

*Consumer  
Loan  
Workouts:  
FRB, FDIC,  
NCUA, OCC  
and OTC Joint  
Statement*

**WHAT THE REGULATORS  
ARE SAYING**

On April 17th, the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Office of Thrift Supervision issued a joint press release (the “Release”) encouraging financial institutions to work with homeowners who are unable to make mortgage payments and stating that institutions will not face regulatory penalties if they pursue reasonable workout arrangements with borrowers. See full release on the Federal Reserve website.

Examples offered by the Release of constructive workout arrangements include modifying loan terms, and/or moving borrowers from variable to fixed rate loans.

The Release also reminds banks and thrifts that programs that which low- or moderate-income homeowners from higher-cost loans to lower-cost loans may also receive favorable consideration under the Community Reinvestment Act (“CRA”).

**WHAT DOES IT MEAN?**

So is this a free pass on fair lending scrutiny for lenders trying to manage portfolio run off? No. In fact, while making it clear that the regulators are encouraging lenders to work with borrowers to resolve payment issues, the Release cautions lenders to follow “prudent” underwriting measures

and makes a point of stating, “...agencies will continue to examine and supervise financial institutions according to existing standards.”

Thus, while the Release provides encouraging news to lenders struggling to manage defaults, it does not suggest – and indeed discourages – abandoning the basics.

**STICK TO THE BASICS**

**Standardize Your Approach.** Document a standardized approach and train loan originator and servicing personnel to adhere to published guidelines. This gets tricky in the workout context, since there is a natural desire to treat each case on an individual basis and tailor the workout accordingly. However, failing to document and follow a prescribed approach, in the interest of retaining maximum flexibility, could leave you vulnerable to claims of inconsistent or disparate treatment. Remember, under an “effects” test, if a program, practice, or pattern of decisions results in members of a protected class receiving less favorable treatment, even if such an effect is unintended, a statutory or regulatory violation may be deemed to have occurred.

**Strive for Consistency.** Most borrowers in default are unable to meet their credit obligations as a result of one of a number of fairly standard reasons:

- (i) upward rate adjustment(s),

- (ii) changed personal circumstances such as disability or job loss,
- (iii) military deployment, or
- (iv) credit over-extension.

While the individual circumstances within such categories vary, a standard loan modification should address the general circumstances. Starting with a standard modification, then working toward more tailored options based on individual circumstances, will enable you to accommodate most requests in a uniform manner, while ensuring compliance with statutory and regulatory obligations.

**Minimize Manager Discretion.** In order to retain consistency, but at the same time retain flexibility, consider placing limits on the extent to which workout specialists can exercise discretion to modify existing obligations, and limit the specialists (e.g., servicing managers or trained workout specialists) authorized to sign off on loan modification proposals.

#### FOR MORE INFORMATION

For additional information regarding these developments, please contact a member of the Consumer and Merchant Financial Services group listed below.

Donna L. Wilson  
202-342-8475  
DWilson@KelleyDrye.com

Joel Hewer  
202-342-8520  
JHewer@kelleydye.com