

New Hampshire Coronavirus Tracker: State Legislative Update; PPP Update; NCUA Update; TCPA Update – 7.13.20

State Housing/Foreclosure Legislation Update

<https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-07/hb1247-veto-message.pdf>

The Association is pleased to report that Governor Chris Sununu vetoed House Bill 1247, *An Act Relative to Mortgage Defaults and Nonpayment of Rent During the Novel Coronavirus Disease (covid-19) Outbreak State of Emergency* over the weekend. The bill would have provided protection for renters and homeowners unable to make their payments during the pandemic emergency and may be found at

http://www.gencourt.state.nh.us/bill_Status/billText.aspx?sy=2020&id=1660&xtFormat=html

The state moratorium on evictions and foreclosures was in force until July 1, 2020. Once the moratorium ended, the state extended the eviction notice requirement from seven to 30 days and allocated \$35 million in federal CARES Act money for a housing relief program. Governor Sununu stated that he believes that House Bill 1247 adds a major structural problem to an already precarious housing environment and that the effect would be to take a bad situation and make it worse.

Under the bill, renters could not be evicted unless a landlord offers a six-month repayment package to recoup the unpaid rent. Of great concern to the Association was a provision that required credit unions and other lenders to act “in good faith” with homeowners who are unable to pay their mortgages. At first glance, it appears that inclusion of such a clause is a simple restatement of a contractual requirement and harmless. In working closely with its Retained Lobbyist, the Association not only closely monitored the progression of the bill, offered testimony in opposition, and tracked the last minute compromise amendment that deleted other adverse provisions but added the good faith language. In addition, the Association strategized on the best path to strike this most recent new requirement imposed on credit unions as mortgage lenders in light of the fragile economy and anti-consumer position it would yield.

In general, it is not unusual for a borrower who is facing foreclosure to attempt to obtain a loan modification from a lender or a servicer acting for the lender. However, even if the borrower requests a loan modification, this does not automatically place the foreclosure process on hold. Nor does the lender automatically violate a duty owed to the borrower by proceeding with the foreclosure even though a loan modification has been requested. While there is an implied covenant of good faith, it cannot create rights and duties not otherwise provided for in the existing contractual relationship.

Furthermore, a lender may not abuse the modification process so as to trick or gain an unscrupulous advantage over the borrower. However, the concern of the Association was that, by including the good faith language directly into statute, a borrower would have an additional claim for damages against a lender for breaching an express, statutory covenant of good faith and fair dealing. More specifically, borrowers and/or their advocates could possibly have greater standing to raise a claim against a credit union for failure to halt a foreclosure while a loan modification application is pending (has been rejected for incompleteness and the borrower fails to further respond in a timely manner) or for failure to properly consider a borrower for loan a modification.

In 2019, Maine added this requirement into state law which may be found at:

<https://legislature.maine.gov/statutes/14/title14sec6113.html>

Massachusetts defeated such a proposal in during the last mortgage crisis in 2012. The bill did not have a two-thirds majority vote in either the House or the Senate.

PPP Update

1. EIDL Advance Program

The Small Business Administration ("SBA") announced the conclusion and success of the EIDL Advance program which provided small businesses and non-profits a total of \$20 billion in emergency funding. Having allocated the full \$20 billion that was appropriated by Congress, the SBA will discontinue making EIDL Advances to new applicants. EIDL Advances were the "grant" portions of the EIDL Loan. By law, the SBA is not permitted to issue new EIDL Advances once all program funding has been obligated. EIDL loan applications will still be processed even though the Advance is no longer available. Small businesses who have been impacted by COVID-19 are still encouraged to apply at www.sba.gov/disaster.

2. PPP Loan Forgiveness

The SBA is partnering with a financial services technology provider on the release of a PPP Forgiveness Platform to accept loan forgiveness decisions, supporting documentation, and requests for forgiveness payments from PPP lenders. The platform will have a user interface for Lenders to upload data and documentation, monitor the status of the forgiveness request, and respond to SBA in the case of inquiry. The PPP Forgiveness Platform will be available only to PPP Lenders, not PPP borrowers.

All PPP Lender Authorizing Officials ("AOs") currently in the CAFS/ETRAN system will receive a welcome email with instructions on how to access this new platform.

3. AO re-certification of CAFS accounts

As a reminder, to avoid missing an important email message because a credit union's account was closed or deactivated, please recertify. Mandatory SBA CLS Account Recertification starts **July 6, 2020 and ends August 7, 2020 at** https://caweb.sba.gov/cls/dsp_login.cfm.

4. PPP Loans "Under Review" Status

Lenders may have received this status, "Under Review," for a few of PPP Loans while servicing a PPP portfolio. The SBA is aware and plans to remove it shortly.

NCUA Eastern Region Webinar

The Association is hosting a virtual meeting with NCUA featuring Eastern Regional Director, John Kutchev, who will share an update on NCUA and their continued actions in response to the pandemic. Participants are invited to submit questions and observations they would like NCUA to address. Questions can be emailed to communications@ccua.org prior to and during the session.

A Dialogue with NCUA

Thursday, July 16, 2020

2:00 pm - 3:00 pm

There is no cost to participate in this regulatory forum, but registration is required. [Click HERE](#) to register. Instructions will be sent to registered participants.

NCUA Board Confirmation Process Update

<https://www.banking.senate.gov/hearings>

The U.S. Senate Banking Committee scheduled a confirmation hearing to be held on July 21 at 10:00 am to consider the nomination of Kyle Hauptman, of Maine, to the NCUA Board. Other nominations that will also be considered include two nominations to the Securities and Exchange Commission: Hester Maria Peirce, of Ohio, and Caroline A. Crenshaw, of the District of Columbia.

If confirmed, Mr. Hauptman will fill the expired board term of Board member J. Mark McWatters, whose term expired in August 2019. The remaining term of the seat expires on August 2, 2025.

U.S. Supreme Court Ruling on Telephone Consumer Protection Act

The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 before cell phones were commonly used. The law is under the jurisdiction of the Federal Communications Commission ("FCC") and governs communications when using an autodialer to contact consumers on their cell phones. Restrictions on wireless calls and text messages prohibit credit unions from contacting their member-owners. Though Congress intended TCPA to stop unwanted robocalls, it was not intended to block consumers from receiving legitimate business communications.

Last week, in a 7-2 decision, the U.S. Supreme Court upheld the constitutionality of the TCPA, but severed as unconstitutional the government debt exception. *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631 (2020). When first enacted in 1991, the TCPA prohibited calls placed using an automatic dialer or prerecorded voice with certain, specific exceptions. In 2015, Congress amended the TCPA to permit calls that relate to the collection of debts guaranteed by the U.S. government. That amendment does not permit the use of the same technology for debts guaranteed by private lenders or calls related to other topics, which served as the basis for challenges that the exception rendered the statute unconstitutionally content-based in violation of the First Amendment.

In the latest development, the Supreme Court held that the government debt exception to the TCPA was an unconstitutional content based speaker restriction. As a remedy, the majority opted to sever the government debt exception from the TCPA, which leaves the remainder of the TCPA fully operative. Therefore, calls intended to collect a debt owed to or guaranteed by the U.S. are exempt from the TCPA. The Court found that government debt collectors are not entitled to a special exception to the TCPA's ban on robocalling.

Unless a caller was relying upon the government debt exception to avoid liability under the TCPA, this decision does very little to change the status quo on TCPA enforcement and compliance. The opinion did not address the contentious definition of an automatic telephone dialing system under the TCPA. Accordingly, callers should remain vigilant whenever telemarketing and consistently audit their telemarketing procedures to avoid potential liability. Still many questions that need answering remain relative to how TCPA regulations apply to servicers and the financial services industry.

In other related activity on the topic, NCUA Chairman Rodney Hood recently wrote to the FCC seeking clarity on the treatment of COVID-19 related calls under the TCPA. The NCUA has supported and encouraged federally insured credit unions in their efforts to provide credit union members with prudent debt relief and help members understand the range of relief possibilities. Consumers may benefit from additional information about the various loan relief programs and options that may be available to them. Autodialed calls providing information about payment deferrals, fee waivers, loan term extensions, other loan modifications and forbearance could assist consumers during this difficult time. Chairman

Hood's letter may be found at <https://www.ncua.gov/about-ncua/leadership/honorable-rodney-e-hood/publications-chairman-rodney-e-hood/letter-fcc-regarding-third-party-petition-automated-calls>.

Consumer Financial Protection Bureau Director Kathy Kraninger has also called on the FCC to provide clarity on the matter.

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