

MBA's COMMERCIAL/MULTIFAMILY FINANCE

Understanding the Regulatory Compliance Framework for Commercial and Business-Purpose Mortgage Loans

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Table of Contents

- Executive Summary 4
- I. ECOA Broadly Applies to All Credit Transactions, Regardless of the Business Purpose 5
- II. Additional Consumer Protection Laws May Apply Depending on the Nature or Location of the Secured Property, Despite Business Purpose 6
 - The Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA) 6
 - The Flood Disaster Protection Act (Flood Act) 8
 - The Home Mortgage Disclosure Act (HMDA) 8
 - The Fair Housing Act (FHA) 9
- III. If the Loan Involves an Individual, Compliance with Consumer Protection Laws May be Required, Despite Business Purpose. 10
 - The Fair Credit Reporting Act (FCRA) 10
 - The Electronic Funds Transfer Act (EFTA) 11
 - The Servicemembers Civil Relief Act (SCRA) 11
 - CAN-SPAM 12
 - The Telephone Consumer Protection Act (TCPA). 12
- IV. State Law Considerations 13
- Takeaways 14
- Appendix A 15

Executive Summary

Although the regulatory compliance framework is well-defined for mortgage lenders making loans to consumers, the applicability of consumer protection laws to commercial and business-purpose mortgage loans tends to be less clear. A common view is that commercial and business-purpose loans are exempt entirely from the panoply of federal and state laws and regulations governing consumer mortgage lending. However, while this is generally the case, certain consumer protection laws apply to secured transactions involving real estate, irrespective of the fact that the loan is secured by commercial real estate or the loan is for a business purpose.

The Mortgage Bankers Association¹ asked us, through this paper, to address the more significant federal laws and regulations that are commonly-perceived to apply only in the consumer mortgage context, but may nonetheless apply to commercial and business-purpose mortgage loans. We have further summarized the potential applicability of these laws in Appendix A. In addition, we provide a brief overview of certain state law issues, including state licensing requirements.² Lenders must be mindful that the Equal Credit Opportunity Act will always apply and, thus, lenders must ensure their practices do not discriminate against, or disparately impact, borrowers in a protected class. In addition, irrespective of the commercial nature or business-purpose, the Flood Disaster Protection Act could apply depending on the type of lender and location of the secured property.

The potential applicability of numerous other laws and regulations largely turn on two key questions:

1. Is the loan secured by property that could be deemed a “residence” or “dwelling”?
2. Is an individual, such as a guarantor or co-applicant, impacted by the transaction?

If the answer to either question is “yes,” lenders should carefully examine the applicability of the various laws and regulations addressed in this paper and any exemption on a case-by-case basis, as the risks of non-compliance include possibly stiff penalties, enforcement actions and private rights of action for certain violations.

¹ Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. The information presented in this paper as well as the State Licensing Database is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the paper or State Licensing Database.

² MBA members can access a State Licensing Database at mba.org.

I. ECOA Broadly Applies To All Credit Transactions, Regardless of the Business Purpose

All deferred-payment credit transactions, including secured transactions involving real estate, are subject to fair lending laws and scrutiny under ECOA, even when such transactions are of a commercial nature or for a business purpose. ECOA prohibits discrimination against any applicant on the basis of race, color, national origin, religion, sex, gender, marital status, age, or public assistance status. ECOA's implementing regulation, Regulation B, also imposes procedural requirements on lenders, including notification requirements for business and consumer credit applications.

Importantly, ECOA's anti-discrimination protections apply to "any person who has received an extension of credit from a creditor" and "any person who is or may become contractually liable for an extension of credit," including corporations, partnerships, cooperatives, and associations. In addition, Regulation B imposes varying notification requirements on business-purpose lenders, depending on whether the loan applicant is a small business or an individual applying for business-purpose credit, whether the application is made for trade credit or credit incident to a factoring agreement, or if the applicant is a business with revenues exceeding one million dollars. Guarantors, co-applicants, or additional signatories, who are often required for business-purpose loans, can trigger additional considerations under Regulation B, for example, adverse action notification requirements.

ECOA's coverage spans across all aspects of a credit transaction and covers more than anti-discrimination requirements. For example, Regulation B's scope governs information requirements, appraisal requirements, investigation procedures, standards of creditworthiness, terms of credit, furnishing of credit information, adverse action notices, revocation, alteration, or termination of credit, and collection procedures. Areas that most typically lead to ECOA inquiries include marketing, underwriting, loan pricing, redlining and reverse redlining, loan modifications, and foreclosures. As a result, a risk-based fair-lending policy with appropriate underwriting, pricing, and exceptions guidance should be developed, as should a program for the periodic monitoring of all aspects of credit transactions.

II. Additional Consumer Protection Laws May Apply Depending on the Nature or Location of the Secured Property, Despite Business Purpose

In addition to ECOA, real estate-secured transactions may implicate a number of other consumer protection laws, depending on the nature or location of the secured property. For example, the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) impose a number of significant compliance and disclosure obligations on mortgage lenders. However, certain transactions are carved out from TILA and RESPA, including loans made primarily for a business or commercial purpose.

In contrast, several consumer protection laws may apply to commercial properties and business-purpose loans, irrespective of the loan's purpose. For instance, if a commercial or business-purpose loan is secured by property that is located in a special flood hazard area, the Flood Disaster Protection Act may apply. In addition, the applicability of the Home Mortgage Disclosure Act (HMDA) turns on the nature of the secured property. Similarly, under the Fair Housing Act (FHA), creditors are prohibited from discriminating in residential real estate transactions involving a "dwelling," which is defined broad enough to cover many properties that are often considered commercial, such as apartment complexes.

Below, we provide additional information on these laws and the types of mortgage loan transactions to which they apply.

The Truth in Lending Act (TILA) and Real Estate Settlement Procedures Act (RESPA)

TILA and RESPA impose significant compliance and disclosure requirements on mortgage lenders, including the TILA-RESPA Integrated Disclosure (TRID) Rule, the Ability-to-Repay/Qualified Mortgage (ATR/QM) Rule, the Loan Originator Compensation (LO Comp) Rule, the Home Ownership and Equity Protection Act (HOEPA), and RESPA Section 8's anti-kickback requirements. Importantly, loans made for a business purpose are generally exempt from the coverage of TILA and RESPA, and TILA further exempts loans made to non-natural persons. However, the exemptions are nuanced and lenders should carefully examine the applicability of any exemption on a case-by-case basis.

TILA AND REGULATION Z

TILA and its implementing regulation, Regulation Z, set forth disclosure, advertising, and other requirements for various consumer credit transactions, including mortgage loans. However, certain transactions are exempt, including loans made to non-natural persons (e.g., corporations or LLCs), irrespective of the purpose of such loan. In other words, if a loan is extended to an entity as opposed to an individual, TILA and Regulation Z will not apply. Note, however, that credit extended to some types of trusts may still be considered to be credit extended to a natural person and thus, such transactions must be carefully evaluated.

In addition to the exemption for loans made to entities, TILA and Regulation Z do not apply to loans made primarily for business or commercial purposes. To determine whether a loan has a business or a consumer purpose, the Official Commentary to Regulation Z offers the following five-factor test:

1. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose;
2. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose;
3. The ratio of total income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose;
4. The size of the transaction. The larger the transaction, the more likely it is to be business purpose; and
5. The borrower's statement of purpose for the loan.

The purpose of the loan, and not the nature of the property used as security or the source of repayment, should be determinative. Examples of business-purpose credit include a loan to expand a business, even if secured by the borrower's residence or personal property, and a loan to improve a principal residence by putting in a business office.

The Commentary to Regulation Z also provides special rules regarding certain non-owner and owner-occupied rental properties. Loans to acquire, improve, or maintain

non-owner-occupied rental property are deemed to be for business purposes, as long as the owner does not expect to occupy the property for more than 14 days during the coming year. If the property will be owner-occupied for more than 14 days within the coming year, the loan will still be considered to have a business purpose if the loan is used to acquire rental property with more than two housing units or the loan is used to improve or maintain rental property with more than four housing units. Even if the rental property does not meet the per se standard for business-purpose credit, the loan may still be considered business-purpose credit under the five-factor test described above.

Practically speaking, TILA and Regulation Z's exemption for business-purpose loans, coupled with the fact that loans to acquire, improve, or maintain non-owner occupied rental property are categorically considered business purpose, should generally operate to exclude most lending on multifamily properties (five or more units) from TILA coverage. However, there is no bright-line rule under TILA automatically limiting its application to loans secured by one to four family properties.

RESPA AND REGULATION X

RESPA and its implementing regulation, Regulation X, also set forth various requirements and restrictions in connection with the origination and servicing of mortgage loans. Among others, RESPA prohibits kickbacks and unearned fees, requires disclosure of mortgage settlement charges, and regulates servicing activities such as escrow maintenance, the imposition of force-placed insurance, and loss mitigation.

RESPA applies to a "federally related mortgage loan," which is defined, in part, as any loan (other than temporary financing such as a construction loan) which is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families. Unlike TILA, which applies generally to extensions of consumer credit, RESPA's coverage is limited to loans secured by residential real property upon which either a one to four family structure is located or is to be constructed using proceeds of the loan; or a manufactured home is located or is to be constructed using proceeds of the loan. Accordingly, a loan secured by commercial property or by a multifamily structure (i.e., 5 or more units) will not generally be subject to the coverage of RESPA.

Further, RESPA and Regulation X specifically exempt loans made primarily for a business or commercial purpose and rely upon the definitions and guidance set forth in Regulation Z for purposes of this determination. Regulation X also includes several other exemptions, such as certain temporary financing, or loans secured by vacant land or unimproved property, unless within two years of closing the proceeds from the loan will be used to construct or place a structure or manufactured home on the property. However, unlike TILA and Regulation Z, RESPA and Regulation X do not exempt loans made to non-natural persons (although a loan otherwise subject to RESPA could potentially be exempt on business-purpose grounds).

The Flood Disaster Protection Act (Flood Act)

The Flood Disaster Protection Act, its subsequent amendments and its regulations (collectively, the Flood Act) potentially apply to any loan secured by improved real estate (including residential, industrial, commercial, and agricultural building, buildings under construction, mobile homes, condominiums, and cooperative buildings) located in a special flood hazard area, even if the loan is for a commercial or business purpose. Under the Flood Act, “regulated lending institutions” are prohibited from making, increasing, extending, or renewing mortgages secured by improved real estate, unless covered by flood insurance. Regulated lending institutions are also required to make certain disclosures regarding flood insurance and comply with other related flood insurance provisions, such as escrow and force-placed insurance requirements. For example, when a lender or servicer determines a property is located in a special flood hazard area but is not covered by flood insurance or is covered by insufficient insurance, the lender or servicer must notify the borrower that the borrower should obtain, at the borrower’s expense, the appropriate amount of flood insurance. In addition, if the borrower fails to purchase adequate flood insurance after being notified of the need, the lender or servicer must purchase the insurance on behalf of the borrower.

A “regulated lending institution” is defined as “any bank, savings and loan association, credit union, farm credit bank, Federal land bank association, production credit association, or similar institution subject to the supervision of a Federal entity for lending regulation.” In turn, “Federal entity for lending regulation” is defined as “the Board of Governors of the Federal Reserve System, the

Federal Deposit Insurance Corporation, the Comptroller of the Currency, the National Credit Union Administration, and the Farm Credit Administration, and with respect to a particular regulated lending institution means the entity primarily responsible for the supervision of the institution.”

If a lender does not meet the definition of “regulated lending institution,” compliance with the Flood Act may not be required. However, the Flood Act also imposes flood insurance requirements on loans purchased by Fannie Mae or Freddie Mac. In addition, other investors or mortgage insurers (e.g., the Federal Housing Administration) require that loans comply with the Flood Act to be eligible for purchase or insurance. As a result, the Flood Act may be indirectly applicable even if the lender does not meet the definition of a “regulated lending institution.” In addition, even if compliance is not strictly required, it is often a best practice for lenders to voluntarily comply.

The Home Mortgage Disclosure Act (HMDA)

HMDA and its implementing regulation, Regulation C, require covered financial institutions to collect and report data regarding mortgage loan originations, applications, purchases, and requests under a preapproval program. Data that must be collected and reported includes, but is not limited to, the ethnicity, race, gender, and gross income of applicants and borrowers. Even when the applicant or borrower is not a natural person, financial institutions are still obligated to report “not applicable” with respect to the subject entities’ ethnicity, race, and sex. In 2015, the CFPB published a final rule making significant changes to the HMDA requirements under Regulation C pertaining to institutional coverage, transactional coverage, the data that must be collected, recorded, and reported, and the processes for reporting and disclosing data (the 2015 HMDA Final Rule). Many of these requirements take effect on January 1, 2018.

There are two coverage factors to consider when it comes to HMDA applicability: 1) institutional coverage requirements; and 2) transactional coverage requirements. Separate institutional coverage criteria apply depending on whether the lender is a depository institution or another type of mortgage lending institution. Such coverage is based, in part, on the volume of covered closed-end mortgage loans and open-end lines of credit that an institution originated in the last two years.

The 2015 HMDA Rule generally adopts a dwelling-secured standard for whether a transaction is covered, and sets forth certain exclusions from coverage. Notably, a “dwelling” is defined as a residential structure, whether or not attached to real property, and includes but is not limited to a detached home, an individual condominium or cooperative unit, a manufactured home or other factory-built home, or a multifamily residential structure or community. Under the 2015 HMDA Rule, excluded transactions include, among others, a closed-end mortgage loan or open-end line of credit made primarily for a business-purpose. However, this exclusion will not apply if the loan or line of credit is deemed a home purchase loan (i.e., a loan secured by and made for the purpose of purchasing a dwelling), a home improvement loan (i.e., a dwelling-secured loan for repairing, rehabilitating, remodeling or improving a dwelling), or a refinancing.

Examples of covered business-purpose or commercial transactions include: 1) a loan or line of credit to purchase or to improve a multifamily dwelling or a single-family investment property or a refinancing secured by such property; 2) a loan or line of credit to improve a doctor’s office or a daycare center located in a dwelling other than a multifamily dwelling; and 3) a loan or line of credit to a corporation if the funds from the loan or line of credit will be used to purchase or to improve a dwelling, or if the transaction is a refinancing. For home improvement loans secured by mixed-use property, reporting is not required for loans or lines of credit to improve commercial space in a multifamily dwelling, but reporting is required if the loan or line of credit is used to improve commercial space in a dwelling other than a multifamily dwelling.

The Fair Housing Act (FHA)

In addition to the anti-discrimination protections of ECOA, if the commercial or business-purpose loan is secured by residential real estate, the FHA may also apply. The FHA prohibits discrimination on the basis of race, color, national origin, religion, sex, familial status, and disability. The FHA applies to any person or entity whose business engages in “residential real estate-related transactions,” including loans to purchase, construct, improve, repair or maintain a “dwelling” or loans secured by residential real estate. The term “dwelling” is broadly construed and is defined as any structure (or portion of a structure) intended for occupancy as a residence by one or more families and any vacant land offered for sale or lease for the construction or location of such a structure.

The FHA applies irrespective of whether the loan is made for a business purpose or for the acquisition of rental property, and irrespective of whether the borrower is a corporate entity or an individual. By its terms, the FHA applies to originators, as well as secondary purchasers or assignees of loans (to the extent the purchaser or assignee engages in the wrongful conduct), and declares it unlawful for any person or entity engaged in the purchasing of loans or other debts or securities which support the purchase, construction, improvement, repair or maintenance of a dwelling, or which are secured by residential real estate, to discriminate in refusing to purchase such loans, debts, or securities, or to impose different terms or conditions for such purchases. To address the FHA requirements, lenders should have clear policies in place that provide for internal controls, training, clear and accurate documentation, and monitoring, as well as policies that emphasize compliance in the underwriting and pricing processes to reduce the risk of discrimination claims and fair lending investigations.

III. If the Loan Involves an Individual, Compliance with Consumer Protection Laws May be Required, Despite Business Purpose

Depending on how the transaction is structured, such as in lending scenarios where an individual guarantor or co-applicant is involved, compliance with consumer protection laws may be required, even if the loan is for a business purpose. For example, the Fair Credit Reporting Act (FCRA) provides certain rights to “individuals” with respect to their credit reports and imposes obligations on lenders that report credit information.

Similarly, the Electronic Funds Transfer Act (EFTA) provides certain rights to “natural persons” with respect to electronic funds transfers. In addition, if a guarantor, co-applicant, or additional signatory is an U.S. service-member, protections under the Servicemembers Civil Relief Act (SCRA) may apply.

Consumer protection laws, such as the Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act, the FTC CAN-SPAM Rule, and the Telephone Consumer Protection Act (TCPA), are also important to keep in mind when considering ongoing relationships with borrowers. These regulations potentially limit how lenders are permitted to communicate with commercial borrowers and any individual signatories to the loan, including through restrictions on calls, faxes, and text messages. Compliance with the CAN-SPAM and TCPA is especially relevant to lenders using auto-dialers or mass email and text messaging campaigns.

The Fair Credit Reporting Act (FCRA)

If a commercial or business-purpose mortgage loan involves an individual guarantor, co-applicant, or additional signatory, FCRA may apply, especially when an individual’s creditworthiness is relied upon in making the loan. The applicability of FCRA will depend on several factors, such as whether the individual will be personally liable on the loan, and the type of report used to evaluate the individual’s creditworthiness.

FCRA and Regulation V impose obligations on lenders who use or share consumer report information or furnish information to consumer reporting agencies. A “consumer report” means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of servicing as a factor in establishing the consumer’s eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes; (2) employ-

ment purposes; or (3) any other purpose authorized under FCRA. For example, a consumer's credit report would generally be considered a consumer report under FCRA. The FTC previously issued guidance that a report from a credit reporting agency on the personal credit report of a consumer to a business credit grantor is a "consumer report" regardless of the purpose for which the information may be used. However, a report on a business entity, or a report on an individual that addresses only their business history, and not their personal credit or employment history, is not a "consumer report" under FCRA.

FCRA requires that a lender must have a permissible purpose to obtain a consumer report, and sets forth specific circumstances that constitute a permissible purpose. A creditor will always have a permissible purpose if the consumer provides a written authorization to access his or her credit report. Under FTC guidance, FCRA allows a creditor to obtain a consumer report on a consumer in connection with a business credit transaction if the consumer is or will be personally liable on the loan as a co-signer or guarantor. However, if an individual is associated with the loan but would not be personally liable for repayment of the credit, a lender would not have a permissible purpose to obtain that individual's consumer report, and would need written permission in order to do so.

FCRA also requires that if a creditor takes adverse action based, in whole or in part, on the information contained in a consumer report, the creditor must provide the person with an adverse action notice. For business-purpose lenders that report consumer information to a credit bureau, the lender must further ensure any reported information is accurate and complete and that any disputes about the accuracy of information reported are properly investigated.

FCRA allows for potential class action litigation, and in the lending space, those cases tend to result from furnishing or reporting old or inaccurate information, failure to provide adequate notices, and failures to follow debt dispute procedures. Adequate policies, careful implementation of those policies, and accurate disclosures should mitigate against those risks, though single plaintiff cases may still arise.

The Electronic Funds Transfer Act (EFTA)

Individual guarantors, co-applicants, or additional signatories to commercial and business-purpose loans can also trigger special considerations under Regulation E,

the implementing regulation of EFTA. Like FCRA, EFTA applies to any "consumer," which is broadly defined to include any natural person. The primary objective of EFTA and Regulation E is to protect individuals engaged in electronic fund transfers and remittance transfers.

If an electronic fund transfer is initiated in connection with a commercial or business-purpose loan, and such transfer is debited from the account of a natural person (e.g., an individual guarantor or co-applicant), compliance with EFTA and Regulation E may be required. Under EFTA, financial institutions are prohibited from requiring preauthorized electronic transfers as a condition of a loan. In addition, EFTA and Regulation E require certain financial institutions and others engaging in electronic fund transfers to provide various disclosures regarding preauthorized transfers, unauthorized transactions and limits on liability, stop payment privileges, and error resolution procedures, among others.

The Servicemembers Civil Relief Act (SCRA)

To the extent the commercial or business-purpose loans deal with individual guarantors, co-applicants, or additional signatories who are U.S. servicemembers, SCRA may apply. SCRA provides a wide range of protections to military servicemembers in connection with mortgage loans, such as protection from sale or foreclosure of real property owned by a servicemember. "Servicemember" is defined as a member of the uniformed services, which in turn includes the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service. SCRA may apply when a servicemember guarantees the obligations of an entity and such servicemember's presence is necessary to run and maintain the business.

If SCRA applies, lenders cannot foreclose on, sell, or seize a property for a breach of a payment obligation on real property originated before the period of the servicemember's military service that is secured by a mortgage, trust deed, or other security in the nature of a mortgage except upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court or the servicemember's waiver of rights pursuant to a written agreement. In addition, an obligation or liability bearing interest at a rate in excess of 6% per year may not bear interest at a rate in excess of 6% during the period of military service and one year thereafter in the

case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage. Because controversies involving SCRA tend to arise on a case-by-case or individual-specific basis, we recommend business-purpose lenders have clear policies in place providing for compliance in the case of guarantors or co-applicants who are U.S. servicemembers.

CAN-SPAM

The CAN-SPAM Act and the FTC CAN-SPAM Rule make it unlawful to send certain electronic mail messages that contain false or deceptive information and provide other protections for email users, such as the right to stop receiving emails. The Act covers all commercial messages, defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service,” including email that promotes content on commercial websites. The Act and Rule make no exception for business-to-business emails.

The Telephone Consumer Protection Act (TCPA)

TCPA and implementing FCC regulations impose restrictions on calls, text messages, and faxes, and further prohibit calls to residential or wireless numbers listed on the Do-Not-Call Registry. TCPA also prohibits, in pertinent part, telephone calls to any “residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes,” and telephone calls “using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”

CAN-SPAM and TCPA violations can sometimes lead to enforcement actions by the FTC, in addition to private litigation, and TCPA has been particularly popular for class action litigation. The risks associated with non-compliance vary depending on the frequency of lender communications or if business-purpose lenders are using automated dialing machines or blast e-mails, as the potential penalties can accrue on a per call or per email basis. Nonetheless, proper policies and training can help mitigate much of this risk.

IV. State Law Considerations

In addition to federal law considerations, commercial and business-purpose lenders may be subject to a number of state law requirements. In evaluating the state regulatory landscape, an important starting point is what state mortgage licensing requirements apply to brokering, originating, or servicing commercial or business purpose mortgage loans.

In contrast to the consumer residential mortgage space, where a license will generally be required in every state to originate loans, and a license is required in many states to service loans, licensing requirements vary significantly when it comes to loans secured by commercial property, or business-purpose loans secured by residential real property. For example, there are some states, including but not limited to Arizona, California, and Nevada, where a mortgage license may be required to make or broker commercial mortgage loans (i.e., loans secured by commercial or multifamily properties, as opposed to 1-4 family residences). In addition, a number of states require licensing to make, broker or service business or investment-purpose mortgage loans secured by residential real property, even though such loans are not consumer-purpose loans.

Depending on the particular state at issue, and the type of collateral securing the mortgage loan, some factors that may affect the licensing analysis include whether the borrower is a natural person or an entity, the loan amount, whether the lender is an institutional investor, whether the lender intends to hold the loan or sell it to an investor, whether the lender is a financial institution such as a bank, whether an entity is servicing its own loans or servicing for third parties, and the applicability of other exemptions offered by a particular state. Since licensing requirements vary significantly by state, lenders should carefully review and consider the licensing requirements in each of the jurisdictions where they do business.

Other state laws governing various aspects of mortgage lending—such as those prohibiting predatory lending, high-cost loans, referral fees, and unfair and deceptive acts and practices (UDAP), may also apply to business-purpose loans. All fifty states and the District of Columbia have some form of UDAP law, many of which are modeled after the FTC Act and afford great weight to the FTC's interpretations of its UDAP provisions. Under the FTC Act, a representation or practice may be found to be deceptive or misleading if: (1) there is a representation, omission, or practice that misleads or is likely to mislead the consumer; (2) the act or practice would be deceptive from the perspective of a reasonable consumer; and (3) the representation, omission, or practice is material. Similarly, a representation or practice may be found unlawful if the act: (1) causes or is likely to cause substantial injury to consumers, (2) cannot reasonably be avoided by consumers, and is (3) not outweighed by countervailing benefits to consumers or competition. Though the standard focuses on consumers, the FTC has previously interpreted the term “consumer” to include businesses. Thus, the FTC Act's prohibition on UDAP could apply to acts or practices that mislead commercial borrowers and any individuals involved, such as guarantors and co-applicants.

Takeaways

It is important to remember that the commercial or business-purpose nature of a loan does not necessarily provide a complete exemption from the significant federal laws and regulations that apply in the consumer mortgage context. As noted above, certain laws and regulations, such as ECOA, apply irrespective of the fact that the loan is secured by commercial real estate or the loan is for a business purpose. Then there are numerous other laws and regulations to be aware of, the applicability of which depends upon on factors such as the nature or location of the secured property, the purpose of the loan, or whether the transaction involves an individual guarantor or co-applicant.

With the ever-increasing focus on compliance in today's regulatory environment, lenders making commercial or business-purpose loans must be mindful of their potential federal and state compliance obligations and have carefully crafted policies and procedures in place to address these requirements. In addition, because some requirements apply not only to originators, but also to

assignees and purchasers of loans, it is critical that investors and purchasers acquiring commercial mortgages or business-purpose loans also take these considerations into account when performing due diligence reviews of the assets and the originators, as well as when structuring the acquisition and holding of these loans.

Appendix A

SIGNIFICANT FEDERAL LAWS THAT ARE COMMONLY-PERCEIVED TO APPLY ONLY TO CONSUMER LOANS	POTENTIALLY APPLIES TO COMMERCIAL AND BUSINESS-PURPOSE MORTGAGE LOANS?
Equal Credit Opportunity Act (ECOA)	Yes, always. ECOA's anti-discrimination provisions apply to all credit transactions, with certain aspects of ECOA (for example, the valuation rules) applying based on the nature of the secured property.
Truth-in-Lending Act (TILA)	Generally, no. TILA does not apply to business-purpose loans (including loans to acquire, improve or maintain non-owner occupied rental property) or loans made to entities.
Real Estate Settlement Procedures Act (RESPA)	Generally, no. RESPA does not apply to business-purpose loans. Further, loans secured by commercial and multifamily properties (5 or more units) generally fall outside the coverage of RESPA.
Flood Disaster Protection Act (Flood Act)	Yes, depending on the type of lender and location of the secured property. The Flood Act applies to any loan made by a regulated lending institution secured by improved real estate located in a special flood hazard area.
Home Mortgage Disclosure Act (HMDA)	Yes, but only if both the institution and the transaction are covered. HMDA's transactional coverage applies to commercial and business-purpose mortgage loans or lines of credit that are: 1) secured by a dwelling (which includes, among other things, a multifamily residential structure or community); and 2) deemed a home purchase loan, home improvement loan, or refinancing.
Fair Housing Act (FHA)	Yes, depending on the nature of the secured property. The FHA applies to commercial and business-purpose mortgage loans used to purchase, construct, improve, repair, or maintain a "dwelling" and loans secured by residential real estate.
Fair Credit Reporting Act (FCRA)	Yes, if the transaction involves the use of a consumer report. FCRA considerations can arise for commercial and business-purpose mortgage loans involving an individual guarantor, co-applicant, or signatory.
Electronic Funds Transfer Act (EFTA)	Yes, if the loan involves an individual. EFTA applies to commercial and business-purpose mortgage loans involving an individual guarantor, co-applicant, or signatory.
Servicemembers Civil Relief Act (SCRA)	Yes, if the loan involves an individual. SCRA applies to commercial and business-purpose mortgage loans involving an individual guarantor, co-applicant, or signatory who is a U.S. servicemember.
Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)	Yes, always. The CAN-SPAM Act imposes restrictions on all messages, including commercial messages.
Telephone Consumer Protection Act (TCPA)	Yes, always. TCPA imposes restrictions on calls to residential and wireless numbers, as well as use of text messages and faxes.



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