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Real Estate Compliance Outlook

Report

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ABOUT US

Contact information:
October Research, LLC
ATTN: The Title Report
3046 Brecksville Road, Suite D
Richfield, OH 44286
Tel: (330) 659-6101
Email: ContactUs@OctoberResearch.com

EDITOR'S NOTE

Compliance still matters

Dear Readers,

With federal regulators moving their focus away from the title insurance, mortgage lending and real estate spaces, some industry professionals may be tempted to assume compliance concerns are no longer a regulatory priority.

That would be short-sighted.

While the Consumer Financial Protection Bureau has rolled back its enforcement agenda, state regulators have stepped up their efforts. State attorneys general have issued several enforcement actions surrounding RESPA issues, Unfair, Deceptive, or Abusive Acts or Practices and other compliance concerns.

States are also tackling compliance questions that are arising with evolving technology like artificial intelligence. From state legislatures to insurance regulators, new rules and guidance are constantly being issued.

Private litigants, too, are stepping up class action challenges of practices that have traditionally been the target of federal agencies, like antitrust violations.

All of that means that the players might have changed, but regulatory scrutiny of the industry has not. As Spencer Fane LLP Partner **Mike G. Silver** explained, the presidential executive orders issued about the mortgage industry "certainly make very clear the administration's position — and regulators can take that position forward. But the obligation to comply with those laws doesn't go away unless the laws themselves go away. And a new administration can easily change the position and then start looking back at conduct and enforcing against it in 2029. For this reason, hewing to best practices remains the best way to navigate this."

For the *Real Estate Compliance Outlook* in-depth report, our editors spoke with experts across the title insurance, settlement services and mortgage lending industries about such best practices and what compliance concerns should remain top of mind moving forward. We hope this serves as a resource as you formulate your business' strategies to keep your operations compliant and secure.

Thank you to Qualia for sponsoring this report.

Erica Peterson

Erica Peterson
Editorial Director
EPeterson@OctoberResearch.com

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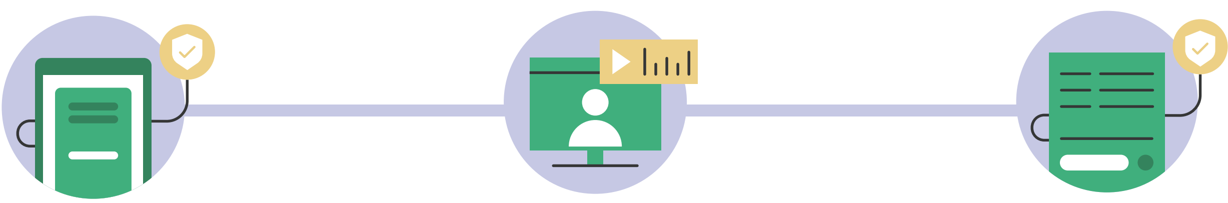

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How the retreat of federal regulators is reshaping mortgage compliance

By Robert Rozboril — Editor, *Dodd Frank Update*

As state regulators race in a direction marked by increased regulatory responsibility, federal regulators are retreating at an even faster clip. Financial institutions, who are bound to get caught in the middle, are facing a compliance landscape unlike anything they have previously encountered.

For mortgage lenders and financial services executives, the shifting dynamic between state and federal oversight has become an operational reality, rather than an abstract policy debate.

Dodd Frank Update spoke with Mitchell Sandler Managing Partner **Andrea Mitchell**, Garris Horn LLP Co-Managing Partner **Richard Horn** and Spencer Fane LLP Partner **Mike G. Silver** about how this patchwork of state laws is evolving and what institutions can do when supervisory and enforcement priorities do not align between state and federal examiners.

Conflicting approaches

The growing willingness of state authorities to act independently of their federal counterparts can make the task of ensuring compliance especially challenging for covered institutions.

When Mitchell sees misalignment between agencies with jurisdiction over her clients, she typically advises them to ask the agencies to work it out between themselves to ensure that the regulators are communicating with one another and aware of any potentially conflicting directives.

"It's not unusual for state and federal exam teams to have a difference of opinion," Mitchell said. "Sometimes it is known to the bank and sometimes it is not. Banks should not be in peril of violating state laws in order to comply with federal laws and vice versa."

Horn and Silver agreed that institutions should weigh the ramifications of differing requirements to determine the appropriate course of action.

"Legal defensibility shifts based on administrative law developments," Silver said.

"At the end of the day, compliance teams have to weigh the effect of these developments and make sound decisions. But, ultimately, they also should be employing best practices. And those best practices can in some cases override the other factors by putting in place a higher floor for compliance."

As an example, Horn noted the reputational risk from a technical disclosure violation may be much less than for fair lending issues, but the legal defensibility may be greater than a fair lending issue.

"Also, the overall risk appetite of the institution in general will have an impact on the ultimate decision," he added.

Mitchell acknowledged that federal and state regulators that share different enforcement priorities or political mandates are often disinclined to take the necessary steps to come into alignment – i.e. communicate with one another in a meaningful way – which can add an extra layer of complexity to the equation. When this is the case, she recommends banks become more proactive in obtaining clear direction.

"If banks start seeing a lack of coordination between state agencies or between state and federal agencies, they will need to take a more active role in establishing clarity around compliance expectations when they are receiving mixed messages," she said.

Horn said there is no single answer when the question of which supervisory authority should govern risk management becomes acute.

"I think all of those should be weighed and considered, and each would have different weight for different legal requirements," he said, noting that an institution's broader risk appetite is itself a determining factor.

Disparate views on fair lending

Few issues illustrate the state-federal divergence more vividly than the ongoing dispute over disparate impact theory in fair lending enforcement. Horn characterized the hypothetical scenario of state and federal regulators viewing the same lending practice completely differently as "quite the rock and a hard place situation."

"I think an institution could question whether the practice in question is actually necessary or whether it can be tweaked to reduce the risks on both sides," he said. "It also depends on which state you're dealing with, because some states are more aggressive than others."

The Consumer Financial Protection Bureau's (CFPB) final rule narrowing the scope of disparate impact under Regulation B has drawn a swift and organized state-level response.

In December 2025, 21 state attorneys general wrote to the bureau objecting to the proposed revisions, which would have eliminated references to the "effects test" and effectively removed disparate impact as a viable theory of liability under the Equal Credit Opportunity Act (ECOA). In May, a group of consumer advocates and fair lending compliance firms filed suit, citing substantially similar arguments.

"This was an early warning signal to the industry that some states maintain that the disparate impact theory is cognizable under ECOA and/or state fair lending laws," Mitchell said. "The challenge with establishing a disparate impact claim is that such claims are heavily reliant on statistical analyses. Therefore, state bank regulators and enforcement agencies that want to pursue disparate impact claims will be somewhat constrained by the depth and strength of their resources that can perform such analyses."

States' supervisory resources have been bolstered over the past year by an influx of federal bank regulatory staff joining state agencies. As result, many states' "analytical capabilities are stronger now than ever before," Mitchell noted.

Silver suggested the rule may not survive the lawsuit, due in large part to possible findings that the bureau failed to follow the Administrative Procedures Act (APA).

"If it makes it all the way to the Supreme Court, all bets are off," Silver said. "There may be receptivity at the court given its current composition to strike down disparate impact as a legal theory and overrule *Inclusive Communities*," referring to the 2015 Supreme Court case recognizing disparate impact claims as cognizable under the Fair Housing Act.

"But there's a long path to get to the Supreme Court. Assuming disparate impact remains in place as a theory, at least for the next few years, I do see states continuing to enforce anti-discrimination laws and supervise aggressively in that area. They believe it is both the right thing to do and something they need to do in absence of federal action."

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Horn noted that states monitoring the CFPB litigation closely, particularly those with statutory language similar to ECOA, have a direct stake in what courts ultimately say about disparate impact theory.

For compliance teams navigating the divergence between federal and state fair lending expectations, Horn and Mitchell advise against abandoning existing programs.

"The fact that the CFPB and federal prudential bank regulators have stopped examining banks for disparate impact risk does not mean disparate impact risk has been eliminated," Mitchell said.

She said banks should maintain preventive and detective controls, including periodic statistical analyses, regardless of reduced federal scrutiny.

"While the CFPB and federal prudential regulators may not be examining banks for disparate impact risk under ECOA, state agencies and private litigants may still pursue fair lending claims under the disparate impact theory under the Fair Housing Act or state laws," Mitchell explained.

Opting out of parity

At the heart of the state-federal tension lies the doctrine of federal preemption, the legal principle stipulating that federal law supersedes conflicting state laws, which has been tested numerous times this year with respect to national banks.

Horn said the erosion has been happening gradually but unmistakably in the courts.

"I think that courts have shown a willingness to chip away at federal preemption," he said. "Many federal consumer financial protection laws have conflict preemption also, which leaves the door open for states to argue that their state law is more protective and not in conflict."

Silver pointed to the debate over state-level legislation being considered in some states, which would allow them to opt-out of state banking restrictions imposed by a long-standing piece of federal legislation: the Depository Institutions Deregulation and Monetary Control Act of 1980, or DIDMCA. The act allows state-chartered banks to charge the maximum interest rate permitted in their home state, regardless of where the borrower is located.

The act includes an opt-out provision, however, which has been infrequently invoked. Colorado and Oregon are among the states to pass laws recently opting out of the DIDMCA's provisions. This would have the effect of requiring state-chartered banks from other states to lend to consumers in the opt-out states to comply with to those states' stricter lending laws, rather than their home states' lending laws.

Several financial services trade associations have sued over these laws, claiming they violate federal rate exportation rules and overstep by attempting to regulate loans made outside of state borders.

Silver noted a state DIDMCA opt-out law of this nature "creates a lack of parity with national banks, which can continue to lend at their home states' rates under the National Bank Act and the Supreme Court's *Marquette* decision."

Artificial intelligence patchwork

The most significant state v. federal clashes in the coming years will revolve around the regulation of artificial intelligence (AI), Silver contended.

"Congress appears nowhere close to passing a comprehensive AI framework that would preempt stricter state laws," he said. "States are now enacting a patchwork of laws which don't fall neatly under traditional pro- and anti-regulatory frameworks. The feasibility of complying with 50 different regimes will be tested, but Congress presumably will need to act first to create a baseline against which the preemption determination can be made."

The patchwork of early state efforts to regulate AI and certain banking functions serves as a model for what institutions should prepare themselves for in the lending space.

"Just like there is a patchwork of state laws developing around AI, there will be a patchwork of different analytical frameworks and AI governance expectations," Silver said. "States through their legislatures and regulatory bodies will make judgments about prioritizing what they think best reflects their own laws and policy preferences.

Silver explained that, right now, there are no clear federal standards to begin with.

"They will hopefully develop over time but the technology is moving so fast, the opportunity versus challenge dichotomy becoming stark, and regulation necessarily getting swept up in debates between the crypto community and the bank community, for example," he said. "States can continue to experiment with approaches and the hope is at some point there is a convergence, especially if best practices and model governance standards are used."

Fair lending and UDAP

Horn and Mitchell both said they expect preemption battles to intensify with respect to state laws concerning unfair or deceptive acts or practices (UDAP), including financial privacy, consumer reporting, open banking and other cross-product issues.

"I could see a state with similar statutory language as ECOA that wants to use disparate impact theory under that language closely monitoring or potentially joining that CFPB litigation regarding disparate impact, because what the courts say about disparate impact could potentially impact their own authority," Horn said. "But states that have their own clear state authority for a disparate impact theory may focus their efforts on enforcement."

Mitchell identified a particularly potent threat to preemption: the combination of state and federal enforcement powers, which Sec. 1042 of the Dodd-Frank Act places in the hands of state banking departments and state attorneys general. This statute expands the types of claims and the scope of relief available to state agencies.

"Sec. 1042 empowers state attorneys general to enforce the enumerated consumer protection statutes transferred to the CFPB for national banks where jurisdiction is established, which arms those agencies with federal consumer protection law enforcement powers," Mitchell said. "That can be impactful as some state laws can be limiting in the type of claims that can be brought against a bank or relief that can be sought."

Learning to cooperate

One potential counterweight to state-level fragmentation is interagency coordination among state regulators themselves.

Silver said the Conference of State Banking Supervisors "traditionally has been an excellent coordinating and information sharing body for the states" and he believes that will continue to be the case.

Meanwhile, the Nationwide Multistate Licensing System and the multi-state mortgage committee represent meaningful achievements in state coordination, but Mitchell and Horn have tempered expectations about how far that cooperation can go.

"I would expect such an initiative to yield some coordination, but I wouldn't expect the states to even out all of their differences," Horn said, pointing to persistent variation driven by individual state laws and differing enforcement priorities.

He noted that some states have been creating their own legal frameworks and regulations pertaining to cybersecurity, data privacy and other matters that have been addressed at the federal level. This is somewhat unsurprising, he added, given that "states, historically, have been the first movers on new consumer protection frameworks, even for mortgages, like with predatory lending laws, ability-to-repay, etc."

Don't touch that dial …

Compliance attorneys consistently warn institutions against dialing back compliance infrastructure in response to reduced federal scrutiny, warning that the proverbial regulatory pendulum always swings back.

"I have recommended that companies stay the course because of the risk of lookbacks in 2029 and state level enforcement today, and sticking to best practices," Silver said. "I think it would be short-sighted for firms to downsize their fair lending apparatuses because of the current federal administration's posture. There is too much risk from other quarters – states, class actions and a future federal stepped up enforcement effort."

Mitchell said frankly, "Any bank that removes all preventive and detective controls for disparate impact risk will bear the burden of reinstituting the testing and monitoring efforts that were discontinued in this administration."

Beyond the operational cost of rebuilding dismantled programs, institutions that choose to reduce fair lending controls may face uncomfortable questions from examiners who note that while supervisory and enforcement policies shifted, legal obligations established under the Fair Housing Act and state fair lending laws did not.

"The optics alone should give banks pause," Mitchell said.

Silver suggested the best approach compliance teams can take in the current climate is to stick to best practices for complying with existing laws, which are much more entrenched than malleable executive orders and federal policies not written into law.

"This is the conundrum many compliance teams find themselves in right now. But it is important to understand that this is not a direct conflict," he explained. "In other words, the federal laws, whether they be ECOA or the Fair Housing Act, remain on the books. The regulations remain on the books, although the CFPB and HUD are attempting to change them. What has changed is the federal government's policy and legal position."

Executive orders and final rules decrying disparate impact theory and other fair lending principles "don't override federal or state statutes," Silver asserted.

"They certainly make very clear the administration's position – and regulators can take that position forward. But the obligation to comply with those laws doesn't go away unless the laws themselves go away," he said. "And a new administration can easily change the position and then start looking back at conduct and enforcing against it in 2029. For this reason, hewing to best practices remains the best way to navigate this."

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State AGs continue to step up scrutiny of referrals, AfBAs, antitrust concerns

By Rae Harris — Editor, *RESPA News*

"RESPA compliance does not exist in a vacuum. State attorneys general (AGs) are using RESPA as one tool among several, and increasingly weaving theories together to address issues at the intersection of RESPA, antitrust, and UDAAP (Unfair, Deceptive, or Abusive Acts or Practices) priorities. Compliance under each doctrine can inform and reinforce the others to best mitigate risks and find paths forward for business that can stand the test of time."

That's according to RESPA expert **Noah Gillespie**, Counsel at Orrick, Herrington & Sutcliffe LLP (formerly Of Counsel for Greenberg Traurig).

Setting the stage

Referrals are at the heart of RESPA, leading to

the prevalence of consumer steering allegations made by regulators.

Gillespie noted that while there is no formal definition of "steering," regulators "tend to view any conduct that channels a consumer toward a particular settlement service provider on any basis other than the consumer's own economic interests as steering activity. The reason this broad net matters for RESPA is that Section 8 prohibits unearned fees and compensation for referrals. In a regulator's eyes, there may be no real distinction between steering and 'referring settlement business.'"

"State AGs are creating and attempting to apply broader definitions of terms that historically have been thought about in narrow ways," Saul Ewing Partner **Francis "Trip" Riley** added. "Now that they are stepping out from the Consumer Financial Protection Bureau's (CFPB) leading shadow, state AG offices are aggressively advancing positions that evidence a total disregard of how historically those statutory and regulatory provisions and specific terms therein have been defined and what conduct has been characterized as fitting or not fitting into those long-standing definitions. They do so without considering how the novel approaches or views that are seemingly driving these new interpretations will or could upend, at worse, a material number of companies' operations and, at the least, the processes they have had in place for decades."

When asked at what point state regulators now view a referral arrangement as giving rise to concerns over the thwarting of or a negative impact on consumer-choice and, thus, possible UDAAP, rather than just a RESPA compliance issue, Riley first explained that a "referral is not a RESPA violation if there is no explicit, implied or passive benefit" going from the referred-to party to the referring party.

"Accordingly," Riley explained, "even assuming the facts do not suggest a 'thing of value for a referral' is occurring, a UDAAP 'concern' is materializing around the notion that a referral by one settlement service provider to another is inherently enveloped by deceitful motivations, and/or is always unfair to the borrower/buyer and is abusive because the referring service provider is fundamentally taking advantage of its relationship with the borrower/buyer."

According to Riley, consumer complaints regarding "blocking tactics used to keep the consumer from educating themselves or muddling such efforts" tend to trigger scrutiny of steering allegations.

Gillespie added that even if a referral arrangement complies with RESPA, "the CFPB and state regulators have closely scrutinized where providers limit choice for consumers … on a basis other than which provider is in the consumer's best interests."

The consumer complaints bringing the most steering risk "include those that allege surprise closing costs or unexpected settlement fees, pressure to use a specific settlement services provider or confusion about who the consumer was actually working with," Gillespie said. "Veterans and first-time buyers feature heavily in recent matters, in part because of concerns that these populations are more vulnerable, as well as the potential misleading impression from government-affiliated branding when in fact consumers are dealing with private lenders and settlement service providers."

AfBAs and RESPA

Regarding affiliated business arrangements (AfBAs), the experts had different takes on whether AGs were looking beyond technical RESPA disclosures to examine consumer behavior and outcomes.

According to Riley, in some instances, "[AGs] have appeared not to be concerned about consumers' actual behavior and outcome, only whether they can create a characterization of the AfBA's formation, investments and/or operations that arguably support a claimed violation of RESPA 8(a) and why 8(c)(4) does not insulate against that alleged violation or why 8(c)(4)'s exception should not be applied to the AfBA."

Gillespie noted that disclosures are necessary for the AfBA safe harbor to apply, but the presence of a disclosure "does not guarantee compliance."

"Regulators closely examine affiliate relationships and payment streams to uncover consumer impacts, and particularly any way that these relationships increase consumer costs," he said. "The Maryland AG's January 2026 settlement with a set of joint venture (JV) title companies is the clearest recent example: the AG found that the JVs 'unlawfully paid fees to real estate agents and brokers who were members of the JVs, in exchange for the referral of consumers who purchased title insurance,' imposed $850,000 in restitution and a $200,000 penalty, and required every JV to be dissolved. AGs are looking for where capture rates, payment flows and consumer outcomes can be mapped backward onto these legal theories."

When asked about the mistakes companies commonly make when managing AfBA relationships, Riley pointed to the misconception that AfBAs only need to provide the basic core title services and do not need sufficient oversight of the activities underpinning those services.

"A plainly disclosed kickback still violates RESPA. With AfBA relationships as with RESPA generally, failing to benchmark and document fair market value for the services actually performed is a critical shortcoming. "

— Noah Gillespie,
Of Counsel for Greenberg Traurig

Gillespie stated that the most common mistake "is treating the disclosure as the entire compliance program rather than the prerequisite."

"A plainly disclosed kickback still violates RESPA," he said. "With AfBA relationships as with RESPA generally, failing to benchmark and document fair market value for the services actually performed is a critical shortcoming. Documentation can be a powerful defense when AGs think payment flows look like compensation for referrals. We also have to keep practical metrics in mind. As partner settlement service provider selection rates approach 100 percent, the clear inference is that the consumer is not given a real choice."

Competition and antitrust considerations

Riley noted that AGs, in a wholesale manner, are not borrowing concepts from antitrust enforcement when they examine all types of permitted and impermissible referral practices.

Gillespie added, however, that AGs are "increasingly framing referral concentration as a market problem rather than a disclosure problem, drawing on theories of market power and tying that come straight from antitrust analysis. The complaints against Zillow, Redfin and Veterans United in many ways think like Section 1 cases more than Section 8 cases."

Concerns about market concentration intersect with RESPA-related investigation when there is a "referral pattern that looks tolerable in a fragmented market" that becomes an enforcement priority "when one platform or lender captures a disproportionate share of settlement services," Gillespie stated.

When asked if a practice that complies with the letter of RESPA can still raise concerns under state competition of consumer protection laws, Riley explained that even states with specific statutes that address unfair competition, "alleging, let alone proving, the operation of an AfBA/JV violates the prohibition against 'unfair' or 'deceptive' compensation is more than difficult. It would require market dominance by the referral-source member of the JV and improper tying activities at a minimum."

"The text of RESPA itself confirms that a more restrictive state law governs, so long as it is not inconsistent with what RESPA itself requires," Gillespie said, referencing 12 U.S.C. § 2616. "Antitrust concerns are currently a major priority for several state AGs. The CFPB previously opined that a digital lead-routing platform can pay only flat, fair-market fees and still face scrutiny if the platform's design steers consumers toward affiliated providers. New York's FAIR Act, which took effect earlier this year, may further invite this cross-pollination. The FAIR Act expands the state's UDAAP statute to reach abusive conduct and erases the prior 'consumer-directed' requirement, allowing for theories based on consumer harm as well as new theories of business-to-business harm."

Riley noted that some AGs are still prioritizing alleged RESPA violations more than UDAAP, but UDAAP often comes on RESPA's heels.

"Both RESPA and UDAAP are key theories that AGs regularly rely upon, independently or together," Gillespie agreed. "Accordingly, providers do well to keep both in mind and to develop their referral programs and compliance policies to satisfy both standards.

"A RESPA claim will almost universally be paired with consumer-protection theories addressing the same conduct," he continued. "UDAAP is flexible and AGs will be sure to craft framing that presents conduct the AG wants to curb as unfair, abusive or deceptive. Private litigants are making these connections as well. The Veterans United class action simultaneously alleges antitrust and consumer protection theories."

Looking ahead

Regarding advances in technology, Riley emphasized that companies providing or using digital lead-generation platforms should keep the corporate governance of artificial intelligence (AI) at the top of their priority list.

Gillespie added that digital lead-generation platforms "aggregate consumer intent at scale, which magnifies RESPA risk, antitrust risk and UDAAP risk. The 2023 CFPB Advisory Opinion warned that even preferential placement in search results can constitute a 'thing of value' under RESPA, and the Zillow, Redfin, Rocket and Veterans United complaints seek to press these theories further."

Gillespie believes that AI-driven lead routing or recommendation systems will become a future enforcement target "sooner than the industry expects."

"Any model that optimizes for revenue per lead arguably encodes a referral preference, and regulators will not accept 'the algorithm decided' as a defense," Gillespie said. "There is no advanced technology exception to established law. Also, we have seen that biases in training data are reproduced in outputs; an artifact in the data such as a promotional campaign from a few years back could surface as the AI tool uniformly directing all consumers to the same settlement service provider. Expect AGs to dig in on the training data, the optimization targets and the audit logs."

When asked what changes the experts would recommend to lenders, title companies and brokerages to prepare for this next phase of enforcement, Riley said the companies should "establish strong corporate governance, policies and procedures around product and services infrastructure that monitor, control for and remediate compliance concerns."

"Run a mock exam now, before a regulator does it for you," Gillespie said.

"Document fair market value for every payment flow, benchmark capture rates, and stress-test your disclosures against ordinary-consumer comprehension rather than formal sufficiency. Map referral relationships to UDAAP, fair housing and antitrust theories in addition to RESPA, and revisit any arrangement that depends on a safe harbor to ensure current practice matches the justification put in place when the program was first envisioned. For [digital] platforms, document the rationale for access and pricing decisions as they happen, to capture point-in-time insights, ensure records will be available, and to detect process changes as they evolve."

Keep up with the latest RESPA developments and enforcement actions by state and federal regulators by visiting RESPANews.com and subscribing to *RESPA News*.

As AI use increases in title, so does compliance guidance

By Phil Keren — Editor, *The Title Report*

THE TITLE REPORT

Title insurance companies using artificial intelligence (AI) to help make decisions or take other actions are being urged to adopt a plan to ensure that their use of AI complies with all applicable laws and is done in a responsible manner.

The National Association of Insurance Commissioners (NAIC) adopted the NAIC Model Bulletin: Use of Artificial Intelligence Systems By Insurers in December 2023. The bulletin gives insurers guidance on how to legally and responsibly use AI in their work and functions as a template that each state can adopt.

As of April 1 of this year, 25 states had adopted the NAIC's AI model bulletin. In each of those states, the department of insurance sent the bulletin to all insurers that are licensed to do business in that particular state.

Steve Gottheim, general counsel for the American Land Title Association (ALTA), said the organization is aware of the rising level of state regulatory activity regarding the use of AI in insurance, including the NAIC model bulletin.

"ALTA has worked with our insurance trade partners as the NAIC has thoughtfully developed its AI guidelines," Gottheim said. "As the industry increases its use of AI in operations, it will be important for companies to keep the model bulletin and related exam tools in mind."

While noting that specific responsibilities might vary by state and the company's role, Gottheim said title insurers and title agents should focus on responsible AI governance, strong vendor oversight and protecting nonpublic personal information (NPI).

"AI can help improve efficiency, accuracy and customer service in real estate transactions, but it must be used with appropriate safeguards, transparency and professional oversight," he said.

Deep dive into the NAIC bulletin

While acknowledging AI can assist with developing products, improving consumer interface, and simplifying and automating processes, the NAIC bulletin also highlights the potential challenges surrounding the use of the technology.

"AI, including AI systems, can present unique risks to consumers, including the potential for inaccuracy, unfair discrimination, data vulnerability and lack of transparency and explainability," the bulletin stated. "Insurers should take actions to minimize these risks."

In states where the bulletin has been adopted, that state's department of insurance tells insurers that "decisions subject to regulatory oversight that are made by insurers using AI systems must comply with the legal and regulatory standards that apply to those decisions, including unfair trade practice laws."

In addition, the bulletin notes that decisions made by insurers cannot be inaccurate, arbitrary, capricious or unfairly discriminatory.

"However, because, in the absence of proper controls, AI has the potential to increase the risk of inaccurate, arbitrary, capricious or unfairly discriminatory outcomes for consumers, it is important that insurers adopt and implement controls specifically related to their use of AI that are designed to mitigate the risk of adverse consumer outcomes," the bulletin stated.

With this framework in mind, the bulletin explains that all types of insurers authorized to do business in a particular state "are expected to develop, implement and maintain a written program for the responsible use of AI systems (an AIS Program) that make or support decisions related to regulated insurance practices."

The bulletin lists general guidelines, as well as specific guidelines for insurers to follow as they develop their AIS program. The specific guidelines address topics such as governance; risk management and internal controls; third-party AI systems and data.

> **"ALTA has worked with our insurance trade partners as the NAIC has thoughtfully developed its AI guidelines. As the industry increases its use of AI in operations, it will be important for companies to keep the model bulletin and related exam tools in mind."**
>
> **— Steve Gottheim,**
> **ALTA General Counsel**

The last portion of the bulletin explains that an insurer can expect to be asked by its state's insurance department about its development, deployment and use of AI systems or a specific predictive model and the outcomes (including adverse ones) of that usage. The state department of insurance can ask the insurer to provide information and documentation relating to an insurer's "pre-acquisition/pre-use diligence, monitoring, oversight, and auditing of data or AI systems developed by a third party," and "relating to or evidencing the insurer's implementation and compliance with its AIS Program, including documents relating to the insurer's monitoring and audit activities respecting compliance."

The state insurance department can also ask insurers to provide documentation connected to the insurer's use of third-party AI systems.

The bulletin also explains the NAIC adopted Principles of Artificial Intelligence in 2020 to help guide insurers as they develop and implement AI systems in their work.

"Those principles emphasize the importance of the fairness and ethical use of AI; accountability; compliance with state laws and regulations; transparency; and a safe, secure, fair and robust system," the bulletin stated. "These fundamental principles should guide insurers in their development and use of AI systems and underlie the expectations set forth in this bulletin."

ALTA's Best Practices provides some guidance

Gottheim added that a section of the association's Best Practices provides a framework to help title and settlement companies protect consumers, safeguard sensitive information and evaluate risks associated with third-party software, automated tools and AI-enabled systems.

Pillar No. 3 of ALTA's Best Practices addresses information security and privacy plans.

Some of the notable Best Practices that apply to the AI-related issues that title firms will be dealing with include:

- Comply with applicable federal and state laws which may require companies that possess records containing NPI to maintain records securely;
- Select vendor service providers and third-party systems whose information security policies are consistent with company's written information security plan (WISP), including but not limited to software tools and resources which may have access to NPI or store records containing NPI as part of their setup or operation. These software tools and resources might include … automated or AI processes that integrate with other internal or external systems; and
- Establish a privacy policy explaining how data is collected and used and publish it on company's website(s) or provide information directly to consumers in another usable form.

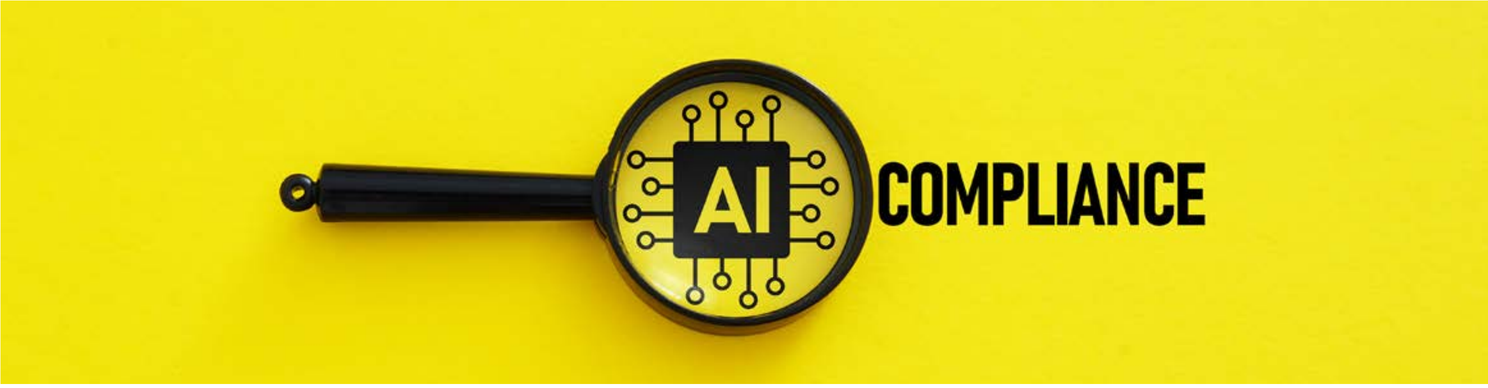
State AI guidance

A month ago, the Texas Department of Insurance (TDI) issued a bulletin on the use of AI.

"While regulated entities continuously adopt new tools for efficiency, AI has the potential to create significant and rapid market change. As the use of AI becomes more prevalent, TDI expects that decisions made and actions taken using AI will comply with all applicable laws and regulations," the bulletin stated, adding that "this includes laws that address unfair trade practices and unfair discrimination."

TDI stressed that its expectations as to how insurance companies govern the development, acquisition and use of AI in their operations extend to third parties.

The bulletin recommended NAIC's Principles on



Artificial Intelligence as "an appropriate guide in AI's development and use." It also recommended companies review the AI Code of Ethics and Minimum Standards adopted by the Texas Department of Information Resources.

Some of the guidance that TDI expects insurance companies to comply with include:

- Decisions made using AI must comply with the legal and regulatory standards that apply to those decisions, including unfair trade practice laws. Compliance with such standards is required, regardless of the tools and methods used in decision-making.
- It is important regulated entities adopt and implement controls to mitigate the risk of adverse outcomes for consumers.
- If a regulated entity uses AI to make a consequential decision, TDI expects a person to review and agree with all decisions before action is taken.
- TDI encourages the development and use of verification and testing methods to identify errors and bias in the use of AI.
- All regulated entities using AI should be able to furnish procedures and protections upon request by TDI.
- Regulated entities should expect TDI's monitoring of AI procedures and protections to include inquiries concerning governance frameworks, risk management, data and privacy protections and internal controls. TDI may also ask questions regarding any specific use of AI or its application.

Check back regularly with TheTitleReport.com for the latest developments regarding AI and title operations.

An overview of FinCEN's massive regulatory push

By Conner Howard — Editor, *The Legal Description*

THE LEGAL DESCRIPTION

Most agree it's a worthwhile endeavor to prevent criminal elements from using real estate transactions to launder money and cover for other illicit activities. The debate starts when industry professionals and regulators of that industry can't agree on what constitutes a "suspicious transaction," or what constitutes a reasonable reporting standard.

That's what we saw last year when the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) announced the Anti-Money Laundering Regulations for Residential Real Estate Transfers, more commonly known as the Residential Real Estate Reporting Rule.

As proposed by FinCEN, the rule aimed to reduce money laundering by boosting transparency in the U.S. residential real estate market. The rule requires certain transfers of residential real estate, whether purchases or gifts, to be reported if four specific conditions are met:

- The property is residential and located in the U.S.
- The transfer is non-financed
- The transfer is made to a transferee entity or trust
- No exemptions apply to the transfer

The rule also outlines seven functions that real estate professionals may perform, establishing a hierarchy for identifying the "reporting person" who is responsible for filing the required real estate transaction report. This person may also enter a designation agreement with others involved in the transaction.

As the effective date of March 1 neared, FinCEN regularly released FAQs, bulletins and other informational documents outlining the transaction reporting requirements that title companies would need to comply with. Similar to the beneficial ownership information (BOI) reporting obligations of previous FinCEN regulations, the rule requires a "reporting person" to submit an online real estate report containing 111 fields by the end of the month after closing, or within 30 days post-closing. Extensive information about various parties involved in the transfer is required to be collected and reported under the rule.

Because the reporting person may not have access to all necessary data, the rule also introduced a reasonable reliance rule, encouraging the sharing of information from other parties. This addendum allows the reporting person to depend on provided information as long as they do not have reasons to doubt its reliability, with some rules around BOI being more restricted.

The rule does not mandate reporting entities to retain copies of their submitted reports, but it does require them to keep BOI certification information for five years. The consequences for failing to file accurate reports fall under existing Bank Secrecy Act (BSA) guidelines, which detail both criminal and civil penalties for noncompliance. The rule also does not currently apply to commercial real estate, though FinCEN hasn't discounted the possibility of extending the regulation in that direction in the future.

FinCEN has claimed that it would securely maintain all data reported under the rule, allowing access only to authorized personnel such as law enforcement, but that hasn't stopped some critics of the rule from expressing concern over the sensitive nature of some of the information the rule demands.

Critics of the rule have also bemoaned not only the sheer scope of reports the rule calls for, but the additional staff hours and training that are expected to be necessary to stay compliant with the rule's reporting standards. One estimate cited by Holland & Knight claims that implementation of the rule impacted approximately 172,753 reporting persons, resulting in between 800,000 and 850,000 reports that would need to be filed annually, as well as supplemental training for more than 642,000 personnel each year.

This all adds up to a massive regulatory obligation for the real estate industry – one that not many were happy about. Luckily for them, high-profile court cases challenging the rule would arise and stop the clock right as enforcement of the rule was set to begin.

Taken to court

The rule had not one, but four legal challenges brought against it in various jurisdictions. Currently, there are four lawsuits on the books against the rule's architects in federal courts. Two cases have been decided in the rule's favor, one other case is still being heard and, most crucially, the final case found that FinCEN overstepped its authority and froze enforcement of the rule.

Flowers Title Companies LLC v. Bessent et al, decided on March 19 in the United States District Court for the Eastern District of Texas, Tyler Division, ended with the court finding the rule to be in conflict with the BSA. The court vacated the rule as a result, asserting that Congress did not allow such reporting mandates. The case was brought against not only FinCEN itself but also named FinCEN Director **Andrea Gacki** and Treasury Secretary **Scott Bessent** as co-defendants. This decision is being appealed by the DOJ.

On the other hand, two cases went in FinCEN's favor. The first was *Fidelity National Financial Inc. v. Secretary Scott Bessent*, which was decided on Feb. 19 in the U.S. District Court, Middle District of Florida, Jacksonville Division. The case challenged the rule, claiming it exceeded FinCEN's authority and violated constitutional rights. District Judge **Wendy Berger** ruled in favor of the rule, accepting a recommendation report by U.S. Magistrate Judge **Samuel Horovitz**, who represents the U.S. District Court, Middle District of Florida. Fidelity is appealing this decision.

The third case, *Corley v. U.S. Department of the Treasury*, was decided on Feb. 25 in the U.S. District Court for the Northern District of Texas, Lubbock Division. The plaintiffs in this case, including homeowner **Jason Corley** and real estate attorney **Zach Long**, argued that FinCEN's rule improperly regulated local activities. However, the presiding court decided that the rule was constitutional, supporting its decision with legal precedents.

The final case, *Puerto Rico Privacy Association Inc. v. U.S. Department of the Treasury*, filed on Feb. 25, claims the rule is unauthorized and unconstitutional. The proceedings have been paused pending the *Flowers* appeal. FinCEN has advised that no real estate reports are required while the appeal is pending.

This smattering of court decisions and ongoing legal conflicts presented real estate professionals with what could easily be a confusing picture – with two district courts issuing conflicting decisions and other cases hanging in limbo or stuck in the appeals process, where does that leave us?

Kevin Shepherd, a partner with Venable LLP who regularly assists clients with complex real estate transactions, told *The Legal Description* that the differences between the *Fidelity* and *Flowers* cases presented the plaintiffs with distinct opportunities for arguments.

"I do not think it's a matter of which plaintiff made the better argument; rather, the administrative law based argument advanced by *Flowers* allowed the district court to resolve the issue on a statutory interpretation, and not constitutional, basis," Shepherd said. "This approach gave the *Flowers* court room to focus on the statutory language per *Loper Bright* without deferring to FinCEN's interpretation of the statutory language."

The debate continues

Though only one case against FinCEN was met with victory for the plaintiffs, enforcement of the rule was effectively paralyzed by District Judge **Jeremy Kernodle**, representing the Tyler Division of the U.S. District Court for the Eastern District of Texas, when he ruled on March 19 in favor of Flowers' position that the rule presented a violation of BSA standards.

As a result, the rule remains on the books but is not currently being enforced. This state of affairs was met with a sigh of relief from many in the industry who – in sympathy for the arguments presented in the cases outlined above – see the rule as unnecessarily burdensome.

Not everyone was happy with the ruling that left this regulation in limbo, however. Following Kernodle's decision, the Financial Accountability and Corporate Transparency (FACT) Coalition, a non-partisan alliance of state, national and international policy advocates, decried the ruling as a move to "strike down safeguards against money laundering."

"In striking down this rule, the district court in Texas has just sided with cartels, money launderers, and U.S. adversaries and given them free license to continue moving their dirty cash through U.S. real estate," **Ian Gary**, executive director of the FACT Coalition, said in a March 20 press release. "Two other federal courts have recently upheld the rule as lawful and constitutional. We therefore expect the government to swiftly appeal this outlier decision and the appellate court to overturn it."

The FACT Coalition's support for the rule dates back to the initial rulemaking period, during which FinCEN publicly solicited comments from industry stakeholders. In a letter to Gacki dated April 16, 2024, the organization outlined its broad support for the proposed rule and its application of national anti-money laundering standards for residential real estate.

"FACT welcomes this long-overdue rulemaking to mitigate money laundering risks in the U.S. residential real estate sector," the letter read in part. "We believe FinCEN's proposal is well crafted to safeguard the U.S. real estate industry from illicit finance, reduce the volumes of dirty money now plaguing some real estate transfers, and prevent the rise of debilitating loopholes in anti-money laundering (AML) oversight within the sector."

The FACT Coalition also expressed support for FinCEN's requirement for reporting on certain transfers financed by private lenders or sellers, which are deemed higher risk. One supporting example given was one involving **Gagik Khachatryan**, who allegedly used disguised loans to purchase a mansion in Los Angeles, highlighting how foreign individuals can circumvent AML checks by using private loans.

"FinCEN may need to recalibrate the rule to hone in on those transactions that are demonstrated to have a higher level of risk and suspicion of money laundering as opposed to a reporting regime that compels the reporting of virtually all non-financed residential real estate transactions."

— Kevin Shepherd,
Venable LLP Partner

However, the support wasn't absolute. In their comments, the FACT Coalition pointed out that the proposed rule's language on exceptions for financed transfers lacks clarity on whether the exception applies to all categories of reportable transfers. To enhance clarity, the coalition suggested amending the language to ensure that the exception is consistently applied to all specified categories of real estate transfers involving credit from compliant financial institutions.

For his part, Shepherd also sees room for improvement in FinCEN's latest attempt to impose rigorous reporting standards on an area of the economy that has seen its fair share of corruption and criminal activity.

"The FinCEN reporting rule casts an extraordinarily broad net in capturing data on residential real estate transactions on a nationwide basis," Shepherd said.

"FinCEN may need to recalibrate the rule to hone in on those transactions that are demonstrated to have a higher level of risk and suspicion of money laundering as opposed to a reporting regime that compels the reporting of virtually all non-financed residential real estate transactions. Not every single non-financed residential real estate transaction is inherently suspicious."

With pending cases and appeals up in the air, as well as one major courtroom defeat to content with, now might be the best time for FinCEN to reflect on the wording and implantation of this heavily – though not universally – criticized anti-money laundering rule. Shepherd noted that a walking back and modification of ill-received regulations is not an unprecedented phenomenon.

"Given how FinCEN has dialed back the breadth of the Corporate Transparency Act regulations under an interim final rule (the final rule is currently pending), it would not be surprising if FinCEN recalibrates the scope of the non-financed residential real estate reporting rule," he said.

For the lastest developments with the FinCEN rule, as well as other industry compliance issues and state attorneys general enforcement actions, visit TheLegalDescription.com.