January 2021

State of the Industry

special report

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Contact information:
October Research, LLC
ATTN: The Title Report
3046 Brecksville Road, Suite D
Richfield, OH 44286
Tel: (330) 659-6101
Fax: (330) 659-6102
Email: contactus@octoberresearch.com

EDITOR'S NOTE

Following the trends wherever they lead

Dear Readers,

No one could have anticipated the sucker punch COVID-19 landed against the industry last winter. Just as surprising was the title industry's ability to adapt to less-than-stellar conditions brought on by the pandemic.

You know the story. Despite stay-at-home orders and other restrictions put in place to slow spread of the coronavirus, industry players found ways to thrive during a time when numerous businesses in other industries were forced to close their doors.

Just as no one could have predicted the pandemic, no one knows for sure what 2021's story will be.

We expect change at the top of the Consumer Financial Protection Bureau after President-elect **Joe Biden** takes office. This likely will usher in a more-aggressive bureau, but those changes are not likely to be seen immediately.

According to economists, we also should expect low interest rates to continue in the short term, and tight housing inventory to keep home prices moving upward.

No matter what happens this year, the publications of October Research, LLC will arm you with the information your business needs to make informed decisions.

Consider this year's State of the Industry special report a down payment on what's to come.

Sincerely,

Mark Lowery
Editorial Director
mlowery@octoberresearch.com

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What's in store for the CFPB?

By **Elizabeth C. Childers, Esq.** — Editor, *Dodd Frank Update*

There has been a lot of speculation about the future of the Consumer Financial Protection Bureau (CFPB) throughout the election season, and especially now as **Joe Biden** is the president-elect.

Since the Supreme Court ruled the director serves at the pleasure of the president, many believe there will be a new leader in the early months of 2021. With a new leader may come new priorities and a shift in how the bureau's mission will be executed. There is also the continuing pandemic demanding attention from regulators, and a country still at risk for economic crisis.

Veteran predictions

At the Consumer Bankers Association (CBA) convention, CBA's **Dan Smith**, the association's executive vice president and head of regulatory affairs, hosted a virtual roundtable with former staff of the CFPB. The group discussed what they believe may be in store for the bureau in the coming year, and policies that may be considered under a new administration.

Speakers included **Anthony Alexis**, a partner at Goodwin Procter LLP and former assistant director and head of the CFPB's Office of Enforcement; **Ori Lev**, a partner at Mayer Brown and former deputy director of the Office of Enforcement for the bureau; **Brian Johnson**, a partner at Alston & Bird, and who formerly held several positions at the CFPB, including deputy director; and **Michael Gordon**, a partner at Bradley and formerly the senior advisor to former CFPB Director **Richard Cordray**.

Alexis said it would be critical for a new administration to relearn what is going on at the CFPB, what resources it has, and how those resources are best used.

"I think critical and first is what is the CFPB's role in repairing what a lot of people would say is somewhat of a distressed economy?" he asked. "And the economy is a consumer economy. It affects how people pay their bills, whether people can pay their mortgages, do they have to pay their mortgages, those types of things. So where does the CFPB fit in?"

Alexis suggested the bureau use tools such as a voluntary disclosure program and more and strategic use of warning letters to reduce the need for "headcount-driven resources." This would allow the CFPB to focus on examinations and investigations.

Lev said he also thought the industry would see a renewed focus from the bureau following the COVID-19 crisis. The changes won't happen overnight, but the bureau in a Biden administration would be likely to emphasize investigations and enforcement in those areas where consumers are being harmed based on the current economic situation.

Focus areas he suggested were how consumers would be treated once their deferments come due, and how mortgages, student, and car loans are being serviced. In a later interview with *Dodd Frank Update*, Lev also added regulatory issues to the list, such as the payday loan rule, debt collection rules, and the issuance of a data collection rule regarding small-business and minority-owned businesses.

Gordon suggested COVID-19 and the regulatory changes that came with the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) are going to be felt for some time and will likely inform bureau decisions for the next several months.

"I think we've learned from the last financial crisis that regulatory expectations can change," Gordon said. "In a crisis they often do. The CARES Act changed certain requirements formally, but there are a lot of other types of soft power that regulators may bring to bear, and these things can evolve not just with leadership, but with time…Regulatory guidance in these kinds of crucibles of pressure and hardship tend to evolve and that's frustrating for industry."

"Regulatory guidance in these kinds of crucibles of pressure and hardship tend to evolve and that's frustrating for industry."

— Michael Gordon,
Partner,
Bradley

CFPB leadership

Smith started his round-table discussion with a short hypothetical: if one of the veterans were the director of the CFPB, and only had six months left in the position, what would they do?

"I don't know if that is a calculation that enters Director **Kathy Kraninger**'s mind," Johnson said. "I think she would continue as she has…Obviously, an incoming president will make a personnel decision about who he wishes to serve as the head of the agency, and after the Seila Law decision, the director serves at the pleasure of the president. Kathy's done what she needs to do to continue the remainder of her tenure, but it's not lost on any of us that politics enters the equation in terms of who an incoming administration might like to have as CFPB director."

Johnson continued, saying there were contingencies to consider in terms of how quickly a new director could be installed. A major factor would be which party controlled the Senate, and how quickly an acting director could be put in place should the president fire Kraninger.

"The Senate controls the confirmation process, and I can see — with Vice President Biden winning the presidency, but the Senate remaining in the hands of the republicans – a repeat of the original confirmation battle with Director Cordray, where republicans would hold confirmation pending some sort of deal to make structural changes to the agency itself," he said. "For instance, putting the agency on appropriations, or changing the leadership structure from a sole director to a five-member commission."

As to how quickly an acting director could be put in place, Johnson said he did not think it would be a quick process, nor would it be easy to find a replacement under such circumstances.

"[T]here aren't a lot of good choices in terms of quickly carrying out a change," he said. "There could be an attempt to have an acting director appointed under the Federal Vacancies Reform Act [FVRA], pending confirmation of the nominee of course, but there's a limited tenure under the FVRA, and there's restrictions on who exactly can be appointed under the FVRA."

According to the law, the acting director would have to be either an existing deputy of the agency, or an existing employee who had worked for the agency for 90 days prior to the opening of the director's seat. However, Johnson said, Kraninger has had the opportunity during her tenure to hire a substantial portion of the existing senior executive leadership for the bureau.

For a potentially new administration, who would want to install its own person, Johnson continued, it would probably be best if someone from outside the agency would be appointed. The administration would likely be looking at a cabinet-level officer, early on in the administration, he said. Whoever would be appointed this way would still be subject to the confirmation process, the outcome of which would be uncertain should the Senate remain republican-controlled.

"Alternatively, if democrats gain control of the Senate, it is a smoother process, but there still is a process to identify how quickly to move through the list of priority appointments," Johnson said. "It's typically moving through the cabinet officials, down through the other key appointments, and really depends where on the priority list in a new administration the CFPB director would fall among other competing slots that need to be filled. I don't think it's an instant, day-one action in terms of installing somebody. I think it's a little more complicated than some folks may realize."

Lev said he suspected that removing Kraninger would be a high priority for a democratic administration.

"The progressives are pushing Biden for a lot of things, and this is one that I think is an easier give for him than some of the other issues out there," Lev said.

"I don't know if it's day one, but I would expect very quickly after Biden is inaugurated there will be a new acting director…My guess is this is high priority and high profile, and there's going to be enough pressure on the administration to do something and do something quickly. They'll figure out a way to do it, notwithstanding the legal constraints."

Lev said Biden's pick for a nominee would likely depend on the make-up of the Senate.

"I would think that the outcome of those Senate races might impact who he nominates because of concerns about whether the Senate would confirm individuals who the republicans would view as more aggressive, or too aggressive," he said. "He will know that before he has to nominate someone…. And he may have a greater sense of republican sensibilities from how other cabinet nominations are treated."

Postal banking and credit-reporting reform

"Biden floated legislation ideas and priorities. One of them was postal banking, and a national interest rate cap. Do you see any of those moving forward in a democratic-controlled Senate? And which ones would have the biggest impact on the work the bureau does in the future?" Smith asked.

Johnson said the short answer depends on whether the filibuster rule will change for legislation in the Senate, which is something that has been mentioned by the Biden campaign. He said it would take a rule change in the Senate to have a simple 50-vote threshold majority for some of Biden's more ambitious proposals to come to pass. Should this happen, Johnson said, "it's anybody's game in terms of what the administration's priorities would be from there."

Alexis said there has been talk regarding postal banking for a long time, with discussions going back to 2012. Postal banking, simply put, is the provision of financial services via the postal service and could help individuals who don't have access to traditional banking options. Alexis said at some point, he would like to know what the CFPB's role would be in regard to postal banking.

"I think that would just be incredible to listen to and try to get an idea as to why and what the CFPB would say about having postal banking," he said.

Gordon said that though postal banking and a national interest rate cap are big ticket items, they could be hard to get done legislatively, and there are other things on the democratic legislative agenda that a Biden administration would likely pursue. Should the administration get even a nominal majority in the Senate, he said he believed the hardships brought on by COVID-19 would provide the opportunity to push some of those legislations through, because it will be packaged as necessary consumer relief.

"Whether that's on credit reporting issues, medical debt, or debt collection generally, there are legislative proposals, some of which the house has passed, that could be repackaged as part of a COVID relief effort," he said.

Johnson also brought up the idea of a public credit reporting agency, administered by the CFPB, that was proposed by the Sanders-Biden unity task force. He said the purpose of CFPB having its own public-sector rating agency would be to provide credit scores for all federal lending programs. According to the task force, "the federal credit agency will also ensure the algorithms used for credit scoring don't have discriminatory impacts, including accepting non-traditional sources of data like rental history and utility bills to ensure credit."

"There's not a lot of meat on the bones in terms of what that would look like, but again, it's another big picture, legislative, big-ticket item that could be part of the policymaking agenda," Johnson said.

Lev said he was surprised that, though the CFPB has supervisory authority over credit reporting agencies (CRAs), there hasn't been a single enforcement action against one based on the accuracy of credit reports.

"We've got actions against furnishers, we got actions against CRAs for selling you credit monitoring products in a deceptive way, but the fundamental issue of the accuracy of credit reports? Or are the scoring models fair and accurate? Nothing in the public."

Johnson said credit reporting is a live issue for consumers, and the data implies continued public frustration with credit reporting agencies.

"Each fiscal year, the bureau receives about 300,000 consumer complaints," Johnson said. "Historically, credit reporting complaints have been at the top. Debt collection at one point was pushing to equal footing, but now it's dropped off. This year, two-thirds of all consumer complaints received by the bureau relate to credit reporting issues."

Combination of low rates, refinances has industry thriving

By **Mark Lowery** — Editorial Director

If you had to use one word to describe the state of the title industry, "thriving" would be as good as any.

The onset of the coronavirus pandemic in early 2020 did not bring the housing market to a halt, as some analysts predicted it would. Rather, the combination of record low interest rates and the adoption of technology enabling safe closings fueled levels of refinance loans not seen in years.

Numbers are not complete for 2020. But through the first nine months of 2020, title insurance premium volume was 17 percent ($13.2 billion) compared with the first nine months of 2019 ($11.3 billion), according to an analysis by the American Land Title Association (ALTA).

During that same period, the title industry paid $347.8 million in claims, down from $409.3 million in claims paid during the same period in 2019, ALTA found.

"As the country weathers the COVID-19 pandemic, the real estate industry as a whole and the land title insurance industry specifically have remained bright spots during these troubled economic times," ALTA CEO **Diane Tomb** said. "Low interest rates, which just set the 14th record low of the year, continue to create high demand among consumers looking to buy as well as refinance. As title insurance premium volume depends on mortgage origination volume, the result of these record low interest rates is a third quarter with even higher volume than an already positive second quarter."

According to ALTA's analysis, total operating income for the industry was up 17.2 percent during the third quarter of 2020, operating expenses were up 16.9 percent, and loss and loss adjustment expenses were down 2.5 percent. Every state had a third-quarter increase in volume except New York and Delaware and the District of Columbia.

During the third quarter, Fidelity held a 33.4 percent market share; First American 23.1 percent; Old Republic 14.5 percent; and Stewart Family 9.1 percent.

Of the independent underwriters, Westcor Land Title Insurance Co. had 6 percent of the market during the third quarter; WFG National Title Insurance Co. had 2.9 percent; Title Resources Guaranty Co. had 2.6 percent; North American Title Insurance Co. had 1.8 percent; and Alliant National Title Co. 1.1 percent.

The top producing states during the third quarter were Texas, $685,472,500 (12.6 percent); California, $636,240,692 (28.6 percent); Florida, $489,603,422 (9 percent); New York, $242,843,842 (-15.4 percent); and Pennsylvania, $217,708,957 (25.2 percent).

What's in store for 2021?

No one knows for sure what will happen with the housing market this year. Interest rates are expected to remain relatively low. However, the percentage of consumers who would benefit from a refinance has steadily decreased. Additionally, the supply of homes on the market remains low: many people are hesitant to list their homes as some fear they will not be able to find a new one.

"The likelihood that consumers may voluntarily reduce consumption in reaction to rising COVID-19 cases, as well as the economic impact of new local restrictions, may be a headwind for economic recovery in December and signals a potential weak start to the new year, a time when the housing market is usually slow," First American Deputy Chief Economist **Odeta Kushi** said. "However, the housing sector's substantial rebound in 2020 is likely to continue in 2021."

"The reasons for optimism are rooted in the housing market 'constants' — historically low rates, strong millennial demand, and limited supply — which will keep home-buying demand robust, especially entering the spring," Kushi said. "The continuation of the supply/demand imbalance will keep the pressure on house price appreciation. The anticipated vaccine rollout next year provides a health and economic 'light at the end of the tunnel,' while the housing market's 'constants' are anticipated to keep housing a bright spot."

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> **— Odeta Kushi,**
> **Deputy Chief Economist,**
> **First American**

Realtor.com projects mortgage rates will average 3.2 percent throughout 2021, reaching 3.4 percent by year's end. It projects the median sales price will increase 5.7 percent in 2021 and existing homes sales will jump 7 percent.

"The housing market in 2021 will be much more hospitable for buyers as an increased number of existing sellers and ramp up in new construction restore some bargaining power for buyers, especially in the second half of the year," Realtor.com stated in its forecast.

"Still-low mortgage rates help buyers afford home price increases that will be much more manageable than the price increases seen in 2020. With companies continuing to allow workers more flexibility, we see the inner as well as outer suburbs and smaller towns continuing to entice home buyers and builders. Areas that can ramp up affordable housing supply will benefit and see an influx of buyers."

Realtor.com believes buyers will continue to use technology to check out homes, explore neighborhoods, and research purchases online.

"Although the pace will slow from late 2020's frenzy, fast sales will remain the norm in many parts of the country which will be a challenge felt particularly for first-time buyers learning the ins and outs of making a major decision in a fast-moving environment," Realtor.com stated. "Buyers who prepare by honing in on the neighborhood and home characteristics that are must-haves vs. nice-to-haves and lining up financing including a pre-approval will have an edge."

Meanwhile, Fannie Mae believes the economy is poised for a considerably stronger 2021 as COVID-19 vaccines are widely distributed.

"We believe the high probabilities of a successful COVID-19 vaccine distribution and additional federal stimulus will carry the economy through a relatively soft first half of 2021 before accelerating in the second half," Fannie Mae Senior Vice President and Chief Economist **Doug Duncan** said. "We also expect housing to remain strong, despite slowing from its previously torrid pace, as homebuilders catch up on current commitments and more existing homeowners list their homes to take advantage of strong price growth. We expect the mortgage market to finish 2020 at a historic level of production before slowing slightly but remaining strong in 2021."

New year to bring compliance headaches

By **Tracey Read** — Editor, *RESPA NEWS*

Jim Paolino has a favorite quote from **Mike Tyson** that sums up 2020 nicely.

"Everyone has a plan until they get punched in the face," Paolino, the founder/CEO of Lode Star Software Solution, said, adding, "and 2020 has been one face punch after another, from an industry volume perspective, from a societal perspective, and from the pandemic."

Paolino was one of three experts who spoke on what the new year may bring for the industry at the RESPRO 2020 Virtual Fall Seminar. The session, "2021: The Return of Stringent Compliance and Enforcement?" was moderated by Sterbcow Law Group Managing Partner **Marx Sterbcow**.

Paolino's co-panelists were **Chuck Cain**, senior vice president of Fidelity National Financial's National Agency Division, and Saul Ewing Arnstein and Lehr Partner **Francis Riley III**.

What can mortgage and title firms expect on a regulatory legislative enforcement front over the next year? Thanks to COVID-19, there may be more questions than answers.

The new normal

Paolino said what he's found interesting this year is how the regulatory environment has been forced to play catch up with everything else going on in the world right now.

"I think as we adjust to this new normal — probably the most overused term of 2020 — regulations had to catch up, just because of the world that we're living in. I think what's an open question is, what's going to stay, what's going to go, and how is that going to affect all aspects of the closing process — from people working remotely, drive-by closings, remote closings, and beyond?" he said.

Cain agreed.

"We were already in the midst of moving forward with eClosings and with remote online notaries," Cain said. "COVID just accelerated all that process and we ended up with things like RIN. We also ended up with processes in the title and settlement world that look more like the business model of the Sonic drive in — where you pull in, you tell them you're there and then somebody comes out with a tray and you sign your documents. So that certainly has been the great dramatic story that we have all dealt with, and we are continuing to deal with.

"The challenge is temporary orders and regulations that came into play in the real estate industry as a result of COVID. Will they remain? Will they be codified? Are they going to be permanent? There have been moves to make some of these things permanent."

Riley said something else to watch are possible ramifications of a predicted surge in default activity.

"We just saw the other day where a large lender entered into a consent order arising from the lender allegedly placing its customers in deferment programs without the customers' knowledge," he said. "First, this activity, if carried out by other lenders, is going to create a real problem to unwind especially as some of those borrowers default. There's going to be a lot of compliance issues and headaches both at the state and federal level based on those deferments as some lenders have tried to pull some of those borrowers out of permitted/required deferments and put them into some other type of repayment process where they can make payments over time."

Riley predicted debt collection — a key focus in 2020 by the Consumer Financial Protection Bureau (CFPB) against other business sectors — could trickle down next year to default mortgage service.

"So, we have to be careful about that as well," he said.

A new administration

In 2021, states will likely continue to carry much of the enforcement burden, Riley said.

However, he noted President-elect **Joe Biden** will almost surely choose a new CFPB director after he takes office.

"I think **[Kathy] Kraninger**'s gone, and I think the whole idea of reconfiguring that division will be done," Riley said.

Kraninger's five-year term is set to expire at the end of 2023.

However, last June, the Supreme Court held in *Seila Law v. CFPB* that the agency's single-director, for-cause removal structure is unconstitutional because it violates the separation of powers.

Cain predicts a more aggressive bureau under Biden, causing states to be more "emboldened" by an active CFPB.

"I think there will be increased scrutiny of the entire real estate industry," Cain added.

Part of that has to do with the deferments when the pandemic hopefully comes to an end at some point next year, he said.

"When this all ends, what then?" Cain asked. "We're going to have consumers lining up outside state regulatory bodies saying `You know, I was told X, and that's not what happened. My credit is impugned,' or 'There's a flag on my credit.'

"We talk about in regard to foreclosure, and delinquency or default, but landlord tenant deferments on rent. How does that come into play? And those landlords who have not been collecting rent, what does their delinquency and default rate start to look like?

"As we come out of COVID, what messes do we have to clean up, and how do they impact consumers? Are consumers outraged by what happened?"

Fair lending and the Townstone case

Paolino said fair lending and the Equal Credit Opportunity Act (ECOA) will be the big story in 2021.

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the same credit score is being treated the same, and making sure everyone who calls us is treated the same. These are issues that have always been important, especially in the mortgage industry, but in the environment we're in now, are only increasing," he said. "We're seeing some activity picking up in that regard.

"We're seeing a bigger and bigger focus on lenders looking in that space. They're doing reporting to see are they over-indexing or under-indexing in certain areas? And how can we use that data to make sure we're adjusting to this fair lending piece? I think it gets really interesting too when you look at the new technology coming into the industry like AI (artificial intelligence) in the automation of underwriting to see if that actually has a bias in it."

Cain said fair lending was going to be huge in 2021 no matter who won the presidential election.

"Fair lending had become a strong priority in this Trump administration," he said. "We have every reason to believe a Biden administration will be just as vigorous in regard to fair lending enforcement as the Trump administration, and probably more so."

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>
> **— Chuck Cain,**
> **Senior Vice President,**
> **Fidelity National Financial**
> **National Agency Division**

Meanwhile, the CFPB's case against Townstone Financial Inc., a small Chicago mortgage company, for alleged violations of the ECOA, redlining and alleged fraudulent money transfers is a lawsuit the industry is watching closely.

Townstone is charged with making statements during weekly radio shows and podcasts and other marketing ventures that allegedly illegally discouraged prospective African American applicants from applying to the company for mortgage loans.

Townstone owner **Barry Sturner** is arguing the bureau is attempting to expand the scope of ECOA well past its statutory reach.

"The particulars of that case — and the fact that it's a non-bank mortgage lender — is certainly very intriguing," Cain said.

Riley said the Townstone case is interesting primarily because it is filed under ECOA.

"I think the argument that the defendants have made — that ECOA has been misinterpreted by the bureau — will prevail," Riley said. "If it doesn't prevail, and the case goes forward and the court finds that ECOA can be applied prospectively on the allegations in the complaint — I think that would be huge, so we have to keep an eye out for that."

Separately, Riley noted the Department of Housing and Urban Development's final rule on the Fair Housing Act's disparate impact standard was finalized several months ago. It was later challenged in federal court and its implementation was stayed as a result. Riley concluded that the decision coming out of that case must be watched. But it is possible that the Biden administration pulls the rule altogether to rework it.

"I think in 2021, you're going to see a lot more both from a regulatory side, and the enforcement side, as well as private causes of action based on the standard the rule set out," he added.

What do we do now?

Sterbcow asked the panel what regulatory legislative trends will be big in 2021.

"From the title and settlement end of things, depending on what state you're located in, as COVID does start to recede, state governors and regulators put these emergency orders in place, and now, we just don't need them. Well, then what?" Cain asked. "And if you're in a state where you're doing RIN transactions under an emergency order, and then the rug gets pulled out and you can't do them anymore under state law, that creates a real problem.

"And they have to relay to their mortgage and realty customers that all those things we have been doing, we're just not allowed to do them anymore. It's the old story, when the war is over, are we just going to scrap all the planes? What do we do now?"

But first, Cain said more shutdowns are likely to come.

"We've seen COVID increase virtually everywhere," he said. "What does that mean? And when those eventually end, how are we going to come out of it? That's something everybody needs to think about. I think some time in 2021, we're going to see a lot of these rules and regulations and governors' orders expire. Do we go back to 2019 processes or are we able to move forward with modern processes?"

Last year more than impacted the appraisal profession

Valuation Review

By **Mike Holzheimer** — Editor, *Valuation Review*

Appraisers have grown accustomed to dealing with many restrictions and guidelines as it pertains to how they assign value to properties. But with the arrival of 2020 and the COVID-19 pandemic, appraisers and other business professionals were forced to deal with changes and adaptations nobody would have ever envisioned.

Economic shutdowns, the loss of income and, tragically in far too many cases, the loss of life has left an emotional scar that may take a lifetime to heal. The pandemic that hit our country has introduced a "new normal," when it comes to how business is conducted.

Virtual meetings, working remotely and trying to do one's job from a safe and healthy distance has more than taken its toll on everyone, both physically and mentally. But if appraisers in 2020 continued to demonstrate a resiliency that helped them keep business thriving during the most difficult of times.

Still, the same question must be asked as to how appraisers feel about their chosen career paths? We've learned many in the industry feel "okay" about where things stand currently. As to conditions improving for the appraiser, there also seems to be the sentiment work can still be found, even during a national health crisis.

And while innovation and creativity enhanced the industry in 2020, there are still many issues that lie ahead.

Many appraisers and organizations remain optimistic they can prosper during a pandemic, and there are those who believe the industry, with much more technology available, will be even better moving further in the future.

We solicited opinions from many regarding what 2020 aspects/changes in the appraisal profession could be categorized as a positive.

"The collaboration throughout the profession was the single biggest positive in 2020," American Society of Appraisers (ASA) CEO **Johnnie White** said.

"From putting on timely webinars so the profession could stay up to date on effects of the pandemic and the programs available to mitigate impacts, to working together to encourage expanded use of synchronous online education that was previously only offered in a classroom setting, the profession stepped up for appraisers — regardless of professional affiliation. That says a lot about the character of the profession."

The Appraisal Foundation (TAF) President **David Bunton** said TAF was pleased how quickly the profession was able to adapt to the pandemic. Appraisers have been busier than ever all while balancing public health concerns and protecting the public trust.

White also elaborated on what advantages may have come to the appraisal profession because of COVID-19, and what may need to remain a focus or area of concern in 2021.

"The increase in the delivery of education virtually is an area that surfaced over the last year. Syncrhonous online education — both qualifying and continuing — are things I would like to see remain even after the pandemic ends," White said. "It allows us as education providers to meet the students where they are and in a more convenient way for the student attendee. We will need to continue to develop and provide best practices for our developers and educators, but that is a welcome challenge to have. I would also point out how we've moved more events online and the increase in participation — both in total numbers, as well as in our global reach. In some ways, the move to a digital-first approach better equips the profession to make a meaningful impact globally that was harder to come by before the pandemic."

"I am so proud of how quickly our boards were able to react to the sudden changes in American life brought on by the coronavirus pandemic," Bunton said. "Thanks to their quick work, appraisers were able to continue their education online and adapt to new conditions even as the demand for appraisals grew throughout the year."

"Appraisers provide an essential service in any market. During challenging economic conditions, appraisers are perhaps even more valuable to their clients and will find new ways to provide reliable, credible opinions of value," Appraisal Institute President **Rodman Schley** said. "Many of those new ways are yet to be determined, but successful appraisers always adapt to change, and 2020 has been a great example of that adaptability.

"I'm also very proud of how the Appraisal Institute's membership came together this year to address common challenges and opportunities, and also, how we worked with other valuation organizations toward common goals," Schley added.

The ASA executive looked at some of the more relevant topics that have taken positive steps such as training, the aging of the profession and technology (CU, hybrids, bifurcated appraisals, etc.). Additionally, he examined the steps implemented in those areas, in particular technology and the market, and commented on what has been working in the appraiser's favor.

"Technology was already well integrated into the process, so it simply became a matter of better leveraging the technology for the benefit of appraisers, consumers, and clients alike," White said. "There is still room for improvement in the area of virtual inspections using the technology readily available today, but I believe that can and will be addressed, and allow for more innovation even after the health risks of the pandemic are mitigated. Done right, technology around the inspection will keep the appraiser in the driver seat without sacrificing quality or consistency.

"Everything we are talking about was already in the marketplace — the pandemic simply shifted how much of the workload was going through any one channel," White added.

"Desktops have and will continue to have a role to play as part of the overall collateral valuation strategy, but there is still no substitute for an appraisal, even where the inspection is conducted using technology solutions, because of what is learned when you access in the interior of the home or facility."

Schley noted opportunities created as a result of the pandemic.

"The coronavirus pandemic certainly has created a new situation for appraisers, particularly in the residential market," he said. "Since many appraisers aren't conducting in-home inspections during state-ordered stay-at-home restrictions, it stands to reason that they'll take advantage of the benefits that technology provides. For example, appraisers can rely on hardware such as drones or applications such as Zoom to see the exteriors and interiors of properties they're appraising. Software that enhances appraisers' ability to produce desktop appraisals is another example."

And while Schley said he is unaware of any data that verifiably tracks use of hybrid appraisals, they do seem to be increasingly accepted by many clients, anecdotally speaking.

"Whether this is a good thing or a bad thing is another question," he said. "The Appraisal Institute continues to promote so-called full or traditional appraisals as the gold standard of real estate valuation. As trained experts, appraisers' ability to conduct an interior inspection only adds to the value of their services. In 2020, the Appraisal Institute formed a University Relations Committee, which will play a crucial part in attracting new AI professionals in the future.

"For many assignments, appraisers have little choice but to rely on drive-by or desktop appraisals due to their lack of access to properties during the coronavirus," Schley added. "From the beginning of the pandemic, the Appraisal Institute has advised its professionals and other appraisers to protect their health, and that of their families. For now, at least, drive-by and desktop appraisals are the new normal for many residential appraisers."

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>
> — Rodman Schley, President , Appraisal Institute

The TAF president said the increased use of desktop appraisals was really only taking place in the lending arena. There will likely always remain a strong demand for appraisals where the appraiser does an in-person inspection of a property, he said, and it remains to be seen what type of appraisal products lenders choose to utilize in the coming year.

Bunton specifically referenced the work of the Appraiser Qualifications Board (AQB) regarding strides in 2020.

"The AQB took a big step this year approving the Practical Applications of Real Estate Appraisal (PAREA)," he said.

"These new minimum criteria provide another pathway for aspiring appraisers to fulfill their experience requirements by taking advantage of innovative technology. We hope this will help more appraisers enter the profession and look forward to seeing the technologies the marketplace develops as a result of this new criteria."

As to proposed legislation, and its effect on appraisers, White thinks the interest around disparate racial impacts in valuation will continue to be a topic of interest, as will ensuring the profession better mirrors the makeup of America as a whole. He said getting licensed appraisers back doing FHA work would help with the increasing workload so many appraisers are experiencing, as well as mitigate some issues in rural areas.

"We are aware of the new administration's concern about perceived discrimination in valuation and are encouraged by conversations we have had concerning solutions and ways to overcome the impacts of historic federal housing policy and in areas of lending deserts. We look forward to continuing this conversation next month in our Promoting Trust for Fair and Affordable Housing Symposium," Bunton said.

With regards to the outcome of the 2020 presidential election, we asked White to try and predict how such changes in Washington will impact appraisers, and what House and Senate rulings should the industry keep an eye on.

"Considering how the issue of valuation impacts on minority community is explicitly in the president-elect's platform, we consider that to be an issue of significance moving forward. We look forward to working with the new administration and Congress to develop practical ways to address a complex issue, with all perspectives at the table," he said.

"The Appraisal Foundation staff looks forward to working with the Biden administration to build public trust in the appraisal profession and build a profession that is more reflective of the country we live in today," Bunton said.

"The Appraisal Institute helped draft and continue to support and encourage the Appraisal Portal legislation's passage to lower the administrative burden that our professionals, and other appraisers, with licenses in multiple states feel," Schley said.

New year brings old, new regulatory issues

20 Years | THE LEGAL DESCRIPTION

By **Andrea Golby** — Editor, *The Legal Description*

After a year unlike any other, when more was done virtually than ever before and the use of technology grew exponentially, all during a refi boom that did not slow down, it's important to take stock of those policies and procedures and new technologies we want to take into the new year.

After an election that brings us a new administration, what should we expect from state and federal regulators this year? Several industry insiders shared their perspectives on what to expect in 2021.

A busy year

"A year ago when we were looking at 2020, we had no idea COVID was going to hit, but it was believed it was going to be a very good year for real estate," said **Charles Cain**, SVP-National Agency Division, FNF Family of Companies. "It turned out to be a better year for real estate than what was generally forecast. In fact, in terms of mortgage origination, I think MBA reported it was the second largest year in mortgage origination of this century. So for the real estate market, it was actually a better year in 2020, but certainly there were so many more challenges to get the transactions closed.

Cain said that all signs point to next year being another strong year, absent some extraordinary thing that we don't foresee now.

"I think next year is going to be a very strong year," he said. "It may not be as strong as this year in terms of activity, but everyone I've talked to in the title and settlement industry, while they've done very well financially, they wouldn't mind if it slowed down just a little."

With the busyness of 2020, **Ruth Dillingham**, Dillingham Consulting LLC, said she is concerned industry members have not had the time to think ahead to compliance issues needing to be tackled in 2021.

"Mortgage lenders and everybody in their area of business have been overwhelmed with getting up and putting one foot in front of the other since Friday, March 13, that the rest of the world keeps moving along," she said. "There are things that are in need of addressing and I'm concerned that lenders haven't been given the opportunity to take a deep breath and go up 500 or 1,000 feet and look at the bigger landscape and some of it is going to impact the way we interact with settlement and title agents. I'm fearful that folks are going to get a vaccination in May and then realize in July they've lost a year and a half keeping up with that is going on in the world."

One of those changes is the complete overhaul of the uniform loan application that becomes mandatory on March 1. Dillingham noted that when TRID was being rolled out, she was on the road for months doing trainings. With this uniform loan application, lenders have not had enough time to do more than listen to a webinar put on by their software vendor.

A shift in direction

The new year will bring us a new president, and with him a new administration with a different focus. Most anticipate a new director at the CFPB, someone who will take a more activist approach at the bureau. How activist the bureau will be, however, is still unknown.

"A Biden administration is going to be much more focused on consumer protection from the CFPB than the Trump administration was," said **George Holler**, managing partner, Holler Law Firm LLC. "That was a huge difference, right? What we were talking about as the state of the industry in 2015 and what we were talking about in 2017 were vastly different things. In 2015 everyone was talking about SOC 1 and SOC 2 and spending all this money and worried that lenders were not going to use smaller players because of the requirement that they oversee their providers. No one is talking about that at this point.

"The Trump administration had a huge impact on people's concern about regulatory activity from the CFPB," he continued. "I think Biden will move to replace the director of the CFPB and put more focus back on consumer protection. Who comes in and what that focus is, I think is a big question."

"I think there will be more scrutiny," Cain said. "Presuming the Republicans hold the Senate, getting a highly activist director at the bureau through the Senate could be difficult. I don't know that we are going to have someone who is going to be as activist as, say, Director Cordray. But I certainly think there will be a higher degree of activism."

Deborah Bailey, managing member, Bailey Helms Legal LLC, said the Senate runoff races in Georgia will have a significant impact on the industry, but to remember that the industry will be observed carefully regardless of who controls Congress.

"Just when you are tempted to look at the election outcome through partisan lenses, the recently announced settlement between the CFPB and multiple states with Nationstar Mortgage LLC leadership serves as a reality check that our industry remains in the crosshairs of politicians and regulators as they enforce federal and local consumer finance laws, the backbone of our industry. The announcement also signals what has been long predicted, a rise in state regulators willing to enforce consumer finance laws in their state. As long as our industry remains focused on the fact that consumers are voters, our industry will be okay, regardless of the election outcome."

"I think we'll see some of the states start to gear up," Cain said. "Those states that have created their own CFPBs like Pennsylvania, we'll see more states interested in what we are doing. Both in the insurance divisions but also as to, such as the Department of Financial Services in New York."

Among other things, Cain said we may see actions in states that follow the Louisiana statute that goes into effect on Jan. 1 to protect local title agents and local processes.

"I think we are going to see more action a state level that is similar to what just occurred in Louisiana that will require brick and mortar and resident agent," Cain said. "From the regulators' standpoint, that gives them a much easier touchpoint in regard to any issue with the title insurance agent."

He said you can see similar provisions in a lot of the RON legislation coming out, where the notaries performing the transactions must be in the state.

Cybersecurity in new environments

Cybersecurity and data security issues changed and shifted in 2020, and will remain critical issues in 2021, especially as state and federal regulators seek a bipartisan issue to work on.

Chris Gulotta, a founding partner and CEO, Gulotta Grabiner Law Group PLLC, noted that during 2020, many companies were not as secure in a work from

home context as they are in their traditional office context.

"Big companies, like title insurance underwriters, or large law firms, have in place the systems, processes and equipment across the spectrum, both in a work from home and at their offices," he said. "But the average vendor in our space (title, settlement, law firm) is approximately seven to 10 people. You have to be concerned that those small to midsize companies may not have the end-to-end security systems, equipment and best practices in place so that their work from home format is as secure as it needs to be. And that's just on the company level. The other consideration is whether such staff, have the policies & procedures and training to understand what they need to be doing at home to ensure "in-office" levels of compliance"

Regulators are continuing to take a close look at cyber security.

"I think privacy issues are going to be front and center and very much on people's minds, particularly regulators," said **Frank Pellegrini**, president & CEO, Prairie Title Services Inc. "We've seen a lot of activity at the state level and some activity on the federal level in the privacy arena. I think privacy is going to be one of those issues that is going to continue to be with us year after year. It's not a goal, it's not an event, it's not a time and place. It's a process."

> **"Privacy is the issue of our time and is a pivotal issue our industry will be forced to address."**
>
> **— Deborah Bailey,**
> **Managing Member,**
> **Bailey Helms Legal LLC**

Holler said it is unlikely federal legislation related to privacy will get through Congress, even if Democrats control both houses.

"Then you've got the hodge podge of state regulation, which is just causing a challenge," he said. "Could the CCPA become a de facto standard? It's possible. There is not a lot of stomach in the rest of the country for following California all that often. But, it is the biggest state and that could become a de facto standard, especially in the national space because if that's the most stringent requirement, then let's follow that because we know we work in California and it's too hard to segregate out our California customers.

"California voters approved a new proposition that adds even more weight and more requirements to the California Consumer Protection Act that was passed," Cain said. "What they have now is much closer to the EU's GDPR regulation. And we may see other states. New York is looking at some type of privacy regulation. Once you have large marketplaces like that, and certainly if you have more than one, then a national lender, a national underwriter has to conform all their operations to meet the requirement of the highest bar. You can't just say, 'All of our California records are kept over here with appropriate disclosures, but everything else is over here. We don't have to worry about it. That doesn't make business sense."

"I think privacy will have to be a part of the DNA of the business operations of every title and settlement provider," Cain continued. "You might be making money and you are doing all the right things in term of your business operations, but if you have a privacy breach or you have a circumstance where a privacy issue has transpired—someone's NPI has somehow been disclosed to some third party that may be in violation of law—then you get to defend a lawsuit."

"Privacy is the issue of our time and is a pivotal issue our industry will be forced to address," Bailey said. "Privacy can be a very broad topic that often seems to morph into a discussion about data privacy and data security. The very sensitive issue of record redaction to shield ownership information for certain sensitive persons such as judges and law enforcement personnel also falls under the privacy umbrella. On the issue of record redaction, our industry is having to walk a fine line as we balance the need for security with our long-standing policy position of advocating for open access to real property records. Privacy also covers the digital footprint we leave behind as we engage in web-based activity even more than before. Further afield are the concern about data privacy in the context of data used for creating artificial intelligence and machine learning algorithms, which are used to build intelligence systems, but in the process upends our current notion of privacy."

RON after a pandemic

People were encouraged to do many things virtually this year, and that included the opportunity to close real estate transactions remotely. By the end of 2020, there were 29 states that adopted remote online notarization (RON) legislation, and governors in other states issued executive orders authorizing remote ink-signed notarizations (RIN). There was certainly an increase in the use of these tools, but will that continue into the new year?

If 2020 is an indication of the type of growth, it may be slower than one might expect. Despite the ability to do remote closings, and health professionals encouraging distancing wherever possible, the growth of remote notarizations was not as significant as you would think.

"With RON, it started out with this idea that we were going to have this huge ramp up and acceleration of the RON timeline," Holler said. "I think when all is said and done, RON will continue on, but not at a substantially different pace than it would have without the pandemic, ultimately. Because all the participants want it with the exception of local recording offices, and what is their motivation to do it? How is it any different now than it was a year ago?"

Richard Bramhall, chief underwriting counsel, Westcor Land Title Insurance Co., agreed remote notarizations are going to go hand in hand with the pandemic, noting that before the pandemic, he spent time explaining the circumstances where remote notarizations made sense.

"After the pandemic, everybody understood where it made sense and so it got a big lift," he said. "It will continue to be benefited by the pandemic to the extent that's the way companies try to work around the problems if the pandemic is put under control with the introduction of satisfactory vaccines. It will be back to rising and falling on the strength of the people who find it to be a benefit because it's convenient."

"It's happening quicker, but not necessarily quickly," Cain said. "Right now, we have the GSEs who are willing to take documents that have been executed using RON or RIN in states where there may not have been legislation. We'll see where they go when they decide that maybe we don't need to do this."

Gulotta noted that in New York, in which Gov. **Andrew Cuomo** authorized RIN early in the pandemic via executive order, industry stakeholders (lenders, title companies, attorneys, etc.) expected RIN to account for 50-70 percent of refinance transactions. Through much of the year, he said, people chose to pass documents back and forth on front porches or do drive up closings rather than consummating the closing itself remotely.

"Shockingly, in the home finance context, consumers are still not up that technology curve or comfortable for whatever reason with adding a remote closing element and haven't fully embraced the RINs in New York, even at the worst of COVID back in March & April of this year" Gulotta said. "Now we are all wondering how will borrowers view closing preferences this winter, when it's not as easy to sit out on a porch or sit in a backyard to do a signing. Now when its dark at 4 pm and the temperature is in the 20's or 30's, how will these closings be facilitated?"

He also noted that many lenders are concerned with the saleability of RON and RIN transactions, especially in states like New York where they are allowed via executive order that must be renewed every month.

Holler noted while consumers and servicers would like RON, the challenge is to get county recorders on board.

Not only may parties to the transaction not be so quick to more forward with RON, but legislatures that have been backed-up due to the pandemic may not chose to take up RON legislation right away.

"Some states are still operating under emergency orders," Cain said. "We'll see what happens when those emergency orders expire and legislatures come back and legislate some type of RON statute. But it's here to stay and will continuing to grow in 2021 and year-over-year, especially if people are doing a refinance."

Pellegrini agreed, noting many have the opinion that it's going to be an easy move to bring many of the RON and RIN temporary measures into permanent laws.

"Of course, we have to understand that many of the legislatures have been off for a good part of the year in states where you have a legislature that convenes every year," he said. "In Illinois, they've been off virtually most of the year, so not much got done. Not much is anticipated for next year here in Illinois. I think Illinois is representative of a lot of other states. We'll just have to see how this shakes out if we have the continued interest in getting these types of closings to become normal as opposed to exceptions."

Gulotta noted that while a RON bill was introduced in the last two years by NYS Senator **James Skoufis**, New York State is grappling with so many other more imminent issues that it may be easier to continue extending RIN's by executive order rather than flesh out the RON process in a comprehensive law as other states have done.

"The industry and all the stakeholders need to come together so that states are moved more and more toward full blown RON statutes, especially on refinances," Gulotta said. "It's surprising, again for refinances, and especially during a pandemic, that someone has to come to your home to facilitate a signing. otehr states have adopted the laws, technology & processes. In every state, consumers are used to logging into portals (think of your health care provider, online banking, etc.) and conducting their personal medical and financial business. There seems to be a logjam between the lenders and their investors, between the lenders and regulators and between vendors and consumers. Maybe the regulators need to give lenders more comfort so they are not more anxious about potential fines and the industry as a whole needs to do a better job to simplify the eclosing process for consumers."

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> **Founding Partner and CEO,**
> **Gulotta Grabiner Law Group PLLC**

Cain also noted that there are many unknowns regarding how RON- and RIN-closed transactions will hold up to bankruptcy and foreclosure. It will likely take two to three years to see if these transactions hold up in court.

"It's going to be a while before we really see where there may have been chinks in the armor on this, but there is every reason to think that we've done a pretty good job in terms of due diligence," Cain said.

Prepare for foreclosures?

In 2021, the industry is going to have to deal with the pent-up foreclosures that have been in forbearance for much of 2020. Dillingham noted this little wave of loan delinquencies will be unlike what we saw between 2009 and 2012. This time around lenders will be dealing with borrowers who lost their jobs, through no fault of their own and did everything they could to try and hang in there, but it doesn't look like that job is coming back or is going to come back with the same amount of vigor that it needs so they can get back on track.

"Lenders are going to have to be very agile in terms of how they negotiate the fine line of 'We appreciate that you still don't have enough money to make your payments, but the time for forbearance has expired and we need to move you into something else' and does that mean encouraging folks to sell," Dillingham said.

She said this will be a sensitive issue for lenders to tread and they will have to make some difficult choices and have hard conversations with borrowers about the options in front of them.

Fair lending issues

Dillingham said one of the easiest places for the Biden administration to work on is the enforcement of fair lending laws.

"I think there is going to be more enforcement around that," she said. "I think folks are going to have to really rethink their training and how they deal with people who don't look or speak the way they do. I would not be surprised if it turned out that a small mortgage company that uses one or two settlement agents who have consistently turned a blind eye to the fact that one or two of the applications drags through the system and others get expedited and the ones that get expedited look and sound like the people they work with and the ones that drag, don't. That happens at the settlement agent and the title agent and the loan originator or processor.

"I think if someone isn't paying attention to the fact that fair lending and fair housing issues have been much more in the news than they've been for a while [they could be in trouble]," Dillingham said.