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Compliance Insights

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FinCEN: BSA Reporting Obligations Remain Crucial During COVID-19 as Fraud Trends Rise

The first case of the novel coronavirus (COVID-19) in the United States was confirmed on January 20, 2020, two months after the first known cases are believed to have originated in China. While the world turned its attention to the virus and finding effective treatment, a hidden threat emerged: fraud. Law enforcement detected an increase in fraud schemes exploiting the COVID-19 pandemic for illicit financial gain, prompting the Financial Crimes Enforcement Network (FinCEN) to release an official notice on May 18, 2020. The notice addresses COVID-19 financial crime trends, FinCEN's role in responding and helping combat the fraud schemes, and its expectations for financial institutions regarding reporting criminal and suspicious activity under the Bank Secrecy Act (BSA).

In the wake of the pandemic, financial institutions in the United States face evolving challenges, such as managing a remote workforce, and dealing with other COVID-19-related initiatives, such as the Paycheck Protection Program (PPP) and forbearance requirements. While acknowledging the current challenging circumstances in the May 18 notice, FinCEN stated that it expects financial institutions to continue to comply with their BSA obligations, including filing of Suspicious Activity Reports (SARs).

FinCEN highlights the need for institutions and their compliance officers to be proactive and diligent in their management of financial crimes compliance risk, including monitoring, investigation and reporting of suspected financial crime. With ongoing money laundering, terrorist financing and fraud concerns, institutions cannot afford to put their financial crimes monitoring and reporting on hold despite COVID-19.

The emerging fraud trends that law enforcement agencies are tracking include cases where perpetrators claim to have vaccines or cures for the coronavirus, products to disinfect homes or buildings, or fraudulent and unauthorized at-home COVID-19 tests. Likewise, financial

institutions are experiencing an unprecedented volume of suspicious activity alerts and must scale operations to accommodate the increased workload.

In addition to the May 18 notice, FinCEN released the first of multiple accompanying advisories, detailing one of the emerging schemes. FinCEN's Advisory on Medical Scams Related to COVID-19 (FIN-2020-A002) provides details and guidance to financial institutions on rising medical fraud schemes, as well as identifies red flags of such schemes, which include but are not limited to:

- Transactions to or through personal accounts related to the sale of medical supplies
- Patterns of high chargebacks and return rates in customer accounts
- Unclear business model and/or difficulty determining the true nature of a customer's business operations
- Suspicious account activity, such as a large wire transaction in a newly opened account that the account holder failed to mention during account opening
- Electronic funds transfers (EFTs) to or from a newly established company that has no known physical or internet presence
- A customer claiming to be selling COVID-19-related goods not usually sold by the customer.

In the medical scam advisory, FinCEN issues guidance to financial institutions on SAR filings related to the pandemic. Institutions are instructed to reference the advisory by including "COVID19 FIN-2020-A002" in the SAR field titled "*Filing Institution Note to FinCEN.*" FinCEN also instructs institutions to indicate a connection between the suspicious activity and activities highlighted in the advisory. Finally, FinCEN reminds institutions of their obligations to retain copies of SARs and their supporting documentation for at least five years from the date of filing.

As remote workforces demand added flexibility, and financial crime activity increases, financial institutions are challenged now, more than ever, to maintain full compliance with BSA expectations. FinCEN recognizes these challenges and has implemented a direct-contact mechanism by which institutions can inquire about COVID-19-related issues and/or seek urgent assistance. FinCEN has also expanded its Rapid Response Program, which leverages its relationships with domestic and international authorities to intercede and hold fraudulent funds or reverse wires, and ultimately recover assets.

During these challenging times, financial institutions should consider the following actions to maintain compliance and fulfill their regulatory obligations:

- Closely monitor the health of their BSA compliance program.

- Perform regular needs assessments to ensure adequate staffing and resources, promptly addressing any needs identified.
- Carefully examine FinCEN's May 18 notice and all related advisories to conform their operations to the latest guidance.
- Leverage FinCEN's direct-contact feature by selecting the "*Need Assistance*" option on FinCEN's website for any questions or concerns related to COVID-19 and its impact to their BSA compliance program.

The COVID-19 pandemic has highlighted a larger concern around the financial system and how financial institutions are required to manage evolving compliance risk when faced with unprecedented events. While compliance with BSA requirements is vital, institutions are also expected to comply with hundreds of other legal and regulatory requirements. The importance of proactive and innovative business continuity plans, specifically related to maintaining legal and regulatory compliance during anomalous times, is now abundantly clear.

OCC Final Rule: Interest Terms Not Impacted When a Bank Transfers Loan

On June 2, 2020, the Office of the Comptroller of the Currency (OCC) issued a final rule to clarify that when a national bank or savings association sells, assigns or otherwise transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer. The final rule, which will go into effect August 3, 2020, amends 12 U.S.C. 85 and 1463(g) of the National Bank Act (NBA) and reaffirms the longstanding understanding that a bank may transfer a loan without affecting the permissible interest term.

The NBA establishes that a national bank may, pursuant to a loan contract, lend money with an interest term consistent with the laws of the state in which the bank is located, and may subsequently transfer that loan and assign the loan contract. However, the comprehensive statutory scheme regarding interest permitted on national bank loans does not expressly address how a national bank's authority to transfer a loan and assign the loan contract affects the interest term. When Congress enacted the NBA, it was understood that loan transfers were a fundamental aspect of the business of banking and that such transfers would play an important role in the national banking system.

However, recent developments have created legal uncertainty about the ongoing permissibility of the interest term after a bank transfers a loan. Based on its supervisory experience, the OCC believes this uncertainty may disrupt banks' ability to serve consumers, businesses and the broader economy efficiently and effectively, particularly in times of

economic stress. Thus, the OCC's final rule on the permissibility of the interest term after the loan transfer is designed to enhance legal certainty and thereby facilitate responsible lending by banks, including in circumstances when access to credit is especially critical.

In 2015, the Second Circuit Court of Appeals held in *Madden* v. *Midland Funding* that the NBA allows federally chartered banks to charge interest on loans that they make nationwide according to the laws of their home state. However, the court also ruled that when nonbanks purchase loans from federally chartered banks in the secondary market, the usury laws of other states can apply. Certain members of Congress have expressed that the *Madden* decision has resulted in a fragmented interpretation of banking law.

The OCC amended 12 CFR 7.4001 and 12 CFR 160.110 by adding a new paragraph, which provides that interest on a loan that is permissible under sections 85 and 1463(g)(1), respectively, shall not be affected by the sale, assignment or other transfer of the loan. This rule expressly codifies what the OCC and the banking industry have always believed and addresses the legal confusion about the impact of a transfer on the permissible interest.

Navigating Mortgage Relief Amid COVID-19 to Prevent Consumer Complaints

On May 21, 2020, the Consumer Financial Protection Bureau (CFPB) released its consumer Complaint Bulletin, which analyzes COVID-19-related complaint information, including trends and demographics. Since the declaration of COVID-19 as a national emergency, a high volume of complaints has resulted from or referenced the pandemic, including many related to mortgages, credit reporting and forbearances.

Among the COVID-19-related complaints analyzed, mortgage and credit reporting-related complaints ranked the highest and third highest, respectively. Consumers with mortgage-related complaints typically cited the inability to pay their mortgages as a result of employment changes due to business closures. Borrowers who were pursuing alternative payment options expressed concern about potential negative credit reporting implications, including a reduced ability to obtain financing.

Balloon payments resulting from mortgage payment forbearance were another area of concern for consumers: Borrowers felt that they would not be able to complete the balloon payments at the end of the 90-day forbearance period generally offered as mortgage relief.

It is standard for mortgage relief option lenders to provide forbearance of up to 90 days. Under the Coronavirus Aid, Relief and Economic Security (CARES) Act, some borrowers may request mortgage forbearance with deferment of up to 180 days. This forbearance period can then be extended up to 180 additional days, totaling 360 days. This relief is

available to homeowners if their mortgage loan is federally owned or otherwise backed by the Federal Housing Administration (FHA), the U.S. Department of Housing and Urban Development (HUD), the Department of Agriculture (USDA), the Department of Veterans Affairs (VA) or Government Sponsored Enterprises (GSE).

The CARES Act also requires lenders to report to credit bureaus if consumers are not current on their loans or have sought relief from their lenders due to the pandemic. During this difficult time, institutions continue to work constructively with affected borrowers to help them navigate their COVID-19-related hardships.

While loan servicing guidelines permit borrowers to stay current with a lump-sum payment, some servicers have informed borrowers that they *must* pay a lump sum once the forbearance period is over to bring the loan current and avoid negative consequences, such as foreclosure. GSE-backed mortgagees, however, are not required to make lump-sum payments at the end of the borrower's forbearance plan under the CARES Act. In all cases, no later than 30 days prior to the expiration of the borrower's forbearance plan, servicers must begin attempts to discuss a non-lump-sum workout option.

Operational Considerations:

- Servicers that provided mortgage relief to GSE-backed mortgage borrowers prior to the enactment of the CARES Act must be prepared to process extensions of these periods, as requested.
- Institutions should implement a plan to handle surges in required borrower interaction to promptly inform consumers of their mortgage relief options, the implications, and the changes to forbearance and credit reporting. Additionally, the plan should account for:
    - Updates to disclosures and call scripting, and
    - Revisions to collections activities.
- In addition to traditional call centers, servicers should consider providing alternative methods to deliver and process mortgage relief information.
- Credit reporting processes must be revised to ensure that mortgage tradeline information for borrowers receiving COVID-19-related mortgage relief appropriately reflects the borrower as current.
- Regulation E:
    - To the extent that borrowers made automated clearing house (ACH) payments initiated by the servicer prior to requesting mortgage relief, institutions must ensure that payments are ended in a timely manner or paused.

    - Upon the end of a forbearance period, servicers must ensure that preauthorized ACH payments are commenced in accordance with disclosures.
- While many institutions have waived overdraft fees during this time, servicers should also consider proactively contacting borrowers prior to commencing post-relief automatic ACH payments in order to avoid payment shock and overdrafts.
- Institutions should implement strong controls, policies and procedures to ensure compliance with relevant loss mitigation laws, rules, and regulations such as the CARES Act and Real Estate Settlement Procedures Act, which in turn may minimize Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) risk.

As many borrowers sought mortgage relief as a result of COVID-19-related hardships, many institutions offered relief in the form of mortgage forbearance. As initial forbearance periods approach expiration, borrowers may request, and in some cases be entitled to, an extension as they continue to experience financial hardship. As such, it is imperative for financial institutions to finalize and implement a strategic approach ahead of forbearance-period expirations.

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