State Department of Financial Services¹¹ and the Florida Office of Financial Regulation,¹² impose additional mortgage regulations.

Real Estate Settlement Procedures Act/Regulation X

RESPA, through its implementing regulation, Regulation X,¹³ applies to all federally related mortgage loans¹⁴ and protects consumers when they apply for and have mortgage loans.¹⁵ Although HUD originally promulgated Regulation X, the Dodd-Frank Act granted rulemaking authority under RESPA to the newly created CFPB.¹⁶ The Dodd-Frank Act also granted authority to the CFPB to supervise and enforce compliance with RESPA.¹⁷

⁶ "Wall Street Reform: The Dodd-Frank Act." *The White House*. <<https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform>> (accessed July 14, 2021).

⁷ "The Bureau." *Consumer Financial Protection Bureau*. <<https://www.consumerfinance.gov/about-us/the-bureau/>> (accessed July 14, 2021).

⁸ "Fair Lending." *U.S. Department of Housing and Urban Development*. <https://www.hud.gov/topics/fair_lending> (accessed July 14, 2021).

⁹ "Division of Financial Practices." *Federal Trade Commission*. <<https://www.ftc.gov/about-ftc/bureau-offices/bureau-consumer-protection/our-divisions/division-financial-practices>> (accessed July 14, 2021).

¹⁰ "Practice Areas: Deceptive Practices, Telemarketing, and Data Privacy." *The United States Department of Justice*. <https://www.justice.gov/civil/practice-areas#_Decep> (accessed July 14, 2021).

¹¹ "Mortgage Companies." *New York State Department of Financial Services*. <https://www.dfs.ny.gov/apps_and_licensing/mortgage_companies> (accessed July 14, 2021).

¹² "Division of Consumer Finance." *Florida Office of Financial Regulation*. <<https://flofr.gov/sitePages/DivisionOfConsumerFinance.htm>> (accessed July 14, 2021).

¹³ 12 C.F.R. § 1024.

¹⁴ "CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act." *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf> (accessed July 14, 2021) at RESPA 3-4.

¹⁵ See "12 CFR Part 1024 - Real Estate Settlement Procedures Act (Regulation X)." *Consumer Financial Protection Bureau* (July 1, 2020). <<https://www.consumerfinance.gov/eregulations/1024>> (accessed July 14, 2021).

¹⁶ "CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act." *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf> (accessed July 14, 2021) at RESPA 1-2.

¹⁷ *Id.*

Regulation X requires lenders and servicers to provide certain disclosures that detail the terms and costs of numerous parts of the mortgage process.¹⁸ It also outlaws lending practices that are potentially harmful to borrowers, such as kickbacks and referral fees.¹⁹

Truth in Lending Act/Regulation Z

Regulation Z and TILA protect consumers when they utilize numerous common types of credit, including credit cards, mortgage loans, and student loans.²⁰ Regulation Z was first issued in 1969 to implement TILA.²¹ TILA rulemaking authority was transferred from the Federal Reserve Board to the CFPB under the Dodd-Frank Act.²² The FTC retained its authority to enforce Regulation Z under the Dodd-Frank Act and enforces compliance by most non-depository entities.²³

Regulation Z regulates such items as mortgage disclosure requirements, appraisal independence, loan originator compensation, and consumer steering.²⁴

Equal Credit Opportunity Act/Regulation B

Regulation B protects applicants from discrimination in any aspect of a credit transaction.²⁵ This regulation was issued by the CFPB pursuant to the Equal Credit Opportunity Act (ECOA).²⁶ The CFPB shares authority with the FTC for enforcing it over mortgage brokers, originators, and servicers.²⁷ Where there is a pattern or practice of discrimination in home mortgage loans, the DOJ may also file a lawsuit under the ECOA.²⁸

False Claims Act

The False Claims Act (FCA) was passed in 1863 to protect the federal government from being defrauded by instituting harsh penalties for such actions.²⁹ In its current form, the FCA prohibits parties from submitting monetary claims to the government based on information they know to be

¹⁸ *Id.* at RESPA 1.

¹⁹ *Id.*

²⁰ "CFPB Laws and Regulations: Truth in Lending Act." *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf> (accessed July 14, 2021) at TILA 1.

²¹ *Id.*

²² "CFPB Consumer Laws and Regulations: Truth in Lending." *Consumer Financial Protection Bureau* (June 2013). <https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_tila-combined-june-2013.pdf> (accessed July 14, 2021) at TILA 3.

²³ "Truth in Lending Act." *Federal Trade Commission*. <<https://www.ftc.gov/enforcement/statutes/truth-in-lending-act>> (accessed July 14, 2021).

²⁴ *See* 12 C.F.R. § 1026.

²⁵ 12 C.F.R. § 1002. *See also* "12 CFR Part 1002 - Equal Credit Opportunity Act (Regulation B)." *Consumer Financial Protection Bureau* (Jan. 1, 2018). <<https://www.consumerfinance.gov/eregulations/1002>> (accessed July 14, 2021).

²⁶ *See* "The Equal Credit Opportunity Act." *The United States Department of Justice* (July 22, 2020). <<https://www.justice.gov/crt/equal-credit-opportunity-act-3>> (accessed July 14, 2021).

²⁷ *Id.*

²⁸ *Id.*

²⁹ "The False Claims Act." *The United States Department of Justice* (Jan. 14, 2021). <<https://www.justice.gov/civil/false-claims-act>> (accessed Aug. 6, 2021).

false, at the penalty of a set fine per violation plus triple the government's damages.³⁰ It also aids in the recovery of funds by allowing private citizens who have particular knowledge of fraud against the government to file so-called "qui tam" lawsuits on behalf of the U.S. government and share in the award if successfully prosecuted.³¹

As relates to mortgage lending, the DOJ has used the FCA to enforce standards on loans insured by the Federal Housing Administration (FHA).³² Specifically, the DOJ has stated that it has "used the [FCA] in a series of settlements and actions against lenders that knowingly submitted or caused the submission of false claims for FHA mortgage insurance by approving FHA insured loans that the lenders knew were not eligible."³³ The DOJ also stated that it brought claims when there were "material defects in the underwriting of the mortgage," including items such as:

 failing to verify a borrower's employment, assets, or credit in accordance with FHA's requirements; materially overstating a borrower's income, assets, or willingness to repay the mortgage loan; materially understating a borrower's liabilities or ability to repay the mortgage loans; and failing to ensure the property provides adequate collateral for the mortgage loan.³⁴

State Regulations

In addition to the requirements for mortgage origination placed by the federal government, originators must comply with state and local laws and regulations. As an example, many states, such as California,³⁵ Florida,³⁶ New York,³⁷ and South Carolina,³⁸ have regulations that require that broker fees be disclosed to borrowers.

The Ever-Changing Regulatory Landscape

The past decade has seen numerous additions and revisions to the regulatory codes governing mortgage origination. While some have been minor updates, certain of these, such as those issued in the wake of the 2008 financial crisis, have had major and far-reaching effects.

³⁰ *Id.*

³¹ *Id.*

³² "The False Claims Act & Federal Housing Administration Lending." *The United States Department of Justice* (Mar. 15, 2016). <<https://www.justice.gov/archives/opa/blog/false-claims-act-federal-housing-administration-lending>> (accessed July 23, 2021).

³³ *Id.*

³⁴ *Id.*

³⁵ Cal. BPC Code § 10241(b).

<https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=10241&lawCode=BPC> (accessed July 19, 2021).

³⁶ § 494.0038 Fla. Stat. (2011). <<https://www.flsenate.gov/laws/statutes/2011/494.0038>> (accessed July 19, 2021).

³⁷ 3 CRR-NY § 38.3. <<https://www.law.cornell.edu/regulations/new-york/NYCRR-Tit-3-Sec-38-3>> (accessed Aug. 11, 2021).

³⁸ S.C. Code Ann. Regs. 40-58-78 (2009). <<https://www.scstatehouse.gov/code/t40c058.php>> (accessed Aug. 11, 2021).

For instance, at the time of its passage in 2010, the Dodd-Frank Act directed the CFPB to publish a single, integrated disclosure for mortgage transactions.³⁹ The CFPB subsequently published the “TILA-RESPA Integrated Disclosure Rule,” (TRID) which incorporated the requirements of TILA and sections 4 and 5 of RESPA.⁴⁰ TRID, which went into effect on October 3, 2015, changed regulations such that most loans were required to receive a loan estimate and closing disclosure under Regulation Z.⁴¹ As a result, Regulation Z now contains “the integrated forms, timing, and related disclosure requirements for most closed-end consumer mortgage loans.”⁴²

These substantial changes required a significant investment of time and money on the part of lenders, as they overhauled existing processes, provided staff training, and upgraded or implemented new technology systems.⁴³ Time to close increased across the board during the initial adjustment period, and smaller lenders often struggled to keep up with their larger counterparts, who had greater resources to invest in making the necessary upgrades to their systems.⁴⁴ Company spokespeople and representatives from prominent organizations such as the Mortgage Bankers Association recognized the massive scope of the undertaking to implement TRID, while also applauding the mortgage industry’s largely successful efforts.⁴⁵

The fluctuating status of the “qualified mortgage” (QM) definition under Regulation Z is another regulatory issue that has had broad implications for mortgage originators. In 2013, the CFPB established a temporary rule defining QMs as loans that were eligible for purchase or guarantee by the GSEs during their time under the conservatorship or receivership of the Federal Housing Finance Agency.⁴⁶ This “GSE Patch,” originally set to expire on January 10, 2021, will be replaced by a Final Rule redefining general QM criteria from a strict 43% debt-to-income requirement to price-based thresholds, and implementing a new category of “seasoned” QM loans that are held in portfolio for 36 months by the originating creditor or first purchaser.⁴⁷ The current expected

³⁹ “CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act.” *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf> (accessed July 14, 2021) at RESPA 2.

⁴⁰ *Id.*

⁴¹ “Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment.” *Consumer Financial Protection Bureau* (Oct. 1, 2020). <<https://www.consumerfinance.gov/data-research/research-reports/trid-rule-assessment>> (accessed Dec. 8, 2021).

⁴² “CFPB Consumer Laws and Regulations: Regulation X Real Estate Settlement Procedures Act.” *Consumer Financial Protection Bureau* (Apr. 2015). <https://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf> (accessed July 14, 2021) at RESPA 2.

⁴³ Swanson, Brena. “TRID one year later.” *Housing Wire* (Oct. 3, 2016). <<https://www.housingwire.com/articles/38182-trid-one-year-later>> (accessed Dec. 8, 2021).

⁴⁴ Teimourian, Sheila. “TRID: Larger Lenders Have the Advantages for Now.” *Fannie Mae* (May 11, 2016). <<https://www.fanniemae.com/research-and-insights/perspectives/trid-larger-lenders-have-advantages-now>> (accessed Dec. 8, 2021).

⁴⁵ Swanson, Brena. “TRID one year later.” *Housing Wire* (Oct. 3, 2016). <<https://www.housingwire.com/articles/38182-trid-one-year-later>> (accessed Dec. 8, 2021).

⁴⁶ “Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): Extension of Sunset Date.” *Consumer Financial Protection Bureau* (Oct. 20, 2020). <<https://www.consumerfinance.gov/rules-policy/final-rules/qualified-mortgage-definition-under-truth-lending-act-regulation-z-extension-sunset-date>> (accessed Dec. 8, 2021).

⁴⁷ “Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): General QM Loan Definition.” *Consumer Financial Protection Bureau* (Dec. 10, 2020). <<https://www.consumerfinance.gov/rules-policy/final-rules/qualified-mortgage-definition-under-truth-lending-act-regulation-z-general-qm-loan>>

mandatory compliance date is October 1, 2022.⁴⁸ Given that a large portion of the mortgage market consists of QMs, with 16% of mortgages falling under the GSE Patch as of 2018,⁴⁹ this revision is set to affect numerous lenders in the coming year.

The Covid-19 crisis has also had disruptive effects on the mortgage industry, though these have most heavily affected mortgage servicers rather than loan originators. As of June 28, 2021, the CFPB issued a Final Rule amending Regulation X to implement more stringent foreclosure safeguards in light of the prevalence of Covid-19 related hardship and allow for additional Covid-19 streamlined loan modification options for borrowers.⁵⁰

As the political and economic effects of the past few years continue to unfold, there are sure to be additional changes to the regulatory landscape governing the U.S. mortgage industry. Quick and nimble adaptation will be crucial to any compliance practice in these evolving times.

Vega Economics Mortgage Origination and Regulatory Compliance Practice Areas

The Vega Economics team and experts are well positioned to navigate through the ever-changing landscape of government regulations and the mortgage industry. Our team has extensive experience providing analyses across a range of issues connected to mortgage origination and mortgage servicing. Our experts have also been engaged to conduct analyses related to real estate investment trusts and real estate-backed securitization instruments.

For any additional inquiries, please contact info@vegaeconomics.com.

definition> (accessed Dec. 8, 2021); "Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition." *Consumer Financial Protection Bureau* (Dec. 10, 2020).

<<https://www.consumerfinance.gov/rules-policy/final-rules/qualified-mortgage-definition-under-truth-lending-act-regulation-z-seasoned-qm-loan-definition>> (accessed Dec. 8, 2021); Andreano, Richard J. Jr. "CFPB Finalizes Ability to Repay/Qualified Mortgage Rules." *Ballard Spahr, LLP Consumer Finance Monitor* (Dec. 14, 2020). <<https://www.consumerfinancemonitor.com/2020/12/14/cfpb-finalizes-ability-to-repay-qualified-mortgage-rules>> (accessed Dec. 8, 2021).

⁴⁸ "Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z): General QM Loan Definition; Delay of Mandatory Compliance Date." *Consumer Financial Protection Bureau* (Apr. 27, 2021). <<https://www.consumerfinance.gov/rules-policy/final-rules/qualified-mortgage-definition-under-truth-lending-act-regulation-z-general-qm-loan-definition-delay-mandatory-compliance-date>> (accessed Dec. 8, 2021).

⁴⁹ Morris, David Z. "A Key Change to Mortgage Lending Rules Is Coming in 2021. Here's What That Could Mean." *Fortune.com* (Aug. 14, 2019). <<https://fortune.com/2019/08/14/mortgage-lending-rule-change>> (accessed Dec. 8, 2021).

⁵⁰ Herlihy, Reid F. "CFPB issues final COVID-19 mortgage servicing rules." *Ballard Spahr, LLP Consumer Finance Monitor* (July 7, 2021). <<https://www.consumerfinancemonitor.com/2021/07/07/cfpb-issues-final-covid-19-mortgage-servicing-rules>> (accessed Dec. 8, 2021).

