



Fair Lending & Fair Servicing

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An overview of the Federal Fair Lending Laws

- “Equal Credit Opportunity Act (Regulation B)**
- “Fair Housing Act**
- “Home Mortgage Disclosure Act (Regulation C)**
- “Community Reinvestment Act (Regulation BB)**

Equal Credit Opportunity Act

- ” Established in 1974
- ” Interpreted by Regulation B, 12 CFR 1002
- ” Purpose: Promote equal availability of credit to all creditworthy applicants without regard to any prohibited basis
 - . “A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.”
 - . Applies to extensions of credit to small businesses, corporations, partnerships, and trusts as well as to individuals.

Equal Credit Opportunity Act

” ECOA and Regulation B prohibit creditors from discriminating on a prohibited basis in virtually all aspects of a credit transaction, including:

- . Advertising and pricing
- . Taking the loan application
- . Processing and evaluating loan applications
- . Notifying the applicant of the credit decision
- . Servicing the credit transaction

Fair Housing Act

” Established in 1968 as a civil rights law

” Purpose:

- . Prohibits discrimination with regard to residential real estate related transactions, including but not limited to:
 - ” Making loans to buy, build, repair, or improve a dwelling
 - ” Purchasing real estate loans
 - ” Selling, brokering, or appraising residential real estate
 - ” Selling or renting a dwelling
- . Display Equal Housing Lending or Equal Housing Opportunity poster in every office or branch engaged in real estate lending



Discrimination

” To discriminate against an applicant means to treat an applicant less favorably than other applicants. This includes:

- . failing to provide information about credit services/products
- . discouraging or selectively encouraging applicants
- . using different underwriting standards based on a prohibited basis

” A lender may not discourage an applicant from applying for a loan based on a prohibited factor.

Prohibited Bases

” ECOA

- . Race or Color
- . Religion
- . National Origin
- . Sex
- . Marital Status
- . Age
- . Income from public assistance
- . Right exercised under Consumer Credit Protection Act

” Fair Housing Act

- . Race or Color
- . Religion
- . National Origin
- . Sex
- . Familial Status (defined as children under 18 living with parent or custodian, pregnant women)
- . Handicap

Additional Prohibited Bases under MGL Ch. 151B

- . Sexual Orientation
- . Genetic Information
- . Veteran Status
- . Ancestry
- . Transgender

Other Relevant MA Laws:

804 CMR: Massachusetts Commission Against Discrimination (MCAD)

209 CMR 56: Right to Cure a Mortgage Default

940 CMR 25: Foreclosure Rescue Transactions and Foreclosure-Related Services

ECOA: What is a Loan Application

” Credit Inquiry vs. Credit Application

- . Inquiry: A potential applicant requests information about a loan product and responses are related only to product information, such as rates, terms, products offered, and qualifying debt ratios.
- . Credit Application: The lender actually evaluates information provided by applicant, decides to deny or accept the information and communicates this to the consumer/prospective applicant.
- . An inquiry can become an application.
- . An application for credit can be written or oral:
 - ” unless loan purpose is to purchase or refinance a principal residence, in which case a written application is required
 - ” unless bank policy requires written applications for commercial credit for example

ECOA: What is a Loan Application

” Prequalification vs. Preapproval

- . Prequalification: request by a prospective loan applicant for a preliminary determination on whether he/she would likely qualify for credit under an institution’s standards, or for a determination on the amount of credit for which he/she would likely qualify
- . Preapproval: request for an approval of a loan and a written commitment is subsequently received
- . When a prequalification can become an application
- . Importance of a written program

Creditworthiness

” Factors you can consider:

- . Income
 - ” Amount and probable continuance
 - ” Cannot discount or exclude part-time or retirement income
 - ” Income of spouse used in a credit application must be considered equally with that of the applicant
 - ” Alimony, child support, or separate maintenance payments should be considered to the extent that such payments are likely to be consistently made
- . Debt to Income
- . Credit History
 - ” Lender should consider credit history of accounts that the applicant and applicant’s spouse are permitted to use or for which both are contractually liable
 - ” Upon request, any information that the applicant presents to show credit information is inaccurate
 - ” Upon request, any credit in the name of applicant’s spouse or former spouse that demonstrates the applicant’s creditworthiness

Creditworthiness

” Factors you can consider (continued):

- . Savings, Investments, Real Estate of the applicant
- . Immigration Status
 - ” May consider whether applicant is a legal resident of the United States
 - ” May differentiate between a non-citizen who has been a long-time resident and someone who is here on a temporary visa

Creditworthiness

” Factors you CANNOT consider:

- . Marital Status: except may be considered for purposes of determining lender’s rights and remedies concerning collateral, community property, or state rights
- . Age: except to legally “favor” elderly applicants (62 or older) or to ensure applicant has capacity to enter into binding contract
- . Race, Color, or National Origin
- . Sex
- . Religion
- . Receipt of alimony, child support, or public assistance income: except may evaluate the length of time likely to be consistently made
- . Childbearing intentions
- . Telephone listing cannot be a consideration, but may consider whether there’s a telephone in the applicant's residence

Marital Status

” Married, Unmarried or Separated

- . Use these terms only
- . Not allowed to request marital status if for individual unsecured credit

” May request information about spouse only if one of the following conditions exist:

- . Spouse will be permitted to use the account
- . Spouse will be contractually liable on the account
- . Applicant is relying on spouse’s income as a basis for repayment
- . Applicant resides in a community property state or is relying on property located in such a state as a basis of repayment
- . Applicant is relying on alimony, child support, or separate maintenance payments as a basis of repayment

Marital Status (continued)

” Signature of Spouse

- . A lender **cannot require** the spouse of an applicant to sign a loan agreement except under special circumstances (e.g., State law requires both signatures for an enforceable lien).

” Joint Applicants

- . Refers to someone who applies “contemporaneously” with the applicant for shared or joint credit.
- . Each applicant **must** evidence his/her intent to apply for joint credit at the time of application.
- . The receipt of joint financial statements **should not** be considered evidence of intent to apply for joint credit.

Co-signers or Guarantors

” When is it acceptable to request Co-signers or Guarantors?

- . If an applicant is not considered creditworthy on his/her own merit, then lender can require a co-signer or guarantor but cannot require that person to be applicant’s spouse or anyone else for that matter (applicant must choose)
- . If applicant is a business or non-natural person, even if the business is creditworthy, lender may require personal guaranty of partners, directors or officers of the business, as well as shareholders of a closely held corporation

Principal Dwelling Applications

” **Written application required**

” **Government Monitoring Information (GMI)**

- . Ethnicity, Race & Sex
- . Collect for transactions secured by a principal dwelling
- . Collect for applicable HMDA-reportable transactions although not secured by a principal dwelling (e.g., HELOCS made for purpose of home purchase or refinance)
- . Must inform applicant that GMI is used by the government to monitor compliance with Federal statutes and that ethnicity, race and sex will be noted based on a visual observation or surname if not completed by the applicant

Note: Although collected, GMI must not be used when evaluating the application!

ECOA: Right of Appraisal

” **Creditor is required to provide copy of appraisal report to applicant either :**

- . by routinely delivering whether credit is granted or denied

or

- . upon request

” **Creditors that provide the report upon request:**

- . must provide written notice of right to receive copy to applicant any time during application process but no later than with the notice of action taken

- . notice must:

” specify that the request must be in writing

” give the bank’s mailing address

” state the time for making the request

- . must delivery copy within 30 days of request, unless request was received more than 90 days after notice of action taken

Notification of Action Taken

- “ **Approval notification within 30 days of a completed application**
- “ **Adverse Action (“notice of adverse action”) within 30 days of a completed application**
 - . a refusal to grant credit in substantially the same amount or terms as applicant requested
 - . a termination of the account or an unfavorable change in the terms
 - . a refusal to increase the amount of credit upon the applicant’s request

Incomplete Applications

- “ May consider “incomplete” if have not received from an applicant all the information that is needed to make a credit decision
- “ May either notify within 30 days of receiving an application that the application request is...
 - . denied for incompleteness
 - or
 - . incomplete and
 - “ specify the information needed
 - “ provide reasonable time to provide
 - “ inform that failure to provide information will result in no further consideration

Notice of Adverse Action

” **Notice of Adverse Action must be in writing and include**

- . specific statement of the action taken
- . specific reasons for action taken (or notice of right to a statement of specific reasons)
- . name and address of the creditor
- . name and address of the creditor’s federal regulator
- . the ECOA notice
- . the Fair Credit Reporting Act notices, if applicable
- . credit score and related information, if applicable

” **Statement of Specific Reasons**

- . applicant must request reasons within 60 days of notice
- . lender must provide reasons within 30 days of request

” **Counteroffers must be provided within 30 days of a completed application**

- . if applicant does not accept counteroffer within 90 days, notice of adverse action must be provided
- . may combine counteroffer and notice of adverse action (eliminates the need to send an adverse action notice if counteroffer is not accepted)

Notification for Business Applications

” **Small Business (\$1 million or less of gross revenues in preceding fiscal year) – same as consumer requirements except:**

- . statement of action taken may be given orally or in writing
- . may provide written notice of right to a statement of specific reasons at the time of application (rather than on adverse action notice) that contains:
 - ” time periods (60 days to request and 30 days to provide)
 - ” contact information (name, address, and telephone number) to obtain reasons
 - ” if the reasons are provided orally, a statement that the applicant can request to have those reasons confirmed in writing within 30 days of receiving the applicant’s written request for confirmation
 - ” the ECOA notice

” **Large Business (more than \$1 million of gross revenues in preceding fiscal year)**

- . notification of action taken within a reasonable time (as opposed to 30 days)
- . must provide specific reasons and ECOA notice if requested in writing by business within 60 days

ECOA Record Retention

” **Consumer Applications = 25 months**

” **Business Applications**

- . Small Business = 12 months
- . Large Business =
 - ” 60 days after notice of action taken
 - or
 - ” 12 months if applicant requests reasons for adverse action
- . Best Practice = 12 months for all business applications

Penalties – Equal Credit Opportunity Act

” Penalties for noncompliance:

- . Civil – actual damages, court costs, attorney’s fees and
- . Individual - \$10,000
- . Class action - \$500,000
- . Regulatory – search files, notify customer of violation, correct damages
- . Referral to Department of Justice or Housing & Urban Development

Penalties – FHA

” Penalties for noncompliance:

- . Civil – actual damages, court costs, attorney’s fees, punitive damages and
- . Individual - \$100,000
- . Regulatory – search files, notify customer of violation, correct damages
- . HUD - \$50,000 civil penalty

Related Federal Laws

” **Home Mortgage Disclosure Act (HMDA)**

- . Enacted in 1975 and implemented by Regulation C
- . Provide the public with loan data used to determine whether housing credit needs are being met
- . Assist public officials in distributing public sector investments
- . Assist in identifying possible discriminatory lending patterns

” **Community Reinvestment Act (CRA)**

- . Enacted in 1977 and implemented by Regulation BB
- . Encourages financial institutions to help meet the credit needs of their communities in which they operate, including low- and moderate-income neighborhoods, consistent with safe and sound banking operations

Overt Discrimination

” Occurs when a lender blatantly discriminates on a prohibited basis

- . Written policy
- . Admitted practice

” Indicators:

- . Expressions of prejudice or bias
- . Admission of discriminatory conduct
- . Prohibited basis variable used in credit scoring system
- . Acting contrary to the Equal Credit Opportunity Act

” Examples:

- . A lender offered a credit card with a limit of up to \$750 for applicants aged 21-30 and \$1,500 for applicants over 30. This policy violated the ECOA’s prohibition on discrimination based on age.
- . A lending officer told a customer, "We do not like to make home mortgages to Native Americans, but the law says we cannot discriminate and we have to comply with the law." This statement violated the FH Act’s prohibition on statements expressing a discriminatory preference and Regulation B’s prohibition on discouraging applicants on a prohibited basis.

Disparate Treatment

” **Occurs when a lender treats a credit applicant differently based on one of the prohibited bases**

- . More likely to occur with applicants who are neither clearly well-qualified nor clearly unqualified
- . Can also be found in underwriting, pricing, and marketing

” **Example:**

- . A non-minority couple applies for an automobile loan. The lender found adverse information in the couple’s credit report. The lender discussed the credit report with them and determined that the adverse information, a judgment against the couple, was incorrect because the judgment had been vacated. The non-minority couple was granted their loan. A minority couple applied for a similar loan with the same lender. Upon discovering adverse information in the minority couple’s credit report, the lender denied the loan application on the basis of the adverse information without giving the couple an opportunity to discuss the report.

Disparate Treatment (continued)

” Redlining – a form of disparate treatment

- . Illegal practice of refusing to make residential loans or imposing more onerous terms on any loans made because of the predominant race, national origin, etc., of the residents of the neighborhood in which the property is located.
 - . Violates both the ECOA and Fair Housing Act
-

- . The term “redlining” was coined in the late 1960s by community activists in Chicago. It describes the practice of marking a red line on a map to delineate the area where banks would not invest. During the heyday of redlining, these areas were most frequently minority inner city neighborhoods.

Disparate Impact (continued)

- ” Occurs when a lender applies a policy or practice equally to all credit applicants, but the policy or practice has discriminatory effect on a prohibited basis and is not justified by business necessity.
- ” Policies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person’s access to credit.
- ” **Example:**
 - . A lender’s policy is not to extend loans for single family residences for less than \$60,000. This policy has been in effect for ten years. This minimum loan amount policy is shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live.

Disparate Impact (continued)

- “ The fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation.
- “ Must also seek to determine whether the policy or practice is justified by “business necessity” (i.e. cost and profitability).
- “ Even with a business necessity, the creditor may be found to be in violation if an alternative policy or practice could serve the same purpose with less discriminatory effect.
- “ A violation of ECOA or Fair Housing Act could be cited without establishing evidence of discriminatory intent.

Fair Lending

” **Under Fair Lending, a lender may not:**

- . Fail to provide information or services regarding any aspect of the lending process
- . Provide different information or services regarding any aspect of the lending process
- . Discourage or selectively encourage
- . Refuse to extend credit or use different standards
- . Vary terms
- . Use different terms to evaluate collateral
- . Treat a borrower differently in servicing a loan or invoking default remedies
- . Use different standards for pooling or packaging loans for the secondary market

Pricing Risks

” Rate negotiations pose increased risk of disparate treatment

- . Establish clear procedures
- . Implement specific controls
- . Perform periodic monitoring (by protected group, geography, lender, etc.)

Advertising Risks

- “ Advertising that leads a reasonable person to believe prohibited basis customers are less desirable
- “ Advertising only in media serving non-minority areas of the market
- “ Marketing through brokers that serve only one racial or ethnic group
- “ Programs that exclude areas of higher minority populations

Steering Risk

“ **Steering is the placement of a customer in a product.**

- . It is important to remember that it doesn't need to be a less favorable product.
- . Can occur when banks offer the same product in various lending channels that price or underwrite the product differently (i.e., portfolio vs. secondary market products).

“ **Management Controls**

- . Allow the customer to make an informed decision and indicate within the loan file that the customer made the choice.
- . Ensure equal access to credit products.

Credit Scoring Risk

- “ If your institution uses a credit bureau scoring system, then you don’t need to be too concerned about its development.
- “ If your institution uses a custom scoring model, whether developed internally or by an outside vendor, then you need to be sure the scores are not tied to any prohibited basis.
- “ For any scoring model, the highest risk resides in the marginal approvals where judgment is used in the credit decision.
- “ Management should monitor how judgment is applied –
 - Track high side and low side overrides
 - Track by underwriter
 - Track by override reasons
 - Set limits on volume of overrides

Third Party Risks

- “The best way to avoid third party risk is to be proactive.
- “Management should evaluate third party loans and lending practices just as it would monitor direct loans.
- “Require clear guidelines for processing applications, underwriting and pricing.
- “Insist on a system for recording how and why decisions were made, who made them, with explanations for any exceptions.
- “Be sure that third parties train employees on the policies, procedures and record-keeping requirements.
- “Your financial institution may be responsible for apparent violations caused by mortgage brokers and other agents if you:
“knew or had reasonable notice of the act, policy or practice that constituted the violation.”

Examination Procedures

” **Examiners are looking for indications of:**

- . Overt Discrimination
- . Disparate Impact
- . Disparate Treatment in Underwriting
- . Disparate Treatment in Pricing
- . Disparate Treatment in Steering
- . Discriminatory Redlining
- . Disparate Treatment in Marketing
- . Disparate Treatment in Servicing Loans, including Loss Mitigation, Default Prevention & Foreclosure Management

Low Risk Fair Lending Examination Procedures

- ” No changes since last examination
- ” Demographics – no high-risk areas
- ” No new products
- ” No Complaints
- ” Underwriting and Pricing Policies
 - . Centralized
 - . No discretion
 - . Exceptions
 - . Controls

How to avoid Examiner Criticism

- ” **Treat all applicants fairly as prescribed under law**
- ” **Document all credit decisions such that credit files accurately reflect what occurred**

Fair Lending Best Practices

” Be Fair

” Be Consistent and Courteous

- . The treatment of loan applicants is important in all aspects of the loan decision, from initial application, underwriting, processing, and through closing

” Be Specific

- . Support the loan decision with appropriate analysis and documents

” Be Prompt

- . Provide consistent and timely notifications to all loan applicants

Fair Lending Best Practices (continued)

” **Annual Fair Lending Training for the Board, Senior Management and anyone with any lending responsibility**

” **Strong written loan policy**

” **Strong underwriting standards**

- . consistency, level of assistance, overrides
- . policy versus practice

” **Second Review of all applications earmarked for denial**

” **Fair Lending Risk Assessment**

- . Understand the credit operation & risk that discriminatory conduct can occur during each stage of credit transaction.
- . The feasibility of developing a factually reliable record of the institution's performance in each area.
- . Goal is to identify areas posing greatest risk and if necessary, conducting a comparative file analysis to identify any discriminatory acts or practices.

Sample Monitors

Area	Description	Sample Size	Date	Results
Fair Lending	Review mortgage files to verify that underwriting exceptions are documented. Additionally, verify that no discriminatory patterns are present with exceptions.			
Fair Lending	Reconcile credit report order invoices to verify that all credit reports were ordered for a bona-fide reason. Reconcile credit report order invoices to the status/outcome of the application to verify that would-be applicants are not being steered away from formally applying for a mortgage based on credit report data (thereby circumventing adverse action notices.)			

Sample Monitors

Area	Description	Sample Size	Date	Results
Fair Lending	Review mortgage files to verify that underwriting exceptions are documented. Additionally, verify that no discriminatory patterns are present with exceptions.			
Fair Lending	Review declined loans to determine if a second review process occurred.			
Fair Lending	Review loan modification requests to determine if consistent treatment of borrowers is evidenced.			

Fairness and Loan Servicing

The New Landscape

- “ The loan servicer’s traditional role was to protect the investor’s interest. Although borrowers have a choice when choosing a lender, the same is not true for loan servicing as there is no choice.
- “ Loan servicing is complex and it involves a multitude of federal and state laws and regulations. Servicing guidelines are involved as well , which can be equally complex.
- “ As a result of skyrocketed default rates in the recent past, there has been unprecedented activity in the loan servicing world: modifications, HAMP, reduction in principal, forbearance, etc. What followed the unprecedented action was a wave of regulatory enforcement, the Dodd Frank Act and the CFPB, etc.
- “ In 2010, the OCC started conducting “fair servicing reviews.” Published a booklet about fair lending and expects self-assessments to be conducted.

Fairness and Loan Servicing

The New Landscape

- “ The CFPB published comprehensive rules in the nature of *national servicing standards applicable to servicers of residential mortgage loans*. The Rules amend Regulation X, which implements the Real Estate Settlement Procedures Act ("RESPA"), and Regulation Z, which implements the Truth in Lending Act ("TILA").
- “ The Rules implement the *mortgage servicing standards* set forth in the Dodd-Frank Act, and other proposed servicing requirements placed on five of the nation’s largest banks as part of the *national mortgage servicing settlement* between forty-nine states and these five banks (the "National Mortgage Settlement"), as well as other corrective guidance from the federal banking regulators.
- “ The CFPB has embedded fair lending into all of its examinations. Examiners are looking at loan modifications to see if different groups end up with different terms.
- “ The rules go into effect January 2014.

The Importance of Training

” No longer will the examiners be satisfied with talking to just a few people.

- Increasingly they want to talk with employees to see how well they understand the bank’s policies.

” Train your employees before an examination.

- Lenders
- Underwriters
- Call Center staff
- Loan Servicing staff
- Collections personnel

See “Underwriter Interview Guide,” Appendix J, OCC Fair Lending Examination Procedures.

Fair Servicing – Key Concept

Under the ECOA, it is unlawful for a lender to discriminate on a prohibited basis in any aspect of a credit transaction. Under both the Equal Credit Opportunity and Fair Housing Acts, it is unlawful for a lender to discriminate in a residential real-estate-related transaction because of a prohibited factor which includes, but is not limited to:

- ” **Failure to provide information or services** or **provide different information or services** regarding any aspect of the lending process. [Footnote 1.] Servicing a loan is part of the lending transaction.
 - ” Treat a borrower differently in servicing a loan or invoking default remedies.
 - ” Use different standards for pooling or packaging a loan in the secondary market.
- ” **Footnote 1** – Source FDIC Compliance Manual, December 2012, /IV-1.1-Fair Lending Overview

Fairness – A subjective concept?

*A lender may not express, orally or in writing, a preference based on prohibited factors or indicate that it will treat applicants differently on a prohibited basis. **A violation may still exist even if a lender treated applicants equally.*** This statement comes directly from the FDIC's Compliance Manual, December 2012.

Disparate Impact – Enforcement Objectives regarding Loan Servicing

When outlining the latest CFPB agenda in February 2013, Richard Cordray noted that “loan servicing practices remain a concern,” and drew parallels between the mortgage servicing market and the student loan servicing market. Mr. Cordray also noted that the CFPB is looking to take steps to address the same kinds of problems faced by student loan borrowers

Servicing – Information Management

In evaluating the *potential for unfairness in loan servicing* (or any aspect of the transaction), the following can provide clues and are some of the elements examiners look for when conducting exams:

- ” Description(s) of databases maintained for loan product(s) to be reviewed.
- Records detailing policy exceptions or overrides, exception reporting and monitoring processes.
- Copies of any consumer complaints alleging discrimination and related loan files.
- Compliance program materials (particularly fair lending policies), training manuals, organization charts, as well as record keeping, monitoring protocols, and internal controls.

Servicing - Discrimination Risk Factors

- ” Data and/or recordkeeping problems –
 - compromised reliability of previous examination reviews?
 - information not readily available?
 - information not being coded or tracked?
- ” The size, scope, and quality of the compliance management program, including senior management’s involvement, designation of a compliance officer, and staffing is materially inferior to programs found in institutions of similar size and credit complexity.
- ” The institution has not updated compliance policies and procedures to reflect changes in law or in agency guidance (e.g. new CFPB servicing requirements effective January 2014).
- ” Fair lending training is nonexistent or weak –
 - has servicing staff been trained on fair lending?
 - has collections staff been trained on fair lending?

UDAAP Considerations

FDIC and Federal Reserve:

Areas of Greatest Potential for Unfair or Deceptive Acts

- Advertising and solicitation
- Servicing and collections
- Management and monitoring of employees
- ” Management of third party service providers

UDAAP Guidance

Where Do You Look for UDAAP Guidance?

- ” 2004 Joint Financial Institution Letter
- ” Enforcement Actions – *See the FIS UDAAP Case Matrix*
- ” CFPB UDAAP Examination Manual

Existing Loan Servicing Laws and Regulations

” RESPA

” Regulation Z

” FCRA

New Loan Servicing Laws and Regulations

CFPB Loan Servicing Rules

Effective January 2014

RESPA, Reg. Z, FCRA requirements still exist, but requirements are tougher.

ARM Adjustment Disclosures

Periodic Billing Disclosures

Prompt Payment Posting

Payoff Statements

Reorganization and Commentary to RESPA

Force-placed Insurance

Error Resolution and Information Requests

New Loan Servicing Laws and Regulations, continued

Information Management

Early Intervention with Delinquent Borrowers

Continuity of Contact

Loss Mitigation Requirements

New Massachusetts Loan Servicing Requirements

” **An Act Preventing Unnecessary and Unlawful Foreclosures**

August 3, 2012 – Governor Deval Patrick signed “An Act Preventing Unlawful and Unnecessary Foreclosures.” The new law expands important consumer protections and continues the Commonwealth’s national leadership on foreclosure prevention.

See MGL Ch. 194 Chapter 194 of the Acts of 2012

” **Semi-Annual Reporting to the Division of Banks**

Chapter 194 An Act Preventing Unlawful and Unnecessary Foreclosures, requires a creditor to report the final outcome of each loan modification on all loans for which a notice of the right to request a modified mortgage loan was sent. This report is to be submitted semi-annually to the Massachusetts Division of Banks, beginning with the period ending on December 31, 2012. There is a template reporting form/worksheet available at <http://www.mass.gov/ocabr/business/banking-services/preventing-foreclosure/>.

Massachusetts - An Act Preventing Unlawful and Unnecessary Foreclosures

- “ This legislation establishes **strong consumer protections** for borrowers that are unparalleled in other states,” said Governor Patrick. “Foremost among these protections is the requirement for creditors to take **reasonable steps to avoid foreclosure** for certain mortgage loans. Creditors now must determine whether the value of modifying the loan outweighs the likely value of foreclosure and, if so, the creditor must make the loan modification. This provision ensures that borrowers will be given every reasonable opportunity to remain in their homes.”
- “ The provisions of this law mandate that **lenders prove loan ownership** prior to taking foreclosure action. The law includes new protections that prohibit lenders from **misrepresentation, unfair costs and imposition of fees for services not performed.**
- “ This bill establishes first-in-the-nation standards which promote **reasonable loan modifications, keep people in their homes,** prevent abandoned properties in our communities, and don’t require banks to sacrifice the bottom line.

More About *An Act Preventing Unlawful and Unnecessary Foreclosures*

Amends M.G.L. c.244 - Foreclosure and Redemption of Mortgages

- “ On Aug. 3, 2012 Gov. Patrick signed Ch. 194 of the Acts of 2012
- “ Sec. 1 adds some requirements re: foreclosure notices in Sec. 14 – assignments must be recorded before notice of sale is sent, recording must be referenced in the notice.
- “ Adds Sec. 35B – Requires that borrowers with “CERTAIN MORTGAGES” be considered for loan modifications.
- “ New Law Requires Good Faith Effort To Negotiate a Commercially Reasonable Alternative to Foreclosure
- “ Requires that creditors send a Right to Request a Modified Mortgage Loan along with their Notice of the Right to Cure a Mortgage Default under Sec. 35A.
- “ For “certain mortgage loans” creditor cannot publish a foreclosure sale notice unless it has taken reasonable steps to avoid foreclosure.

Steps to Avoid Foreclosure in Massachusetts

” Reasonable steps include:

- ” An assessment of borrower’s ability to make an affordable monthly payment.
- ” A Net Present Value (NPV) analysis to compare what the creditor gets if loan modified with what it gets if it forecloses.
- ” If the NPV shows creditor will get more with a modification—must offer modification.

Modification process:

- ” Borrower has 30 days to respond to the Right to Request a Mortgage Modification Notice – must provide list of income & debts – problem – no form.
- ” Failure to respond within 30 days shortens right to cure period from 150 days to 90.
- ” Creditor must respond with a written assessment within 30 days of receipt of borrowers request for a loan modification.

Other Requirements Under the *Act to Prevent Unlawful and Unnecessary Foreclosures*

- ” Borrowers may make counteroffer – have substantiating documentation – creditor to respond within 30 days.
 - ” DOB regulations at 209 CMR 56.00 lay out what is required of borrowers and creditors to show good faith compliance.
 - ” Entire loan modification process should not take more than 150 days.
 - ” Right to modify only once every 3 years.
 - ” Creditor must file *Affidavit of Compliance* with Registry of Deeds prior to publishing Notice of a Foreclosure Sale.
 - ” Does not apply to certain loans, e.g. loans offered through Mass Housing and Mass Housing Partnership.
- *Important:** Amends Sec. 14 regarding foreclosure notices - Notice of sale is invalid unless at the time the Notice is mailed an assignment or chain of assignments has been recorded. The recording information for the assignment must be referenced in the Notice. *Refer to Ibanez.*

CFPB: Snapshot of Complaints

In its *Snapshot of Complaints Received*, published in March 2013, the CFPB broke down complaints received from the public into several different categories. **With respect to mortgage servicing:**

- ” The CFPB has handled more than 63,700 mortgage complaints.
- ” The most common type of mortgage complaint concerns problems consumers face when they are unable to make payments (61%).
- ” Consumer confusion persists around the process for obtaining loan modifications and refinancing, especially regarding document submission timeframes, payment trial periods, allocation of payments, treatment of income in eligibility calculations, and credit bureau reporting during the evaluation period.
- ” Other types of mortgage complaints relate to making payments, loan servicing, or escrow accounts (22 %).

Enforcement Actions and Lessons Learned

In the aftermath of the mortgage crisis, waves of enforcement actions have been brought against loan servicers. Such enforcement action, along with public outcry, was the impetus behind numerous changes that have been since enacted in the loan servicing world.

Fremont

Option One

Morgan Stanley

Goldman Sachs

Royal Bank of Scotland

Enforcement Actions and Lessons Learned

” Eaton vs. Federal National Mortgage Association

” Juarez v. Select Portfolio Servicing

” US Bank v. Ibanez

Challenged the validity of foreclosures when they are part of securitized mortgage pools. Because the ownership of mortgage loans were divided and transferred numerous times, the *mortgage assignment was not recorded* until over a year after the foreclosure process had started. This was a fairly common practice in Massachusetts. Under Ibanez, ownership of the mortgage must be evidenced before starting any foreclosure process. Ibanez was a major impetus behind the new Massachusetts law to prevent unnecessary foreclosures.

Opinion letter 002-139 - under MGL Ch. 183, section 55, if a borrower pays off a mortgage, the bank must provide a discharge free of charge.

CFPB Examination Guidance

Nine Modules:

- ” Servicing Transfers
- ” Payment Processing and Account Maintenance
- ” Customer Inquiries and Complaints
- ” RESPA and Force-Placed Insurance
- ” Credit Reporting
- ” Information Sharing and Privacy
- ” Collections
- ” Loss Mitigation
- ” Foreclosure Practices

The Cost of Non-Compliance

- ” DOJ Enforcement
- ” State Attorneys General Enforcement
- ” Regulatory Investigations
- ” Mandated Foreclosure Reviews
- ” Fines, Penalties, Restitution
- ” Harm to Reputation

Recent Examples:

- ” Goldman Sachs and Morgan Stanley reached agreements in January 2013 with the Federal Reserve Board to pay \$557 million and provide other assistance to help mortgage borrowers.
- ” The OCC and the Federal Reserve reached agreements with Aurora, Bank of America, Citibank, JPMorgan Chase, MetLife Bank, PNC, Sovereign, SunTrust, U.S. Bank, and Wells Fargo.

Promoting a Culture of *Fairness Awareness*

” The role of Senior Management

Tone at the top

” Frequent staff training

Training is much more than having staff complete a yearly training module

” Information Management

Coding information, access to information, aggregating data

” Monitoring Trends

Reports and metrics, feedback to Board and Senior Management

Thank you!

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