



# FINTECH AND MARKETPLACE LENDER ISSUES


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2023 SW&M Hybrid Legal Update Seminar

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## Roadmap

- Terminology
- Regulation Pitfalls
- Contract Pitfalls
- Relationship Pitfalls
- Industry Pitfalls



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## Terminology

- Marketplace Lending:
  - Indirect Refinance or Indirect Non-purchase
  - “Marketing Agreement”
  - Sometimes vendor helps with paperwork
  - On purchaser’s paper
- FinTech: an extremely broad term
  - Internet lender, offload asset pool to CU
  - Often has independent funding source and assigns to CU after origination



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# REGULATION PITFALLS



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## Acquisition Regulations

### FEDERAL

- Regulation 701.22
  - Participation
- Regulation 701.23
  - Eligible Obligation
  - See proposed rule
- Legal Opinion 15-0813
  - Indirect = “originated by” if
    - Final underwriting decision
    - Assign loan soon after signed by borrower

### CALIFORNIA

- Financial Code 14959
  - Purchase loans to its members
  - Purchase loans originated by another credit union
- DFPI Interpretation
  - FinTech is originator, not CU buyer
  - No insight on traditional indirect
  - NCUA’s new rule might impact potential arguments



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## NCUA Proposed Rule

- Comment Period closes February 28, 2023
- NCUA Proposed Rule to codify legal opinion and extend to FinTech
  - But says it's purchased from the originator
- Other Provisions
  - Eliminate FCU Eligible Obligations cap except notes from liquidating CUs
  - Insert requirements for policy and purchase agreements



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## Memberization

- Important Element
- Timing?
  - Need to fit paperwork into origination process
- Full scope
  - Include any membership qualification requirements/paperwork
  - E.g., membership form for association
- What paperwork?
  - FCU – “subscribe to a share” = affirmative act for FCU’s membership
  - CACU – more ambiguous
    - Your signature card? Just an intent/consent to join a CU?



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## Memberization

- Who Pays for Membership
  - “Incentive for membership” - \$ comes from CU or elsewhere
  - When?
  - Disparate impact analysis?
- FCU long unwritten tradition
  - CA DFPI questioning?



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## CONTRACT PITFALLS



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## Contracts

- Normal Loan Purchase Issues
  - Representations – they know borrower better than you
    - Their process complies with law
    - If collecting information, accurate
  - Servicing standards
    - What do they need consent for?
    - What are they going to report and how often?
    - How can you replace them?
    - Collections license?
    - How can they change their policies?
  - General & lending specific legal compliance
  - Anti-churn



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## Contracts

- Special Recourse Issues:
  - Marketplace lenders don't want to repurchase, and don't want to adopt credit risk (true sale issues)
- Special Insurance Issues:
  - Are they in a business to have insurance re: fraud, defalcation, lending laws?
- Special Operational Issues:
  - Indirect refinance – who pays off old loan? who watches the money?



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# RELATIONSHIP PITFALLS



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## Relationship

- Due Diligence
  - Where networks of sellers/installers, ensure standards for quality/stability
    - Holder in Due Course Rule
  - Servicing & collections policies, also BSA/CIP policies
- Commitments
  - Minimum commitments to buy
  - What about minimum send?
  - Outs for market disruptions?
- Exclusivity? For what scope?
- What portion are you getting?
  - Just the subprime, or a good mix?

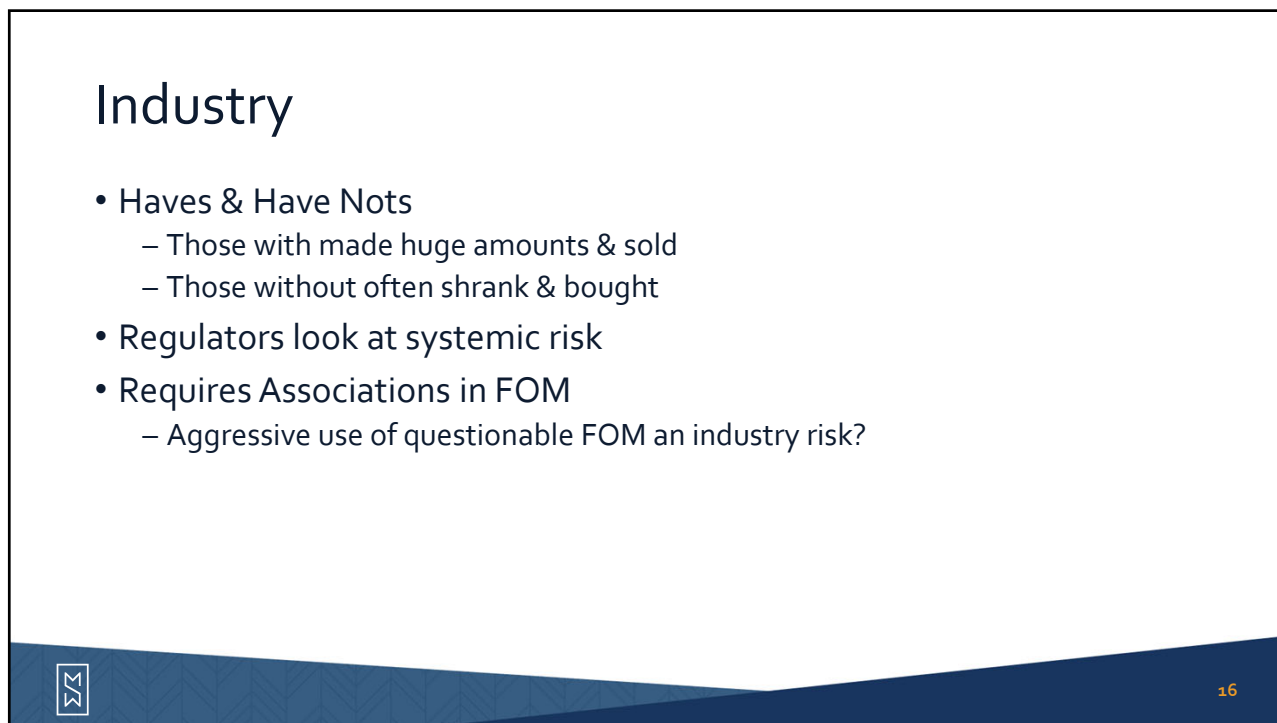


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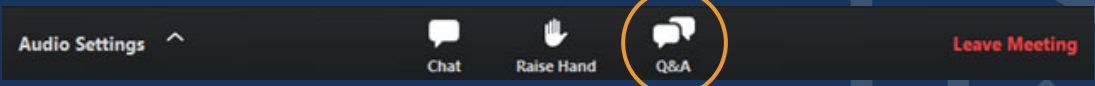


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# QUESTIONS?





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# THANK YOU!

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