



Kris Kully

Feeling the Fair Lending Heat

By Kris Kully

*NCUA Has Put the Spotlight on It,
Despite No Mention in Its 2018 Priorities*

Many credit unions have reported an uptick in fair lending heat recently, particularly from the National Credit Union Association (NCUA)

The NCUA's apparent spotlight on fair lending has come as a surprise to some, as the agency's supervision priorities for 2017 (or even for 2018) did not include that topic. (The NCUA reported instead that it would focus on cybersecurity, fraud, and compliance with the Bank Secrecy Act, Service Members Civil Relief Act, and Military Lending Act.) Similarly, the agency's fair lending guides and examination procedures have not changed in years. Accordingly, many credit unions did not see this heightened fair lending scrutiny coming.

Nonetheless, with the 2010 creation of the Office of Consumer Financial Protection and Access (OCFPA), the addition of staff, and the development of a remote examination process, the NCUA appears to be flexing its muscles.

Certainly, the NCUA (like other fair lending regulators) is focused on the extent to which credit unions may treat members differently. We have seen this play out in unique ways for

credit unions.

DISCRETIONARY UNDERWRITING

Since they have a relatively deep understanding of their members' financial circumstances and history, a credit union may feel comfortable making certain allowances or exceptions for an applicant during the mortgage loan underwriting process, such as considering length of membership to approve an otherwise borderline ap-



plication. That deep understanding is laudable, and considering length of membership or a member's unique history or circumstances is not necessarily prohibited (not like other factors that the NCUA has indicated are prohibited, such as whether the member is a first-time homeowner or currently lives in a particular ZIP code, or whether the subject property's neighborhood includes dwellings of a certain age or residents of a certain income level).

However, any type of discretionary or subjective underwriting criteria could lead to fair lending scrutiny, as they represent a risk that certain members could be disparately affected on a prohibited basis (e.g., race, ethnicity, gender, or age). The NCUA is likely to focus on any exceptions, overrides, or other types of discretionary decision-making in the loan approval or pricing process.

Accordingly, credit unions should have policies in place to ensure they evaluate the fair lending risks of those considerations, and fully document their reasoning for any exceptions.

In addition, we wonder whether the NCUA is taking cues from the Consumer Financial Protection Bureau (CFPB), historically a fierce fair lending enforcer (although now under, sort of, new leadership). Specifically, like the CFPB, the NCUA seems interested not only in whether a credit union has complied with its fair lending obligations, but whether it can demonstrate and ensure its ability to comply.

COMPLIANCE TRAINING

In addition to focusing on data required under the Home Mortgage Disclosure Act (HMDA) for evidence of disparate treatment or impact, the NCUA seems interested in a credit union's fair lending compliance program, particularly with regard to its

training program.

Generally, the NCUA expects a credit union to ensure that all personnel involved in taking or acting on loans or loan applications receive fair lending/servicing training. Certain employees, such as those in marketing, may need additional or customized training. We understand the NCUA expects the training to apply not just to new hires, but to occur periodically, and be updated as needed to address newly-assessed risks.

The credit union should consider making the training mandatory (including for members of the board), and it should demonstrate clear compliance expectations. The credit union should keep track of who has and has not completed it.

Similarly, a fair lending compliance program should include policies and procedures to ensure that fair lending is a consideration when developing new marketing campaigns and products, and when placing new branches.

The credit union should evaluate the fair lending risk when considering any such efforts, and should determine who within the organization is responsible for ensuring those evaluations take place. The credit union should document the reasons for those decisions, and should be prepared to provide supporting evidence.

RISK ASSESSMENT

A fair lending compliance program should include a regular risk assessment regimen, addressing all the credit union's lending-related operations (marketing, underwriting, pricing, servicing, loss mitigation, foreclosure, etc.). The program also should



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include a methodology and schedule for quality control monitoring, tracking of fair lending-related complaints, independent fair lending audits (internal and/or external), and course corrections when appropriate.

While HMDA data has been the primary information source regarding a credit union's lending patterns that could be discriminatory, it appears the NCUA will turn down that heat, at least temporarily. The agency announced that in the second quarter of 2018, examiners will begin diagnostic evaluations of whether credit unions have taken "good faith efforts" to comply with the new HMDA data collection requirements.

The NCUA stated that it does not intend to cite violations for errors found in those early evaluations, or to require data resubmission (unless the errors are "material," which the agency does not define). The NCUA also reports that it does not intend to assess HMDA penalties related to data that is collected in 2018 and reported in 2019.

Accordingly, while there is no indication that the NCUA will let up on its fair lending scrutiny, it is giving credit unions a break of sorts in meeting the major systems, operations, and training challenges in preparing for the new HMDA requirements. ▲

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Kris Kully is a law partner in Mayer Brown's Washington, D.C. office. She concentrates her practice on federal and state regulatory compliance matters affecting providers of consumer financial products and services. Kully is a former lawyer for the Department of Housing and Urban Development. In that role, she provided legal counsel to the department on the mission oversight of Fannie Mae and Freddie Mac, the interpretation of the RESPA and the implementation of the department's various housing assistance and community development programs.