WISCONSIN BANKERS ASSOCIATION
Compliance Journal

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Read "Special Focus" for time sensitive information on bankruptcy rule changes affecting mortgage lenders and services. Next, check "Judicial Spotlight" for a court case that affects guarantors' obligations to banks. Turn to "Regulatory Spotlight" for numerous regulations that have been transferred to CFPB. Finally, read "Compliance Notes" for information on new Wisconsin driver's license procedures and receipts.■

# SPECIAL FOCUS

## Recent Amendments to Federal Bankruptcy Rules Create Significant New Requirements for Mortgage Lenders and Servicers

**Notice No. 2012-1**

Mortgage lenders and servicers must familiarize themselves with the new debtor-friendly amendments to the Federal Rules of Bankruptcy Procedure ("FRBP") that became effective December 1, 2011. These changes, which can have severe consequences for unaware creditors, affect bankruptcy claims filed on or after the effective date, and pending claims "insofar as just and practical." Creditors that fail to implement procedures to comply with these changes may be subject to a variety of sanctions, including disallowance of the claim, evidentiary sanctions, fines and even imprisonment. The amendments to the rules impact FRBP 3001, the procedural rule for filing a proof of claim, and create FRBP 3002.1, which creates notice requirements in Chapter 13 (wage earner reorganization) cases for claims secured by a debtor's principal residence.

The impetus for these amendments comes from recent bankruptcy cases. One such case is *In re Wright* (Bankr. N.D. Iowa, December 28, 2011) in which American Home Mortgage Servicing (AHMSI) was ordered to pay the homeowners $50,000 for failing to notify the debtors that their mortgage payments under a debtor/court-approved Chapter 13 bankruptcy payment plan had increased. In its opinion, the Court noted that the recently enacted Rules amendments would address these types of notice issues as well as problems related to erroneous accounting and improper application of payments.

### New Requirements Related to Proof of Claim Filings

A revised proof of claim form (Bankruptcy Form B10) has been issued to comply with FRBP 3001. The new rules emphasize the accuracy of proof of claims information, and include penalties of up to $500,000 in fines and/or imprisonment for up to 5 years for false statements or fraudulent claims. To that end, the signature block on Form B10 now contains a declaration that the signor, under penalty of perjury, attests that the information is true and correct to the best of the signer's knowledge, information and reasonable belief, as required by Bankruptcy Rule 9011(b).

Also notable on Form B10 is language that clarifies formerly ambiguous instructions regarding the inclusion of supporting documentation. Previously, it was common for creditors merely to submit a summary of documents evidencing perfection of their security interest. The new form clarifies that creditors must attach actual supporting documentation properly redacted as set forth in the instructions to Form B10, or, if the documents are not available, an explanation as to why they are not.

New also is the Mortgage Proof of Claim Attachment (Attachment A), which must be appended to the proof of claim if the creditor's claim is secured by a lien on the debtor's principal residence. This attachment requires a detailed itemization of prepetition interest, fees, expenses and other charges. It also requires disclosure of the amount necessary to cure any default and an escrow account statement (if applicable) as of the date of the petition.

### Additional Chapter 13 Requirement Created by New Bankruptcy Rule 3002.1

Two new forms, created to implement the newly created Rule 3002.1, must be filed as a supplement to the proof of claim in Chapter 13 cases where the claim is secured by a security interest in the debtor's principal residence. Supplement 1 provides notice of a mortgage payment change, including disclosure of the basis for and effective date of the change. It must be filed at least 21 days <u>before</u> the payment change becomes effective. Supplement 2 requires disclosure of postpetition fees, expenses and charges, and must be filed within 180 days from when they are incurred. Both Supplement 1 and 2 must be served on the debtor, debtor's counsel and the Chapter 13 trustee. Like the revised proof of claim form, both include a declaration

that the information is true and correct to the best of that individual's knowledge, under penalty of perjury.

Lastly, Rule 3002.1 provides a strict 21-day response period for mortgage creditors to file a written response after receiving the Final Cure Notice from the Chapter 13 trustee. The creditor's response must be filed as a supplement to the proof of claim and served on the debtor, the debtor's attorney and the trustee. The response should indicate whether the creditor agrees that the debtor has fully paid the amount required to cure the default on the claim and whether the debtor is otherwise current on all payments. If applicable, the response must also itemize any required cure or postpetition amounts that remain unpaid to the creditor as of the date of the statement.

In light of the fact that the amendments to the Rules have already gone into effect, mortgage lenders and servicers must act promptly to familiarize themselves with the new provisions and incorporate them into their procedures. As the revised Rules and recent court decisions suggest, a creditor's failure to do so may have serious consequences.■

*WBA wishes to thank the co-authors of this informative article, Atty. Paul Lucey, partner, Michael Best & Friedrich LLP, and Atty. Heather Bessinger, associate, Michael Best & Friedrich LLP.*

*WBA also wishes to note that the forms referenced in the article may be found at: www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms/BankruptcyFormsPendingChanges.aspx.*

# JUDICIAL SPOTLIGHT

## Wisconsin Court of Appeals Case Affects Guarantors' Obligations to Banks

A Wisconsin Court of Appeals recently issued an opinion in *McFarland State Bank v. Sherry, et al.* that affects how banks should pursue remedies against defaulting mortgagors and guarantors. The Court of Appeals held that the amount of the Bank's winning credit bid in the Bank's mortgage foreclosure of the borrower's property should be used to offset the amount that the Bank can subsequently collect from the guarantor of the borrower's obligations.

In the *Sherry* case, the Bank obtained a judgment of foreclosure against the mortgagor for $152,000, and retained the right to collect a deficiency judgment against the mortgagor. At the same time, the Bank also obtained a separate judgment against the guarantor, Sherry, for the same $152,000. Both were default judgments. At the sheriff's sale of the property, the Bank credit bid and purchased the property for $147,000; the principal amount of the debt. The circuit court confirmed the sale and found that the property had a "fair value" of $147,000, as proposed by the Bank.

After the sale, Sherry tendered payment for the difference between the judgment and the amount of the Bank's credit bid (with interest and fees, about $17,000). When the Bank refused to accept the payment, Sherry asked the circuit court for relief from the judgment. The circuit court denied the request, and Sherry appealed the decision, arguing that the fair value of the property should be used to offset the amount he owed to the Bank.

While the appeal was pending, the Bank and Sherry came to an agreement, by which Sherry paid the full amount of the judgment and received the property from the Bank. Despite the agreement the appeal was allowed to continue. Although Sherry was unable to convince the circuit court that the amount of the credit bid should be used to offset the total amount he owed pursuant to his guaranty, the Court of Appeals was persuaded to hold in his favor.

The Court of Appeals rejected the Bank's arguments, some of which were addressed in the written opinion and others of which were ignored. The Bank first argued that the guarantor's obligation was independent of the borrower's

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WISCONSIN BANKERS ASSOCIATION
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Read "Special Focus" for an article regarding rules and interpretations governing mortgage loan originator compensation. Next, check "Regulatory Spotlight" for CFPB rules on remittance transfers under Regulation E. Finally, turn to "Compliance Notes" for recent announcements from CFPB and Treasury.■

# SPECIAL FOCUS

## Murky Rules Govern Mortgage Loan Originator Compensation

**Notice No. 2012-2**

The final Federal Reserve Board (FRB) rules amending Regulation Z to prohibit mortgage loan originators (MLOs) from receiving compensation based on the terms or conditions of a residential mortgage loan became effective on April 1, 2011. As a result, compensation paid to MLOs can no longer be based on loan terms and conditions such as interest rate, APR, loan-to-value ratio or the existence of a prepayment penalty. In addition, the rules prohibit compensation based on a factor that is a "proxy" for loan terms and conditions. The term "proxy" in this context is not defined in the final FRB rules.

The "proxy" issue has caused some confusion among banks because the FRB, in a March 2011 webinar, took the position that a bank's calculation of "profit" includes, ***or is a proxy for***, residential mortgage loan terms or conditions. This interpretation of "profits" as a proxy for loan terms or conditions is not addressed in the FRB's final rules. Nevertheless, during a teleconference on February 21, 2012, the FDIC stated its intention to follow the FRB's interpretation that MLO compensation arrangements based on "profits" or "profitability" are impermissible under the final rules. The FDIC and FRB state that such compensation arrangements are not permitted because they generally include income that is derived from loan terms and conditions, such as interest rates.

Unlike the FDIC, the Office of the Comptroller of the Currency (OCC) has not publically commented on FRB's "profit as proxy" interpretation. However, when asked about MLO compensation rules, the OCC is directing banks to FRB's interpretation. The issue is further complicated by the fact that the Consumer Financial Protection Bureau (CFPB) took over authority for many consumer protection laws, including Regulation Z, on July 21, 2011. As a result, moving forward, the CFPB is responsible for clarifying the issue of profits as a proxy for a loan's terms and conditions.

The American Bankers Association (ABA) has asked the CFPB to clarify certain outstanding MLO compensation issues, including the "profit as proxy" issue. According to the ABA, the CFPB plans to address these issues as part of a formal rule-making process beginning in the first or second quarter of 2012. During the recent teleconference, the FDIC confirmed that it expected the CFPB to issue additional guidance on the "profit as proxy" issue in the near future. The FRB's and FDIC's current interpretation of this issue will be subject to any formal rules subsequently issued by the CFPB.

Until the CFPB issues additional guidance, banks should be aware that certain common employer contribution plans and arrangements may be considered impermissible by the FRB and the FDIC. According to the FRB and the FDIC, MLOs cannot be paid compensation tied to bank profits, if the profits include income derived from residential mortgage loans. The FRB and the FDIC provide the following as examples of arrangements where the use of "profits" could be a proxy for loan terms and conditions:

- Profit-sharing and bonus plans
- 401(k) contributions
- Employee Stock Option Plans (ESOPs)
- Other Retirement Plan Contributions
- Income goals

As discussed in more detail below, banks may continue to make contributions to plans that include MLOs, provided the contributions: (1) are not tied to bank profits, or (2) exclude from "profits" income derived from residential mortgage loans. However, banks should be cautious about modifying plans to remove MLOs from their benefit plans. Such actions may violate Internal Revenue Code prohibitions against discriminating in favor of highly-compensated employees. In addition, banks need to ensure

any modifications to their plans conform with other applicable Internal Revenue Code and ERISA requirements.

If the CFPB does not provide additional guidance on the "profit as proxy" issue, there remain a number of benefit plans that banks may utilize that do not tie contributions to profits. For example, banks may continue to contribute to bank-wide 401(k) plans, under which the bank makes matching contributions based on the employee's contribution. Other profit sharing plans are also permissible, provided such plans are not linked to bank profits. Despite the name, the IRS permits employers to make contributions to a "profit sharing" plan without regard to the existence of profits. Many employers allocate contributions to profit sharing plan participants according to a predetermined formula based on compensation and years of service. Such contributions are permissible, provided no component of the plan is tied to profits that include income derived from residential mortgage loans.

Banks may also issue bonuses or other incentives such as stock options, provided that the bonus or other incentive is not tied to profitability. Banks may consider tying such incentives to permissible forms of compensation under the final rules. Permissible forms of compensation include, but are not limited to, compensation based on overall loan volume, long-term loan performance, hourly rate, existing versus new customers, quality of loan files, or the amount of credit extended (provided the compensation is a fixed amount or percentage). Regardless of method, according to the FRB and FDIC, if a bank makes contributions or other bonus payments to MLOs, the bank is responsible for showing that contributions are not based on bank profits that include income derived from residential mortgage loans.

Until the CFPB issues additional guidance, it appears that state member banks regulated by the FRB and state non-member banks regulated by the FDIC will be examined based on the FRB's interpretation of the MLO rules that profits are a proxy for loan terms and conditions. The OCC has not taken a public position on this issue, so it is unclear whether national banks will be examined based on the FRB's current interpretation. Banks subject to the FRB's interpretation of the MLO compensation rules should examine their current benefit plans and their current bonus structures to determine whether all or a portion of their contributions are based on bank profitability. Banks who wish to amend their plans or bonus programs to comply with the FRB's interpretation should seek advice of legal counsel to ensure any changes meet all applicable Internal Revenue Code, ERISA and banking law requirements. In addition, banks should be watching for additional regulatory guidance from the CFPB, as it will have the final regulatory say on this issue.■

*WBA wishes to thank the Banking Group attorneys at the Boardman & Clark LLP Law Firm for providing this article. Contact Atty. Patrick Neuman of the Banking Group to learn how Boardman & Clark can assist in reviewing, amending or establishing compensation plans under the rule and FRB's interpretation. Atty. Neuman may be reached at: PNeuman@boardmanclark.com or 608-283-1774.*

# REGULATORY SPOTLIGHT

## CFPB Issues Final and Proposed Rules on Regulation E.

- The Bureau of Consumer Financial Protection (CFPB) has issued a final rule amending Regulation E, which implements the Electronic Fund Transfer Act (EFTA), and the official interpretation to the regulation, which interprets the requirements of Regulation E. The final rule provides new protections, including disclosures and error resolution and cancellation rights, to consumers who send remittance transfers to other consumers or businesses in a foreign country. The amendments implement statutory requirements set forth in the Dodd-Frank Act. The final rule provides for a one-year implementation period. CFPB has also published a proposed rule, as is highlighted in the following paragraph, to further refine application of the

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Read "Special Focus" for an article regarding new rules for remittance transfers. Next, check "Regulatory Spotlight" for Call Report revision information. Finally, turn to "Compliance Notes" for information concerning FDIC's position on overdraft fees in certain "force-pay" transactions.■

# SPECIAL FOCUS

## Final Rule Amends Regulation E on Remittance Transfers

**Notice 2012-3**

The Bureau of Consumer Financial Protection (CFPB) has issued a final rule amending Regulation E, which implements the Electronic Fund Transfer Act (EFTA). The final rule, effective **February 7, 2013**, provides additional protections to consumers who send remittance transfers to foreign countries as set forth in the Dodd-Frank Act (DFA). The final rule outlines required disclosures, generally provides a thirty (30) minute cancellation period after payment for a transfer is made, and requires service providers to investigate disputes and remedy errors.

This article is intended to provide an overview of the final rule, and does not address every detail of the rule. For more information, the rule may be found at: http://www.gpo.gov/fdsys/pkg/FR-2012-02-07/pdf/2012-1728.pdf

**Definitions**

"Remittance transfer provider" ("provider") is defined as any person that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person. The rule does not provide a numerical threshold for whether remittance transfers are provided in the normal course of business. A proposed rule, issued in conjunction with the final rule, solicits comment on a potential safe harbor threshold.

"Remittance transfer" is defined as an electronic transfer of funds requested by a sender in the United States to a designated recipient in a foreign country that is sent by a remittance transfer provider. Transactions subject to the rule include cash-based remittance transfers, consumer wire transfers, and international ACH transactions. Small-value transfers of $15 or less are excluded from the definition of remittance transfer. The $15 exclusion refers to the amount that will be transferred to the designated recipient in the currency in which the transfer is funded, and does not include any fees or taxes imposed in connection with the transfer.

"Sender" is defined as a consumer in a State who primarily for personal, family, or household purposes requests a remittance transfer provider to send a remittance transfer to a designated recipient.

"Designated recipient" is defined as any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country.

**Disclosures**

A provider must generally provide a written pre-payment disclosure to a sender when the transfer is requested and prior to payment. The pre-payment disclosure must include three items in the currency in which the transfer is funded: the amount to be transferred, any fees or taxes imposed by the provider, and the sum of these amounts. This information is intended to enable the sender to understand the total amount to be paid out of pocket for the transfer. The disclosure must include the exchange rate to be used, rounded to no fewer than two and no more than four decimal places. If fees or taxes are imposed by a person other than the provider, the provider must disclose any such fees or taxes separately to enable identification of fixed and variable costs. The disclosure must then provide the total amount to be received by the designated recipient, in the currency in which the funds will be received, to demonstrate how third party fees or taxes reduce the amount to be received. The provider must use the disclosed exchange rate to calculate third party fees or taxes and the amount to be received. Information not applicable to the transaction can be excluded from the pre-payment disclosure. For example, in a dollar-to-dollar transfer, no exchange rate is required to be disclosed.

The provider must also issue a written receipt to the sender, generally when payment is made. Different timing requirements apply to transfers that are scheduled in advance, as discussed below. The receipt must include the information included on the pre-payment disclosure, along with: the date in the recipient country on which the transfer

will be made available to the recipient; contact information for the designated recipient; a statement regarding the sender's cancellation and error resolution rights; the name, phone number, and web site of the provider; and the name, phone number, and web site of the state agency that licenses or charters the provider, if applicable, and CFPB, along with a statement that the sender can contact such agency and CFPB. The receipt should not otherwise include information on the provider's primary federal regulator, as CFPB believes this could confuse senders. To mitigate compliance risks, CFPB understands that providers may choose to overestimate the disclosed date of availability and provide a statement that the funds may be available sooner.

Alternatively, a provider may issue a single written disclosure to the consumer. The single disclosure must be provided prior to payment and must accurately disclose all of the information required on the pre-payment disclosure and the receipt. In the event such combined disclosure is not accurate when payment is made, the provider must issue new disclosures prior to receiving payment for the transfer. In addition, in connection with the combined disclosure the provider must supply proof of payment when payment for the transfer is made. Proof of payment must be clear and conspicuous, and provided in writing or electronically in a retainable form. Proof may be provided on a separate piece of paper or on the combined disclosure itself, such as a stamp or confirmation code entered on the disclosure.

For transfers conducted entirely by telephone, mobile application, or text message, pre-payment disclosures may be provided orally or by mobile application or text message. The receipt for such transfers may be mailed or provided electronically, subject to compliance with E-SIGN requirements. If pre-payment disclosures are provided orally, the provider must include a statement regarding the sender's cancellation rights. As the receipt for such a transaction may be mailed to a sender, the sender may not otherwise receive information about cancellation rights until after the cancellation period has ended.

**Foreign Languages**

Pre-payment disclosures generally must be made in English and, if applicable, either: in each of the foreign languages principally used by the provider to advertise, solicit, or market, either orally or in writing, at that office; or in the foreign language primarily used by the sender to conduct the transfer. More than one language may be principally used by a provider. Several factors determine whether a language is principally used by the provider, including the frequency of advertising in the language, the prominence of such advertisements, and the specific foreign language terms used. With respect to transfers conducted entirely by telephone, mobile application or text message, disclosures provided orally or via mobile application or text message must be provided in the language primarily used by the sender to conduct the transfer. The written receipt may be provided solely in English, as CFPB believes the sender is not under pressure to comprehend information quickly when such information is provided in writing.

**Use of Estimates**

The use of estimates of the exchange rate, third party fees and taxes, and the amount which will be received in the currency in which the transfer is received are allowed in two circumstances. The first exception is temporary and applies when a provider that is an insured depository institution or credit union is unable to determine exact amounts for reasons beyond its control, and the transfer is sent from the sender's account with the provider institution. The commentary provides the following three examples of situations in which this exception would apply: where the exchange rate is set by the recipient's institution when the transfer is received and the provider has no correspondent relationship with the recipient's institution; where the fees required to be disclosed are imposed by an institution involved in the transfer with which the provider has no correspondent relationship; and where the recipient country imposes a tax that is a percentage of the amount transferred and the provider is unable to determine the exchange rate or other fees involved in the transaction. This temporary exception is currently scheduled to expire on **July 21, 2015**. DFA grants CFPB the authority to extend the exception through **July 21, 2020**.

The second exception is permanent and applies when the provider is unable to know the amount that will be received due to the laws of the recipient country or the method in which the transfer is made in the recipient country. The commentary provides examples of when the exception will apply, such as when the exchange rate is set by the recipient

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country's government after the provider has sent the remittance transfer. CFPB expects to provide a safe harbor list of recipient countries which qualify for this permanent exception prior to the effective date of the rule.

The rule provides approaches on which estimates can be based. If a provider does not use those approaches, the provider is deemed in compliance with the rule if the recipient receives either the same or a greater amount of funds than the amount disclosed on the pre-payment disclosure.

**Procedures for Resolving Errors**

A sender may provide notice of alleged error within 180 days of the promised date of delivery. Notice may be provided orally. The provider must investigate the claim within 90 days of receiving the sender's notice, and must report the results of its investigation to the sender within three business days after completing the investigation. If an error occurred as described, the provider may inform the sender either orally or in writing. If an error did not occur as described, the provider is required to send written notice of its findings to the sender.

Examples of errors include an incorrect amount paid by the sender, failure to disclose all fees that were imposed, misapplication of the exchange rate, and an incorrect amount of currency received. An error does not include a difference in the amount received due to application of the actual exchange rate, fees or taxes, rather than any estimated amounts, or when an alleged error results from extraordinary circumstances outside the provider's control that could not have been reasonably anticipated, such as war, civil unrest, or a natural disaster.

If the error is due to an incorrect amount paid by the sender or received by the recipient, the sender may direct the provider to send the amount of the remedy to the recipient at no additional cost to either the sender or recipient. If the error resulted from incorrect information provided by the sender, the provider may pass on third party fees imposed in connection with resending the transfer, but the provider may not impose its own fees. The provider also cannot impose charges in connection with its investigation of an alleged error.

**Cancellation**

A sender generally has the right to cancel the transfer within a minimum of thirty (30) minutes after payment is made. Payment is considered made when the sender provides cash or authorizes the payment. The provider may choose to allow a cancellation period longer than 30 minutes. As the cancellation period applies regardless of the provider's normal business hours, a provider may choose to set a cutoff time for transfers. For example, if a bank closes at 5:00 PM, it may set a cutoff time of 4:30 PM.

A valid cancellation request must be received by the provider before the transferred funds are picked up by the recipient or deposited into an account held by the recipient. In connection with a valid cancellation request, the provider must refund the total amount of funds provided by the sender within three business days, including fees and taxes to the extent not prohibited by law. While the provider may be unable to recover some of the fees or taxes imposed for the transfer, CFPB believes the length of the required cancellation period will alleviate this problem, as a provider could wait to send the transfer until after the required 30 minute cancellation period lapses.

**Transfers Scheduled in Advance**

When a sender authorizes transfers in advance, the provider must deliver the required pre-payment disclosures within a reasonable time prior to the scheduled date of each subsequent transfer. The final receipt must generally be mailed or delivered no later than one business day after the date on which the transfer is made. If the transfer is made from the sender's account at the provider institution, the receipt may be provided on or with the next regularly scheduled periodic statement for that account, or within 30 days after payment for the transfer is made if a periodic statement is not provided. If a transfer is authorized more than three business days prior to the date the transfer is scheduled to be sent, the sender may cancel the transfer up to three business days before the scheduled date of the transfer. A transfer scheduled less than three business days before the date of the transfer is subject to the general cancellation period extending thirty minutes after payment is made for the transfer.

Appendix A to Regulation E provides twelve model forms that may be used in connection with remittance transfers. Use of the model forms is optional, but does grant a safe harbor to the provider.

**Conclusion**

To summarize, the final rule requires remittance transfer providers to provide pre-payment disclosures and written receipts to consumers in connection with remittance transfers sent to foreign countries. In certain circumstances estimates may be used in the disclosures. Procedures for resolving errors are mandated by the rule, and providers must generally allow senders a cancellation period extending at least 30 minutes after payment for the transfer is made. The final rule is effective **February 7, 2013**.■

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Read "Special Focus" for an article regarding cross-collateral clauses and the flood rules, and an update concerning mortgage loan originator compensation rules. Next, check "Regulatory Spotlight" for numerous CFPB communications. Finally, read "Compliance Notes" for information about indefinite postponement of NLRB's rule to post a notice regarding employees' rights to unionize.■

# SPECIAL FOCUS

## Flood Insurance and The Cross-Collateral Clause In WBA Consumer Loan Forms

**Notice No. 2012-4**

In recent months a number of bankers have inquired about the cross-collateral clause in the WBA consumer forms and the interplay of the clause with the federal flood insurance statute and regulations ("Flood Rules"). Attorneys with the WBA and the Boardman & Clark LLP Law Firm recently discussed the interplay of the cross-collateral clause in WBA consumer loan documents and the Flood Rules with representatives of the FDIC. At one time, the FDIC had taken the position the cross-collateral clause in the WBA consumer notes requires flood insurance to be increased on existing collateral located in a special flood hazard area (SFHA), when a subsequent loan is made to the same borrower. After the discussions, the FDIC agrees that the cross-collateral clause in the WBA consumer notes used to document consumer purpose loans does not automatically trigger the Flood Rules.

For example, assume a lender makes a mortgage loan on the WBA 458 Mortgage Note, which identifies on the face of the note that the collateral is a residential dwelling. The dwelling is in a SFHA.

The Mortgage Note also includes a standard cross-collateral provision on the reverse side of the form providing, in part, that the Mortgage Note is also secured by:

> ". . . all existing and future security agreements covering personal property (other than a dwelling, unless the security agreement granting a security interest in the dwelling is disclosed on the reverse side), between Lender and any of us . . .."

Under this cross-collateral provision, any personal property taken as collateral from the borrower at a later time (other than a dwelling), also secures the Mortgage Note.

Assume that a second consumer loan is made to the same borrower and the second loan is secured by a motor vehicle. This second loan to the borrower may be documented on WBA 454L Consumer Simple Interest Note and Chattel Security Agreement or a WBA 455 Consumer Universal Note ("Consumer Note"). The vehicle taken as collateral for the subsequent Consumer Note also secures the Mortgage Note by virtue of the cross-collateral clause in the Mortgage Note (and the security agreement).

The Flood Rules provide that a lender shall not make, increase, extend or renew a loan secured by a building or mobile home located or to be located in an SFHA unless the building or mobile home and any personal property securing that loan are covered by flood insurance for the term of the loan. Note that the trigger for the Flood Rules is that the lender has made, increased, extended or renewed a loan secured by a building or mobile home located or to be located in a SFHA. If one of the triggering events occurs, then the building or mobile home and any personal property securing the loan must be covered by flood insurance for the term of the loan and the other requirements of the Flood Rule, such as notice to the borrower of property in a SFHA, apply. However, the first step is the trigger. No increase in flood insurance or notice to the borrower is required if the Flood Rules are not triggered.

In the case of the loans described above, the lender must comply with the Flood Rules when it makes the original home loan secured by a home located in a SFHA. When the car loan is made the lender must determine whether it is making, increasing, extending or renewing a loan secured by a building or mobile home in a SFHA.

1. The Home Loan. The Bank does not make, increase, extend or renew the existing home loan when it makes the car loan. True, the collateral securing the home loan increased because the car also secured the home loan. But, increasing collateral for a loan is not a trigger for the Flood Rules. Therefore, as to the home loan, no triggering event occurs at the time of the car loan.

2. The Car Loan. Likewise, the Bank does not make, increase, extend or renew a loan secured by a building located in an SFHA when it makes a car loan using a Consumer Note. As to collateral other than the car, the cross-collateral clause on the reverse side of the Consumer Note disclaims any dwelling as collateral unless described in the appropriate blank in the Consumer Note. If the home in the SFHA is not described in the Consumer Note, the home will not secure the car loan. This means the car loan is not secured by real estate or a dwelling located in an SFHA and the Flood Rules are not triggered for the car loan.

Lenders are also reminded that commercial and agricultural loans are treated differently. The cross-collateral clauses in the WBA commercial and agricultural loan documents are broader than they are in the consumer loan documents. The WBA commercial and agricultural loan documents generally provide that the collateral securing a loan to a commercial or agricultural borrower secures all loans to the borrower even those made after the initial loan. Likewise, collateral provided by guarantors may secure commercial and agricultural loans. In the commercial or agricultural context, if one loan to a borrower is secured by property located in a SFHA, the cross collateral clauses are likely to trigger the Flood Rules when a second loan is made to that borrower. Lenders should continue to review commercial and agricultural loans for compliance with the Flood Rules whenever a new loan is made. In the commercial or agricultural loan context, the lender must determine whether collateral is covered by sufficient flood insurance and whether the notice to borrower is required by the Flood Rules, by reviewing all collateral for a loan, taking into account the broad cross-collateral clause in the WBA commercial and agricultural loan forms.

While WBA cannot expressly address cross-collateral clauses in other vendors' forms, such clauses are common. Thus, whether or not a lender uses WBA loan documents, it is important for the lender to understand cross-collateral clauses in loan documents it uses, and analyze the facts of a particular transaction in the context of such clauses and the Flood Rules.

## CFPB Clarifies Mortgage Loan Originator Compensation Rules With Respect To Qualified Plans

**Notice No. 2012-5**

As discussed in February's *WBA Compliance Journal*, the Federal Reserve Board's ("FRB") mortgage loan originator compensation rules under Regulation Z effective April 1, 2011("Compensation Rules") prohibit compensation paid to mortgage loan originators based on a factor that is a "proxy" for residential mortgage loan terms and conditions. The FRB and the FDIC have taken the position that a bank's calculation of "profit" includes, or is a proxy for, the bank's residential mortgage loan terms or conditions. The Consumer Financial Protection Bureau ("CFPB") became responsible for Regulation Z on July 21, 2011, and is responsible for clarifying the issue of profits as a proxy for residential mortgage loan terms and conditions.

On April 2, 2012, the CFPB issued Bulletin 2012-02, which clarifies that the FRB's "profit as proxy for loan terms" interpretation of the Compensation Rules does not extend to contributions made to "qualified plans". Qualified plans include profit sharing, 401(k) and employee stock ownership plans subject to Internal Revenue Code ("Code") §401(a). According to the guidance, banks may contribute to qualified plans for mortgage loan originators out of a pool of profits derived in part from residential mortgage loan transactions. This new interpretation contradicts earlier information previously provided by the FRB and the FDIC, which had included 401(k) plans as an example of compensation that could fall under the Compensation Rules. CFPB Bulletin 2012-02 may be found at http://www.consumerfinance.gov/guidance/.

While this additional guidance is helpful for banks that offer qualified plans to their employees, it does not clarify how the FRB's "profit as proxy" interpretation applies to non-qualified profit-sharing arrangements not governed by Code §401(a), such as phantom stock plans, cash bonus plans and certain deferred compensation plans. The guidance indicates that questions about how the Compensation Rules apply to non-qualified plans have been fact specific and that the CFPB anticipates providing greater clarity on this issue in proposed rules on the mortgage loan origination provisions

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2. The Car Loan. Likewise, the Bank does not make, increase, extend or renew a loan secured by a building located in an SFHA when it makes a car loan using a Consumer Note. As to collateral other than the car, the cross-collateral clause on the reverse side of the Consumer Note disclaims any dwelling as collateral unless described in the appropriate blank in the Consumer Note. If the home in the SFHA is not described in the Consumer Note, the home will not secure the car loan. This means the car loan is not secured by real estate or a dwelling located in an SFHA and the Flood Rules are not triggered for the car loan.

Lenders are also reminded that commercial and agricultural loans are treated differently. The cross-collateral clauses in the WBA commercial and agricultural loan documents are broader than they are in the consumer loan documents. The WBA commercial and agricultural loan documents generally provide that the collateral securing a loan to a commercial or agricultural borrower secures all loans to the borrower even those made after the initial loan. Likewise, collateral provided by guarantors may secure commercial and agricultural loans. In the commercial or agricultural context, if one loan to a borrower is secured by property located in a SFHA, the cross collateral clauses are likely to trigger the Flood Rules when a second loan is made to that borrower. Lenders should continue to review commercial and agricultural loans for compliance with the Flood Rules whenever a new loan is made. In the commercial or agricultural loan context, the lender must determine whether collateral is covered by sufficient flood insurance and whether the notice to borrower is required by the Flood Rules, by reviewing all collateral for a loan, taking into account the broad cross-collateral clause in the WBA commercial and agricultural loan forms.

While WBA cannot expressly address cross-collateral clauses in other vendors' forms, such clauses are common. Thus, whether or not a lender uses WBA loan documents, it is important for the lender to understand cross-collateral clauses in loan documents it uses, and analyze the facts of a particular transaction in the context of such clauses and the Flood Rules.

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of the Dodd-Frank Act. We expect the CFPB will release these proposed rules in late summer or early fall of this year.

On April 17, 2012, the FDIC issued Financial Institution Letter 20-2012, in response to CFPB Bulletin 2012-02. The FDIC acknowledged the CFPB's position that contributions to qualified plans are permitted under the Compensation Rules and reiterated that questions about how the Compensation Rules apply to non-qualified plans are fact-specific. According to the FDIC, banks should:

- Ensure that their policies and practices related to compensation programs are consistent with the Compensation Rules, commentary, and applicable CFPB guidance; and
- Incorporate periodic reviews of their residential mortgage loan originator compensation policies into their overall compliance program and report any material exceptions to their board of directors.

The FDIC further states that its compliance examiners will review bank compensation programs in light of the Compensation Rules, and consider the specific facts of the bank's compensation program, the totality of the circumstances at each bank and the bank's efforts to comply with the Compensation Rules. The FDIC notes that the purpose of the Compensation Rules is "to protect consumers in the mortgage market from unfair or abusive lending practices that can arise from certain loan originator compensation practices, while preserving responsible lending and sustainable homeownership." FIL 20-2012 may be found at http://www.fdic.gov/news/news/financial/2012/fil12020.html?source=govdelivery.

Until CFPB issues additional clarification on these issues, and given the recent FDIC guidance, banks that offer non-qualified compensation arrangements that include a profit component should review those arrangements to determine whether they include compensation paid to residential mortgage loan originators based on bank profitability derived in part from residential mortgage loan transactions. If so, banks should assess whether these arrangements are in compliance with the Compensation Rules and determine whether additional assistance from outside counsel is necessary. Banks should also be sure to document internal assessments of their compensation arrangements. Our informal discussion with the FDIC suggests that examiners will be focusing more attention on these types of arrangements in the coming months, and that such non-qualified profit-sharing arrangements may be looked at with additional scrutiny, especially if a majority or significant portions of overall bank profits are tied to residential mortgage loan transactions.■

*WBA wishes to thank the Banking Group attorneys at the Boardman & Clark LLP Law Firm for providing this article. Contact Atty. Patrick Neuman of the Banking Group to learn how Boardman & Clark can assist in reviewing, amending or establishing compensation plans under the rule. Atty. Neuman may be reached at: PNeuman@boardmanclark.com or 608-283-1774.*

# REGULATORY SPOTLIGHT

## Agencies Extend Comment Period on Annual Stress Proposals.

- The Federal Deposit Insurance Corporation (FDIC) has issued a notice to announce an extension to the comment period on an annual stress test proposal. On **01/23/2012**, FDIC published in the *Federal Register* a proposed rule to implement the requirements in Section 165(i)(2) of the Dodd-Frank Act by requiring state nonmember banks and state savings associations supervised by FDIC with total consolidated assets of more than $10 billion to conduct annual stress tests. Due to the scope and complexity of the proposal, FDIC has determined that an extension of the comment period is appropriate. Comments are now due **04/30/2012**. Copies of the notice may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-6799.pdf. *Federal Register*, Vol. 77, No. 55, 03/21/2012, 16484-16485.
- The Office of the Comptroller of the Currency (OCC) has issued a notice to announce an extension to the comment period regarding an annual stress test proposal. On **01/24/2012**, OCC published in the *Federal Register* a proposed rule to implement section 165(i) of the Dodd-Frank Act. The proposed rule would require national banks and federal savings associations with total consolidated assets of more than $10 billion to conduct an annual stress test and comply with certain reporting and disclosure requirements. To allow parties more time to consider the impact of the proposed rule, and so that the comment period on the proposed rule will run concurrently with the comment period for a comparable rule proposed by the Board of Governors of the Federal Reserve System (FRB), OCC has determined that an extension of the comment period is appropriate. Comments are now due **04/30/2012**. Copies of the notice may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-

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Read "Special Focus" for articles covering advertising of unsecured loans, interest reporting on non-resident aliens, and EEOC guidance on use of arrest and conviction records in connection with employment decisions. Next, read "Regulatory Spotlight" for numerous CFPB items. Finally, turn to "Compliance Notes" for the latest address information for IBRETA funds remittance.■

# SPECIAL FOCUS

## Regulator Expresses Concern That Advertising "Unsecured" Loans May Be Deceptive

**Notice No. 2012-6**

A federal banking regulator has expressed a concern to the WBA about banks that advertise "unsecured" loans but use loan documents that contain provisions granting the bank a security interest in deposit accounts or providing that collateral given to secure other loans also secure the "unsecured" loan (e.g., cross-collateralization). The regulator expressed a concern that advertisements of loans as unsecured where the loan documents include such collateral provisions may be "deceptive." If a bank advertises "unsecured" loans, it should be certain that the loan documents evidencing the loan are consistent with the advertisement.

An example of a typical cross-collateral provision may clarify this issue. Borrower obtains Loan 1 from Bank. Loan 1 is secured by Borrower's car. The grant of the security interest in the car states that the car secures all obligations of Borrower to Bank, including Loan 1 and any new debt entered into in the future between the Borrower and Bank. Borrower obtains Loan 2 from Bank. Borrower signs a promissory note for Loan 2 but does not grant a new security interest in any of Borrower's assets. Even though Borrower does not grant a new security interest for Loan 2, the security interest granted to Bank as part of Loan 1 covers Loan 2 so Loan 2 is secured. If Loan 2 is advertised as an "unsecured" loan, the loan terms would not be consistent with the advertisement and therefore the advertisement may be deceptive.

In light of this concern, if a bank advertises "unsecured" loans it should review its loan documents to determine whether the loan documents grant a security interest in any collateral, including deposit accounts, or include a cross-collateral provision like that discussed above. Banks are reminded that all WBA consumer, commercial and agricultural notes and credit agreements contain provisions in which the borrower grants the bank a security interest and lien in deposit accounts the borrower may at any time have with the bank, provided the creation of a lien is not prohibited by law or would not render a nontaxable account taxable. In addition, WBA promissory notes and credit agreements include a cross-collateral provision.

Banks should not market or advertise as "unsecured" loans that are documented on WBA promissory notes or other forms distributed by other companies that contain provisions in which the borrower grants a security interest and lien in any collateral, including deposit accounts, or include a cross-collateral provision as described above.

The regulator did not specifically address the nature of the advertising it reviewed; advertising may be more than the traditional newspaper or radio ad. For example, regulators may view a bank's inclusion of "unsecured" loans on the bank's website as "deceptive" if the bank uses loan documents that include cross-collateral provisions or grant a security interest or lien in any collateral. According to the regulator, the advertisement could be deceptive even if the bank did not intend to deceive the borrower and did not intend to enforce any security interest granted to it.

Until further advised by the WBA, WBA suggests that banks review their marketing and refrain from advertising "unsecured" loans in connection with loans documented on WBA loan forms or other forms that include a grant of a security interest and lien in any collateral, including deposit accounts, or include a cross-collateral provision. FIPCO® is in the process of revising WBA forms to provide greater flexibility for banks to make and advertise unsecured loans and will let banks know as soon as they are available.

The regulator also expressed a concern about credit applications for an "unsecured" loan if the bank uses loan documents that contain collateral provisions like those described above. Regulators may view using loan documents with collateral provisions when the borrower has applied for "unsecured" credit as deceptive. Therefore, banks should review their credit applications to determine whether borrowers can elect to obtain an "unsecured" loan. Because of the regulator's expressed concern, and until further notice by the WBA, credit applications should not

indicate that the credit being applied for is unsecured if used in connection with WBA promissory notes or other forms that include the provisions discussed in this article.

## Requirement to Report Interest Paid to Non-Resident Alien Individuals

**Notice No. 2012-7**

The Internal Revenue Service (IRS) has issued a controversial final rule requiring the reporting of interest on deposits maintained at U.S. offices of certain financial institutions that is paid to certain non-resident alien individuals. The final rule, effective **April 19, 2012**, applies to payments of interest made on or after **January 1, 2013**.

This article is intended to provide an overview of the final rule and accompanying Revenue Procedure, which may be found at: www.gpo.gov/fdsys/pkg/FR-2012-04-19/pdf/2012-9520.pdf and www.irs.gov/pub/irs-drop/rp-12-24.pdf, respectively.

**Background**

In January 2001, the IRS proposed similar rules which would have applied to all non-resident aliens. The 2001 proposal was withdrawn in August 2002 in response to strong opposition from the financial services industry and some members of Congress. A revised proposal was issued in August 2002 to require reporting to non-resident aliens who are residents of certain specified countries. In January 2011, the August 2002 proposed regulations were withdrawn and a new proposal was issued. The January 2011 proposed regulations required reporting on payments of interest aggregating $10 or more in one calendar year on a deposit account maintained at a U.S. office of a financial institution and paid to certain non-resident alien individuals. On April 19, 2012, the January 2011 proposal was finalized. It should be noted that Treasury may issue further guidance on the requirement at some point in the future. This article provides information on the final rule and corresponding revenue procedure as they currently stand.

**Reporting Requirement**

The reporting requirement applies to interest payments aggregating $10 or more in one calendar year on deposits maintained at a U.S. office of a financial institution that are paid to a non-resident alien individual who is a resident of a country with which the United States has entered into an information exchange agreement. Revenue Procedure 2012-24 was issued by IRS to identify those countries with which the U.S. government has such agreements. The individual must be a resident of a designated country as of December 31 prior to the calendar year in which the interest is paid for the requirement to apply. Interest payments are reported on Form 1042-S for the calendar year in which the interest is paid.

Financial institutions are currently required to report interest paid to depositors who are U.S. citizens, U.S. resident individuals, and Canadian resident individuals. Many financial institutions have implemented automated systems to generate Form 1099-INT or Form 1042-S, as applicable, for this purpose. The requirement to report interest paid to a broader group of non-resident alien individuals is said to build on the reporting and information collection systems currently used by U.S. financial institutions.

Non-resident alien individuals who maintain deposit accounts in the United States are currently required to complete a Form W8-BEN at the time the account is opened to declare their non-U.S. residency status and their country of residence. The final rule allows U.S. financial institutions to use existing W8-BEN information to produce Forms 1042-S for the non-resident alien individual depositors as required. Payors may rely on the permanent residence address provided on a valid form W8-BEN to determine the country of residence for a non-resident alien, unless the payor knows or has reason to know that such documentation is unreliable or incorrect. To address the potential compliance burden, the final rule allows a payor to elect to report interest payments to all non-resident alien individuals, rather than just those individuals who are residents of countries identified in the Revenue Procedure.

**Purpose of Reporting Requirement**

IRS considers the required reporting essential to the U.S. government's efforts to combat offshore tax evasion. The U.S. government must be able to obtain information from other countries regarding income earned and assets held in those countries by U.S. taxpayers. The effectiveness of the information exchange is said to depend largely on the

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United States' ability to reciprocate by providing information to those countries in return. The regulation is also intended to facilitate intergovernmental cooperation on the Foreign Account Tax Compliance Act, which requires overseas financial institutions to identify U.S. accounts and report information about those accounts to the IRS. Compliance with the regulation will allow the U.S. government to exchange information with foreign governments for tax administration purposes.

**Information Exchange Agreements**

A number of comments to the January 2011 proposed regulations expressed concern that the information required to be reported under the rule might be misused. Some comments suggested non-resident alien depositors may become targets for crime and may experience decreased physical safety in their countries of residence due to the information reported to the foreign governments, as the information could be intercepted by third parties or released by the foreign government. In response to such comments, IRS has stated that all of the information exchange agreements which have been entered by the United States require that the information exchanged be treated and protected as secret by the foreign government. The agreements generally prohibit the foreign government from using any information exchanged for any purpose other than administering, collecting and enforcing the taxes covered by the agreement. Under the agreement, neither country is permitted to release the information shared or use it for any other law enforcement purpose.

The U.S. government will not enter into an information exchange agreement unless the Treasury Department and IRS are satisfied that the foreign government has strict confidentiality protections. The foreign government must have the necessary legal safeguards in place to protect exchanged information and must impose adequate penalties for any breach of that confidentiality.

Notwithstanding an information exchange agreement, IRS will not exchange information with a foreign country if IRS determines the country is not complying with its obligations under the agreement to protect the confidentiality of the information and to use the information solely for collecting and enforcing taxes covered by the agreement. Similarly, IRS will not exchange information with a country that does not impose tax on the income being reported, as the information could not be used for the enforcement of tax laws in that country. Without an information exchange agreement, IRS is statutorily barred from providing information to another country.

The appropriate form of the information exchange may vary depending on the country requesting the information. For example, information might only be exchanged upon specific request. IRS requires the requesting country to explain the intended permitted use of the information and to justify the relevance of that information to the permitted use. In appropriate circumstances, IRS might exchange certain information on an automatic basis. Currently, the only country with which IRS automatically exchanges information is Canada.

**Conclusion**

Financial institutions will be required to report interest payments to non-resident alien individuals who are residents of specified countries when such payments aggregate $10 or more in a calendar year. The requirement applies to payments made on or after January 1, 2013. Revenue Procedure 2012-24 lists the countries with which IRS has an information exchange agreement; financial institutions must report interest payments to individuals who are residents of designated countries as of December 31 prior to the calendar year in which the interest is paid. Financial institutions may rely on the country of residence listed in a valid form W8-BEN to determine whether an account holder is a resident of a designated country. The WBA Frontline Compliance Update webinar, scheduled for June 28, will cover the final rule and other important topics. For more information on the webinar, please visit: www.wisbank.com/education. Finally, WBA will report on any additional guidance that may be issued by Treasury on the final rule or revenue procedure in a future edition of *WBA Compliance Journal*.

## EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act

**Notice No. 2012-8**

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC), which is responsible for the enforcement of Title VII of the Civil Rights Act, issued a detailed update of its enforcement guidance regarding the use of arrest and conviction records in employment decisions. According to the EEOC, this guidance does not represent a fundamental change in its position on Title VII and criminal records. Rather, the guidance provides a more in-depth analysis on certain issues, which the EEOC believes is timely given employers' increased access to criminal history information, as well as recent judicial guidance on Title VII and criminal records. The EEOC's guidance is particularly relevant to banks, as federal law regulates their employment of certain individuals with criminal records, and the guidance directly addresses this issue. At the same time, however, the impact of the guidance may be somewhat limited. To begin, the EEOC's enforcement duties are specific to Title VII, which only regulates an employer's use of conviction records in certain limited circumstances. In addition, the limitations on an employer's use of conviction records under the Wisconsin Fair Employment Act already impose restrictions that are similar to those contemplated in the EEOC guidance.

**Overview of Title VII and Criminal Records**

Title VII of the Civil Rights Act does not directly prohibit discrimination on the basis of a criminal record.

United States' ability to reciprocate by providing information to those countries in return. The regulation is also intended to facilitate intergovernmental cooperation on the Foreign Account Tax Compliance Act, which requires overseas financial institutions to identify U.S. accounts and report information about those accounts to the IRS. Compliance with the regulation will allow the U.S. government to exchange information with foreign governments for tax administration purposes.

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The U.S. government will not enter into an information exchange agreement unless the Treasury Department and IRS are satisfied that the foreign government has strict confidentiality protections. The foreign government must have the necessary legal safeguards in place to protect exchanged information and must impose adequate penalties for any breach of that confidentiality.

Notwithstanding an information exchange agreement, IRS will not exchange information with a foreign country if IRS determines the country is not complying with its obligations under the agreement to protect the confidentiality of the information and to use the information solely for collecting and enforcing taxes covered by the agreement. Similarly, IRS will not exchange information with a country that does not impose tax on the income being reported, as the information could not be used for the enforcement of tax laws in that country. Without an information exchange agreement, IRS is statutorily barred from providing information to another country.

The appropriate form of the information exchange may vary depending on the country requesting the information. For example, information might only be exchanged upon specific request. IRS requires the requesting country to explain the intended permitted use of the information and to justify the relevance of that information to the permitted use. In appropriate circumstances, IRS might exchange certain information on an automatic basis. Currently, the only country with which IRS automatically exchanges information is Canada.

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**Overview of Title VII and Criminal Records**

Title VII of the Civil Rights Act does not directly prohibit discrimination on the basis of a criminal record.

The EEOC's guidance indicates, however, that there are two ways in which an employer's use of criminal records may violate Title VII. First, an employer's use of criminal records in a manner that evidences disparate treatment of a protected class may violate Title VII. For example, an employer that rejects an African American applicant on the basis of a criminal record but hires a similarly situated white applicant with a comparable criminal record could be found to have violated Title VII. This guidance is not new, but it serves as an important reminder that employers that have employment policies regarding the consideration of criminal records in employment decisions must apply those policies in a consistent manner.

Second, an employer's use of criminal records in a manner that has a "disparate impact" on a protected class may violate Title VII. Disparate impact discrimination may occur when an employer's "facially neutral" policy has a disproportionately negative impact on those in a protected class. Again, this point is not new, and banks may already be familiar with disparate impact issues in other contexts. For example, the Consumer Financial Protection Bureau has recently advised lenders that it will apply a "disparate impacts effects test" in fair lending examinations. Still, although not entirely new, the EEOC's guidance provides a more in-depth analysis of its position on consideration of arrest and conviction records in employment decisions. The EEOC's concern with disparate impact in employers' use of conviction records stems, as least in part, from recent statistics that show that African Americans and Hispanics are arrested and incarcerated in disproportionate numbers in relation to the general population. For example, the EEOC's guidance cites a 2001 U.S. Justice Department estimate that while 1 out of every 17 white men is expected to go to prison at some point in his lifetime, the expected rate is 1 out of 6 for Hispanic men and 1 out of 3 for African American men. In its guidance, the EEOC concludes that this data "supports a finding that criminal record exclusions have a disparate impact based on race and national origin."

In addition, the guidance also cautions that in designing and implementing criminal records policies, employers must carefully distinguish between arrest records and conviction records. The EEOC notes that an arrest record, in itself, is not evidence of criminal conduct. Thus, a policy to screen out candidates based solely on an arrest record is not permissible. Rather, an employer must look to the underlying facts to determine if business necessity justifies adverse employment action in regard to an arrest (i.e., it is the underlying circumstances, not the arrest, that is relevant). In contrast, a record of conviction generally provides sufficient evidence that the individual engaged in particular criminal conduct, so the conviction record itself may be relevant to employment considerations.

**EEOC's Guidance on Compliance with Title VII**

The EEOC's compliance guidance focuses primarily on the disparate impact analysis discussed above. Under this framework, if an employer's use of criminal records has a disparate impact on a protected class, then the employer will be liable under Title VII unless it can demonstrate that its criminal record policy or practice "is job related for the positions in question and consistent with business necessity." According to the EEOC, "the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." As a general matter, the EEOC's guidance focuses on the need for employers to have specific evidence to justify a criminal records policy. The guidance rejects the idea that a policy can be adequately supported with a generalized concern about security.

The EEOC's guidance provides an example of a circumstance in which it believes an employer's criminal records policy would meet the "job related and consistent with business necessity" defense. Specifically, the EEOC believes an employer will meet that defense if it "develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job [known as the *Green* factors] . . . , and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity."

In effect, the EEOC is suggesting that employers consider the particular facts related to each individual with a criminal record before taking an adverse employment action on the basis of the individual's record: "Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." The EEOC outlines a number of factors that may be relevant to an individualized assessment, such as the facts and circumstances surrounding the offense or conduct; the number of convictions; the age of the convictions; the individual's employment history (e.g., evidence that the individual successfully performed the same type of work post-conviction); rehabilitation efforts; and whether the individual is bonded under a federal, state, or local bonding program.

Finally, even if an employer is able to establish that its policy is job related and consistent with business necessity, the employer may still be held liable under Title VII if the employee can show that there is "a less discriminatory 'alternative employment practice' that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt."

**Specific Issues Applicable to Banks**

For banks, which are subject to federal regulations restricting the hiring of individuals with certain criminal convictions, there is an additional twist in the disparate impact analysis. As the EEOC's guidance acknowledges,

"in some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations." The guidance goes on to explain that "[c]ompliance with federal laws and/or regulations is a defense to a charge of discrimination." The guidance specifically notes that banks are among the employers who are subject to such federal laws, specifically 12 U.S.C. § 1829, which requires a ten-year ban on employing individuals in banks if they have certain financial-related convictions. Thus, banks that properly comply with their legal obligations under federal law regarding the hiring of individuals with certain types of criminal records should not be in violation of Title VII.

However, the EEOC's guidance specifically notes that to the extent that employers choose to impose conviction record exclusions that go beyond the requirements of federal law, those exclusions would be subject to a Title VII analysis. Therefore, to the extent a bank wishes to adopt criminal records policies that are more expansive than the requirements of federal law, it must analyze the policy to ensure that it will comply with Title VII (as well as other applicable laws, such as the Wisconsin Fair Employment Act).

The EEOC's guidance provides an example on this point. The example concerns a bank that has adopted a policy that prohibits the hiring of anyone with convictions for any type of financial or fraud-related crimes within the last 20 years, which is more restrictive than the 10-year restriction imposed by federal law. In the example, the bank justifies the policy by asserting that it is necessary for its depositors to have 100% confidence that their funds are safe, but it provides no specific evidence that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than 10 years. The EEOC concludes that if the policy were shown to have a disparate impact on a protected class (which is a prerequisite for liability under a disparate impact analysis), then the policy would violate Title VII because the bank's "generalized concern about security, without proof' is insufficient to support adding 10 years to the federally mandated exclusion.

Another area where the EEOC's guidance could present an issue for banks is in relation to bonding requirements. Some bonds include restrictions regarding criminal records, and a bank may wish to use an individual's inability to meet those conditions as the basis for an adverse employment decision. If, however, the bond requirements are more stringent than federal law, the EEOC's guidance suggests that to ensure compliance with Title VII, the bank would have to consider whether such adverse employment action is job related and consistent with business necessity.

**Employment Applications**

The EEOC's guidance directly addresses inquiries regarding criminal records on employment applications. In one portion of the guidance, the EEOC explains, "[a]s a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." The EEOC's reference to "applicable laws" refers to 12 U.S.C. § 1829, which imposes hiring restrictions on banks. Thus, we believe that the EEOC's guidance recognizes the validity of a regulated employer, such as a bank, asking for criminal record history on an application in order to ensure compliance with federal law.

Federal law, specifically 12 U.S.C. § 1829, prohibits the hiring of individuals convicted of any criminal offense involving dishonesty or breach of trust or money laundering without permission from the Federal Deposit Insurance Corporation (FDIC). Further, it imposes a 10-year ban against the FDIC's consent to the hiring of individuals with convictions for certain enumerated crimes. In light of this law, the FDIC's Statement of Policy provides as follows in regard to employment applications:

> The FDIC believes that at a minimum, each insured institution should establish a screening process which provides the insured institution with information concerning any convictions . . . pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions.

The current WBA 350 Application for Employment requests that applicants specify whether they have been convicted of any criminal offenses and whether they currently have any pending criminal charges. It also requests that applicants list certain details of any such convictions or pending charges. It provides, however, that neither a conviction nor a pending charge will "automatically disqualify an applicant from employment" and that the nature of the conviction or charges will be considered "in accordance with law." We believe that this application is consistent with the FDIC's Statement of Policy, the EEOC's guidance regarding arrest and conviction records, and Wisconsin law.

**Impact on Wisconsin Law**

For Wisconsin employers, certain elements of the EEOC's guidance (such as the suggestion of an individualized assessment) should not be entirely unfamiliar. The reason for this is that the Wisconsin Fair Employment Act (WFEA) lists arrest and conviction records as prohibited bases of discrimination. Thus, in Wisconsin, an employer may be liable under the WFEA if it takes adverse employment action against an individual on the basis of an arrest or conviction record. However, the WFEA also contains certain exceptions to its general prohibition of discrimination on the basis of arrest or conviction records. For example, it is not employment discrimination for an employer to refuse to employ an individual who has been convicted of an offense that is substantially related to the circumstances of a particular job.

The EEOC's guidance regarding Title VII explains that Title VII preempts any state law or local law that purports to require or permit the doing of any act which would be an unlawful employment practice under Title VII. That is, if a particular employment practice violates Title VII, an employer will likely not be able to rely on state law as a defense. For employers in Wisconsin, this means that before relying on Wisconsin's arrest and conviction record law in taking an adverse employment action, an employer must also consider whether the action would violate Title VII.

One specific area where this may present an issue is in regard to the consideration of the age of conviction records. The WFEA's exception that allows an employer to deny employment to individuals with "substantially related" convictions has been interpreted to allow employers to deny employment on the basis of a substantially related conviction, regardless of the age of that conviction. This interpretation could be found to be inconsistent with Title VII, since the EEOC's guidance, as discussed above, directs employers to consider the age of a conviction. Thus, employers should seek counsel when designing or implementing employment policies regarding conviction records.

**Action Items for Banks**

In light of the EEOC's guidance, banks should take the following actions:

- Review any policies regarding the consideration of arrest or conviction records in employment decisions to ensure that they are consistent with the EEOC's Guidance. For example, to the extent a policy is more restrictive than federal law and could result in disparate impact, it should be reviewed for compliance with the EEOC's guidance regarding the "job related and consistent with business necessity" defense.

- Review the manner in which such policies are implemented to ensure that implementation is consistent with EEOC guidance. For example, consider whether policies are consistently applied (i.e., to avoid disparate treatment), whether a proper distinction is made between arrest and conviction records, and whether an individualized assessment is used when appropriate.

- Review job applications for compliance.

- Contact counsel with any particular concerns.

The full text of the EEOC's guidance can be found here: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. In addition, a brief Q&A issued by the EEOC along with this guidance can be found here:http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.■

*WBA wishes to thank Jennifer S. Mirus and Andrew N. DeClercq, attorneys with the Boardman & Clark LLP Law Firm, for providing this article.*

# REGULATORY SPOTLIGHT

## Agencies Issue Guidance Regarding Effective Date of Section 716 of Dodd-Frank Act.

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), and Federal Deposit Insurance Corporation (FDIC), (collectively, the Agencies) have issued a guidance to provide clarity regarding the effective date of section 716 of the Dodd-Frank Act (DFA) with respect to entities for which each is the prudential regulator. Section 716 prohibits the provision of federal assistance to any entity defined under that section to be a swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity. "Federal assistance" is defined for purposes of section 716 as "the use of any advances from any Federal Reserve credit facility or discount window which is not part of a program with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act," and "[FDIC] insurance or guarantees" for certain purposes specified in section 716(b)(1). Section 716(h) provides that its general prohibition on federal assistance is effective 2 years following the date on which DFA is effective. Section 716 will be effective on **07/16/2013**. The guidance was issued **05/10/2012**. Copies of the guidance may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-05-10/pdf/2012-11326.pdf. *Federal Register*, Vol. 77, No. 91, 05/10/2012, 27456-27457.

## CFPB Issues Proposed Rule on Regulation Z.

The Bureau of Consumer Financial Protection (CFPB) has issued a proposed rule to amend Regulation Z, which implements the Truth In Lending Act, and the official interpretation to the regulation. Regulation Z generally limits the total amount of fees that a credit card issuer may require a consumer to pay with respect to an account, limiting fees to 25 percent of the credit limit in effect when the account is opened. Regulation Z currently states that this limitation applies prior to account opening and during the first year after account opening. The proposal requests comment on whether to amend Regulation Z to apply the limitation only during the first year after account opening. Comments are due **06/11/2012**. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-04-12/pdf/2012-8534.pdf. *Federal Register*, Vol. 77, No. 71, 04/12/2012, 21875-21878.

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Read "Special Focus" for an update on the DHS Medicaid eligibility asset verification data match, and a summary of recent FinCEN issuances. Next, check "Regulatory Spotlight" for numerous CFPB items. Finally, turn to "Compliance Notes" for a reminder that as of July 1, 2012, Wisconsin becomes a motor vehicle title to lien holder state.■

# SPECIAL FOCUS

## Update on DHS Medicaid Eligibility Asset Verification Data Match

**Notice No. 2012-9**

As reported in previous issues of *WBA Executive Letter*, during the summer of 2011, the Wisconsin Department of Health Services (DHS) attempted to establish an electronic data match with financial institutions for the purpose of complying with a federal law requirement to verify assets of persons applying for or receiving Medicaid benefits to ensure the eligibility of such persons to receive those benefits. WBA was first alerted to this when a member institution contacted the association asking why the institution had received from DHS a data match agreement to be signed and returned to DHS. At that time, WBA determined DHS lacked specific statutory authority to establish such a data match program, that institutions should not sign the agreement and should not engage in matching activity related to this program. DHS subsequently sent a letter to financial institutions indicating that any signed agreements regarding this program were not in effect.

WBA and the Community Bankers of Wisconsin (CBW) worked together to assist in drafting legislation necessary to provide DHS specific authority to carryout its federal mandate, while also including provisions to protect financial institutions from liability when providing information in good faith to comply with the program. As a result of those efforts, 2011 Wisconsin Act 192 was enacted in April 2012. The statute, sec. 49.45 (4m), is very similar to the existing electronic data match program statutes in Wisconsin regarding delinquent taxpayers and child support payors, and provides the same two matching options under the existing programs—the financial institution matching option or the state matching option. As is the case with these two existing programs, the statute establishing the new Medicaid eligibility data match requires a signed agreement between the State agency (in this case DHS) and the financial institution before the data match may be implemented. WBA and CBW are currently working with DHS to draft and finalize the data match agreement, as well as other issues such as timing of implementation. It is expected that this process could be completed soon. It is also our understanding that DHS will draft a list of frequently asked questions regarding implementation and operational issues. WBA will provide timely updates on the details and status of the program, as warranted, in upcoming issues of *WBA Executive Letter* and *WBA Compliance Journal*.

## Summary of Items Recently Issued by FinCEN

**Notice No. 2012-10**

In recent months, FinCEN has issued final rules, an advance notice of proposed rulemaking, and guidance on a number of Bank Secrecy Act (BSA) related topics. This article is intended to provide a brief overview of these items, and does not cover each item in detail.

**Electronic Filing Requirement**

As previously reported in past editions of *WBA Compliance Journal*, FinCEN is mandating electronic filing of certain BSA forms, including Currency Transaction Reports (CTRs) and Suspicious Activity Reports (SARs), as of **July 1, 2012**.

While most FinCEN reports fall within the electronic filing mandate, there are limited exceptions, which include the Currency and Monetary Instrument Report (CMIR) and Form 8300: Report of Cash Payments Over $10,000 Received in a Trade or Business. In addition, while Reports of Foreign Bank and Financial Accounts (FBARs) are included within the e-filing requirement, the deadline for filing FBARs electronically has been extended to **June 30, 2013**.

FinCEN provided institutions the opportunity to apply for a limited-term exemption from the electronic filing requirement. The deadline to apply for an exemption has passed; those institutions which were not granted an exemption must comply with the electronic filing requirements by **July 1, 2012**.

**Guidance on FinCEN's New CTR and SAR Forms**

FinCEN's BSA E-Filing System currently accepts submissions of the new CTR and SAR forms. The System

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**Guidance on FinCEN's New CTR and SAR Forms**

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will also continue to accept past versions (legacy reports) until **March 31, 2013**. Until such time, institutions may choose to file either the legacy reports or the new reports.

While the new reports do not create new obligations or otherwise change existing statutory or regulatory expectations, there have been substantive revisions to the reports. The new SAR contains different sections of specific activity characterizations that will generally be most relevant to a particular industry. When the filing institution's industry is selected, those sections specific to other industries will automatically be noted as not applicable. The new CTR and SAR also contain a number of additional data fields regarding the type of financial services and suspicious activity involved, as applicable. These data fields are intended to facilitate more effective use of the information by law enforcement.

With respect to the SAR, the narrative remains a critical component of the filing. The new SAR allows filers to include a single, comma separated value (CSV) attachment. The attachment may include data which is more easily readable and usable in the spreadsheet format than it would be as part of the narrative, but it is not intended to be a substitute for the narrative.

FinCEN has also announced a change in the timing of filing CTRs. FinCEN regulations have consistently required CTRs to be filed within 15 days. Notwithstanding this requirement, in connection with the receipt of magnetic media files from 1987 through 2008, FinCEN issued electronic specifications referencing a 25 day period to assist in submitting magnetic media files on a fixed schedule. FinCEN understands that institutions have continued this business practice with respect to batch e-filing. FinCEN will temporarily maintain the 25 day compliance period referenced in earlier specifications through **March 31, 2013**, at which time all CTRs must be filed within 15 days.

**SAR Confidentiality Reminder**

FinCEN issued Advisory FIN-2012-A002 to remind financial institutions, and the lawyers who advise them, of the requirement to maintain the confidentiality of SARs. Institutions, along with their directors, officers, employees, agents and contractors are prohibited from disclosing SARs and any information that may reveal the existence of a SAR. Unauthorized disclosure of a SAR may undermine law enforcement efforts by notifying a suspect of an investigation, deter institutions from filing SARs, and threaten the safety and security of institutions and individuals who file these reports. Such unauthorized disclosure is a violation of federal law and may result in civil penalties of up to $100,000 for each violation, along with criminal penalties of up to $250,000 and/or imprisonment not to exceed five years. Institutions may also be held liable for civil money penalties resulting from anti-money laundering (AML) program deficiencies that led to the SAR disclosure of up to $25,000 per day for each day the violation continues.

Institutions should ensure all persons entrusted with information regarding a SAR are informed of the confidentiality requirement as well as the consequences for violating the requirement. Risk-based measures to enhance SAR confidentiality may include limiting access to SAR information on a need-to-know basis, restricting areas for reviewing SARs, logging access to SARs, and providing electronic notices that highlight confidentiality concerns before a person may access or disseminate the information. Any person who becomes aware of the unauthorized disclosure of a SAR should immediately contact FinCEN's Office of Chief Counsel at 703-905-3590, along with contacting the institution's primary federal regulator as required by a corresponding SAR rule.

**Guidance on CTR Aggregation for Businesses with Common Ownership**

FinCEN has issued guidance to clarify whether transactions conducted by businesses with common ownership should be aggregated for CTR purposes. FinCEN regulations require an institution to aggregate multiple currency transactions if the institution has knowledge that the transactions are made by or on behalf of any person and result in either cash in or cash out totaling more than $10,000 in one business day. Accordingly, the institution must determine whether multiple transactions amounting to cash in or cash out of more than $10,000 in one business day were conducted by or on behalf of the same person.

While multiple businesses may share a common owner, there is a rebuttable presumption that separately

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incorporated entities are independent persons. For this reason, transactions by businesses with common owners should not automatically be aggregated. The institution must ultimately determine whether the businesses are being operated independently, according to the information the institution obtains in the ordinary course of business. Factors to consider in determining whether the businesses are operated independently include: whether the businesses are located at the same address or share the same employees, whether the accounts of one business are repeatedly used to pay the expenses of another business, or whether the accounts of either business are repeatedly used to pay the personal expenses of their common owner. If the institution determines the businesses are not being operated independently, the transactions conducted by each business should be aggregated for CTR purposes.

**Final Rule on CTR Exemption for Payroll Customers**

FinCEN has issued a final rule to amend the regulation allowing institutions to exempt transactions of certain payroll customers from the CTR requirement. To be eligible for the exemption, the regulation previously required a payroll customer to "regularly" withdraw more than $10,000 in order to pay its U.S. employees in currency. The final rule amends the exemption to cover those payroll customers who "frequently" withdraw more than $10,000 in order to pay U.S. employees in currency, and became effective **June 7, 2012**. FinCEN has previously interpreted "frequently" to mean five or more transactions in a year, and had not provided a similar interpretation of the term "regularly." FinCEN believes that the lack of a specific definition for the term "regularly" may have prevented some institutions from using the exemption for payroll customers, and intends for the amendment to provide greater clarity for banks in applying the exemption standard for these customers.

**Guidance on Determining Eligibility for Exemption from CTR Requirements**

FinCEN has revised the guidance that was initially published on **August 31, 2009** in order to update relevant citations reflecting the final rule transferring FinCEN's regulations from 31 C.F.R. § 103 to 31 C.F.R. Chapter X, as well as to update the guidance regarding exemption eligibility for payroll customers. The guidance, FIN-2012-G003, outlines the substantive changes to the previous CTR exemption system made by the final rules issued in December 2008 and June 2012:

- Financial institutions are no longer required to file a designation of exempt person report (DOEP) for or conduct an annual review of customers who are U.S. or state governments, other depository institutions operating in the U.S., or entities acting with governmental authority. The DOEP filing and annual review requirements continue to apply for businesses listed on a major national stock exchange, non-listed businesses, and payroll customers.
- Institutions may now designate an otherwise eligible non-listed business customer or payroll customer for exemption after the customer has conducted five or more reportable transactions in currency in one year.
- Institutions may now designate a customer who is otherwise eligible for a Phase II exemption as eligible after maintaining a transaction account for two months (previously twelve months were required), or in less than two months if the bank conducts a risk-based analysis and forms a reasonable belief that the customer has a legitimate business purpose for conducting frequent or regular large currency transactions.
- Institutions are no longer required to file a biennial renewal or to report a change of control for an exempt Phase II customer.

The guidance also clarifies that the final CTR exemption rules do not relieve banks of their separate obligation to conduct suspicious activity monitoring and reporting for both Phase I and Phase II exempt customers. In addition, the guidance provides answers to commonly asked questions regarding the final rules and CTR exemption requirements.

**Advance Notice of Proposed Rulemaking on Customer Due Diligence Requirements**

In early March 2012, FinCEN issued an advance notice of proposed rulemaking (ANPR) requesting comments on a wide range of issues regarding the implementation of an express customer due diligence (CDD) regulation. The ANPR also requested comments on a potential requirement for financial institutions to identify beneficial ownership of their accounts, subject to risk-based verification and pursuant to an alternative definition of beneficial ownership. While the comment deadline of **May 4, 2012** has passed, the items discussed in the ANPR remain relevant, as FinCEN may issue a proposed rule in the future.

Existing BSA regulations, including the AML program and SAR rules, contain an implicit basis for a CDD obligation. However, FinCEN believes that an express rule requiring institutions to perform CDD, including an obligation to categorically obtain beneficial ownership information, may be necessary to protect the U.S. financial system from criminal abuse and to guard against terrorist financing, money laundering, and other financial crimes. FinCEN is concerned about a lack of consistency in the way institutions address implicit CDD obligations and collect beneficial ownership information, and believes this lack of consistency may limit the ability of institutions to rely on CDD efforts of other institutions. FinCEN believes an explicit CDD program rule would enhance efforts to combat financial crimes by strengthening the ability to identify and report illicit financial transactions; promoting consistency in the implementation of, examination for, and enforcement of CDD program requirements; assisting financial investigations by law enforcement; facilitating reporting and investigations in support of tax compliance; and promoting global financial transparency and efforts to combat

transnational illicit finance, consistent with international standards.

FinCEN believes an effective CDD program includes the following elements: conducting initial due diligence on customers; understanding the purpose and nature of the account and expected activity associated with the account; identifying the beneficial owner(s) of all accounts; and conducting ongoing monitoring of the customer relationship and conducting additional CDD as appropriate. FinCEN is considering an express customer identification and risk-based verification component of CDD, which would not create a new Customer Information Program (CIP) obligation, but would be satisfied by compliance with the institution's current CIP obligations. While certain customers are exempt from CIP requirements, those customers would not be exempt from the requirements to understand the nature and purpose of the account and to conduct ongoing monitoring.

Existing FinCEN regulations require the collection of beneficial ownership information in two limited situations: private banking accounts and correspondent accounts for certain foreign financial institutions. However, in its ANPR, FinCEN is considering expanding the requirement to obtain beneficial ownership information on all customers as an essential element of an effective CDD program.

**Resources**

FinCEN has issued a number of items in recent months that impact the operations of financial institutions. The items discussed in this article may be found at the following URLs:

- Announcement of BSA E-Filing Mandate: www.gpo.gov/fdsys/pkg/FR-2012-02-29/pdf/2012-4756.pdf.
- BSA E-Filing System: http://bsaefiling.fincen.treas.gov/main.html.
- Guidance on New CTRs and SARs: www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-G002.pdf.
- SAR Confidentiality Reminder: www.fincen.gov/statutes_regs/guidance/pdf/FIN-2012-A002.pdf.
- Guidance on CTR Aggregation for Businesses with Common Ownership: www.fincen.gov/statutes_regs/guidance/html/FIN-2012-G001.html.
- Final Rule Amending CTR Exemption for Payroll Customers: www.gpo.gov/fdsys/pkg/FR-2012-06-07/pdf/2012-13781.pdf.
- Guidance on Determining CTR Exemption Eligibility: www.fincen.gov/statutes_regs/guidance/html/FIN-2012-G003.html.
- ANPR on CDD Requirements: www.gpo.gov/fdsys/pkg/FR-2012-03-05/pdf/2012-5187.pdf.

In addition, WBA will be offering the WBA BSA/AML Compliance - Recent Developments and Common Errors Webinar on July 17, 2012 from 11:30 AM to 1:30 PM. The webinar will focus on recent developments in BSA/AML requirements and will be presented by Ken Golliher, a principal with Pegasus Educational Services, LLC. Further information on the webinar may be found at: www.wisbank.com/education. Also, please note that the February 2013 WBA Compliance Forums are scheduled to include a session on BSA/AML compliance.■

# REGULATORY SPOTLIGHT

## Agencies Issue Final Supervisory Guidance on Stress Testing for Banking Organizations with Over $10 Billion in Total Consolidated Assets.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC), (collectively, the Agencies) have issued a supervisory guidance, which outlines high-level principles for stress testing practices, applicable to all Agency-supervised banking organizations with more than $10 billion in total consolidated assets. The supervisory guidance does not apply to banking organizations with consolidated assets of $10 billion or less. The supervisory guidance is effective **07/23/2012**. Copies of the supervisory guidance may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-05-17/pdf/2012-11989.pdf. *Federal Register*, Vol. 77, No. 96, 05/17/2012, 29458-29472.

## Agencies Sign Memorandum of Understanding on Supervisory Coordination.

The Bureau of Consumer Financial Protection (CFPB), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and National Credit Union Administration (NCUA) (collectively, the Agencies) have signed a memorandum of understanding (MOU) on supervisory coordination. Section 1025 of the Dodd-Frank Act requires the Agencies to coordinate important aspects of their supervision of insured depository institutions with more than $10 billion in assets and their affiliates. Under the MOU, the Agencies will coordinate examinations and other supervisory activities and share certain material supervisory information concerning: (1) compliance with federal consumer financial laws and certain other federal laws that regulate consumer financial products and services; (2) consumer compliance risk management programs; (3) activities such as underwriting, sales, marketing, servicing,

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Read "Special Focus" for a summary of recent state legislation, including the new DHS data match and changes to UCC Article 9. Next, check "Regulatory Spotlight" for numerous CFPB issuances and BASEL III proposals. Then, turn to "Compliance Notes" for a reminder that in Wisconsin, as of July 30, 2012, any motor vehicle title with a lien listed will be sent to the first lien holder of record. Finally, check "Compliance Calendar" for free WBA programs in August on Health Care Reform, and BASEL III proposals.■

# SPECIAL FOCUS

## Summary of Recently Enacted State Legislation.

**Notice No. 2012-11**

There are several recently enacted state legislative items which directly impact financial institutions. The following article highlights select provisions of those items.

**Financial Record Matching Program with Department of Health Services: 2011 Wisconsin Act 192**

Effective, **04/17/2012**, 2011 Wisconsin Act 192 creates a new financial record matching program between financial institutions and Wisconsin's Department of Health Services (DHS) for the purpose of determining eligibility of applicants for, and recipients of, Medical Assistance (MA). DHS is responsible for administering the MA program which provides health care benefits to low-income families and individuals. Federal law requires that each state implement such a matching program.

Under the new law, DHS must enter into an agreement with each financial institution doing business in Wisconsin to operate a financial record matching program. At the time this publication went to print, DHS was working to finalize the agreement language with assistance from the Wisconsin Bankers Association, Community Bankers of Wisconsin, and others; thus, institutions should expect to receive the agreement in mid-August. Upon receipt, institutions will then have 30 days to review and return the signed agreement to DHS's vendor HMS, Inc.

Similar to the existing data matches for delinquent child support payers and taxpayers, the law and agreement require the financial institution to participate in the electronic financial record matching program by electing either the: (1) financial institution matching option; or (2) the state matching option.

If an institution elects the financial institution matching option, all of the following applies: (1) At least once each calendar quarter, DHS will provide to the financial institution information regarding applicants, recipients, and other individuals whose resources must be disclosed by law to determine the eligibility of an MA applicant or recipient. The information will include names and social security or other taxpayer identification numbers. (2) Based on the information received, the financial institution must take actions to determine whether any applicant, recipient, or other individual has an ownership interest in an account maintained at the financial institution. If the financial institution determines that an applicant, recipient, or other individual has an ownership interest in an account at the financial institution, it must provide DHS with a notice containing the applicant's, recipient's, or other individual's name, address of record, social security number or other taxpayer identification number, and the account information. The account information must include the account number, the account type, the nature of the ownership interest in the account, and the balance of the account at the time that the record match is made.

If a financial institution instead elects the state matching option, all of the following applies: (1) At least once each calendar quarter, the financial institution must provide DHS with information concerning all accounts maintained at the financial institution. For each account maintained, the financial institution must notify DHS of the name and social security number or other tax identification number of each person having an ownership interest in the account, together with a description of each person's interest. (2) DHS will take necessary actions to determine if any applicant, recipient or other individual has an ownership interest in an account maintained at the financial institution. Upon request of DHS, the financial institution must provide to DHS, for each applicant, recipient, or other individual who matches information provided by the financial institution, the address

of record, the account number and account type, and the balance of the account.

The agreement will provide an option for the institution to select one of two quarters in which the new data match process will begin. Institutions are encouraged to select the earlier of the two quarters, to the extent feasible, to help the State begin to realize savings this program is expected to generate; however, the later quarter option may be selected if the institution needs additional time to prepare for the new data match. For its participation, DHS must pay the institution up to $125 per calendar quarter within 30 days of receiving the institution's invoice. For payment to be made, the institution must make a one-time filing of IRS Form W-9 with the State.

The new law further provides that a financial institution participating in the financial record matching program, and the employees, agents, officers, and directors of the financial institution may use the information received from DHS only for the purpose of matching records. None of those persons may disclose or retain information received from DHS concerning applicants, recipients, or other individuals. Any person who violates this prohibition may be fined not less than $50 nor more than $1,000 or be imprisoned for not less than 10 days or more than one year or both. However, the new law also provides that an institution will not be liable for disclosing financial information, or taking any other action in good faith to comply with the law.

**Adoption of 2010 Amendments to UCC Article 9: 2011 Wisconsin Act 206**

2011 Wisconsin Act 206 adopts the 2010 amendments (2010 Amendments or new law) to UCC Article 9 approved by National Conference of Commissioners on Uniform State Laws. The new law is effective **07/01/2013**, just under one year from now. At the time of publication of this article, 26 states had adopted the 2010 Amendments. The following provides an overview of several changes the new law makes to UCC Article 9 (Wis. Stats. Ch. 409).

First, the new law specifies how a debtor's name must be identified on a financing statement. If the debtor is an individual to whom the Wisconsin Department of Transportation (DOT) has issued an operator's license or identification card that has not expired, the financing statement, to be sufficient, must provide the name of the individual as it appears on the operator's license or identification card. If the debtor is an individual who does not hold an unexpired DOT-issued operator's license or identification card, the financing statement must provide the individual name of the debtor or the surname and first personal name of the debtor. Revisions have also been made regarding how the debtor's name is to appear on a financing statement when collateral is held in a trust or an estate.

Second, under current UCC Article 9, the law of the jurisdiction where the debtor is located, while the debtor is located there, governs the: (1) perfection of a security interest; (2) effect of perfection or nonperfection; and (3) priority of a security interest in the collateral. If the debtor moves to a new jurisdiction or collateral is transferred to a new debtor in a new jurisdiction after a security interest is perfected, the security interest remains perfected until the earliest of the following, as applicable: (1) time perfection would have ceased under the law of the original jurisdiction; (2) expiration of four months after a change of the debtor's location to a new jurisdiction; or (3) expiration of one year after a transfer of collateral to a person that becomes a debtor and is located in the new jurisdiction. If the security interest becomes perfected under the law of the new jurisdiction before any of these time periods elapse, the security interest remains perfected. If such time has elapsed before perfecting under the laws of the new jurisdiction, the security interest becomes unperfected and is deemed to never have been perfected, as against a purchaser of the collateral for value.

The new law, however, contains provisions which are applicable to the filing of a financing statement when the debtor has changed location to a new jurisdiction and a security interest attaches within four months after the change of location. It provides circumstances in which a financing statement filed before the change of location under the law of the original jurisdiction is effective to perfect a security interest and identifies when a security interest remains perfected under the laws of the new jurisdiction. In addition, the new law provides circumstances in which a financing statement is effective to perfect a security interest in collateral that is acquired by a new debtor before, and within four months after, the new debtor becomes bound by the security agreement and specifies when the security interest remains perfected under the law of the new jurisdiction.

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Third, under current UCC Article 9, if the debtor is an organization, a filing office may refuse filing of an initial financing statement or certain amendments if the financing statement or amendment does not provide a type of organization for the debtor, a jurisdiction of organization for the debtor, or an organizational identification number for the debtor or indicate that the debtor has no such number. The new law eliminates these omissions as reasons for refusing to file an initial financing statement or amendment to a financing statement.

Fourth, under current UCC Article 9, a person may file a "correction statement" if that person believes the filed record is inaccurate or was wrongfully filed. The new law changes the name of the filing from "correction statement" to "information statement", and permits a secured party of record to file the information statement, containing certain information, if the secured party believes that the person who filed a record was not entitled to file it.

Fifth, the new law revises the definition of "good faith" to be consistent with the definition for that same term in other areas of the UCC. Currently under UCC Article 9, the term "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. The new law revises the term to mean honesty in fact in the conduct or transaction concerned.

Finally, the new law also: (1) narrows a previous exception to specify that certain agreement terms which restrict assignments are ineffective if the sale of a promissory note or payment intangible is a disposition of collateral after default or is an acceptance of collateral in satisfaction of the debtor's obligation; (2) provides rules relating to a secured party's control of electronic chattel paper; (3) improves compatibility with the use of electronic records and creates a new term "public organic record"; (4) updates the statutory financing statement forms to accommodate the 2010 Amendments; and (5) contains transition provisions applicable to perfected and unperfected security interests existing prior to **07/01/2013**.

WBA will hold a phone seminar on **October 25, 2012**, detailing all aspects of the 2010 Amendments to UCC Article 9, including transition rules for existing filings, with UCC experts Atty. John Knight, Boardman and Clark, L.L.P. and Atty. Nolan Zadra, U.S. Bank. Registration information for this important, time-sensitive program will be available soon at www.wisbank.com/education.

**Annual Audit of Savings Bank or Savings and Loan Association: 2011 Wisconsin Act 182**

Previously, a Wisconsin-chartered savings bank or savings and loan association was required to obtain an annual audit by an independent certified public accountant not connected with the financial institution. The audit report was required to be filed with DFI's Division of Banking. Effective **08/01/2012**, a Wisconsin-chartered savings bank or savings and loan association is permitted to either hire a certified public accountant or appoint an auditing committee to conduct the annual audit. Additionally, the certified public accountant is not required to be independent from the financial institution. The audit report is no longer required to be filed with DFI, but it must be retained by the financial institution. DFI has the authority to take custody and appoint a conservator of a savings bank after two requests for an audit report. This is a change from previous law which permitted such actions after one extension request by the savings bank. DFI also retains its authority to order an audit of a savings bank if one has not been done in the year prior to examination and has the authority to order an audit of a savings and loan association at any time. The amendments apply to an audit commenced on or after **08/01/2012**.

**Deposit Placement Programs of Public Depositories: 2011 Wisconsin Act 204**

Under existing law, the governing board of a public depositor is required to designate one or more public depositories in which the treasurer must deposit all public moneys received by the treasurer. The governing board is also required to specify whether the public moneys are to be maintained in time deposits, demand deposits, or savings deposits and whether security is required of the public depository to secure the repayment of deposits which exceed deposit insurance. However, effective **04/17/2012**, local governmental units, or certain other depositors may have additional deposit placement options under 2011 Wisconsin Act 204, beyond that which is noted above.

The new law provides that, notwithstanding the above noted existing provision, the governing board of a public depositor may direct its treasurer to deposit public moneys in a selected public depository, and directly or through an authorized agent, instruct the public depository to arrange for the redeposit of the moneys through a deposit placement program that meets all of the following conditions: (1) On or after the date it receives the public moneys, the selected public depository arranges for the redeposit of moneys into savings deposit accounts in one or more federal or state savings and loan associations, state banks, federal or state savings banks, savings and trust companies, or national banks insured by the Federal Deposit Insurance Corporation (FDIC) or state credit union insured by the National Credit Union Administration (NCUA); and (2) The full amount of the public depositor's moneys redeposited by the selected depository into deposit accounts with the financial institution identified in (1), plus any accrued interest, are insured by FDIC or NCUA.

The new law also provides that a treasurer who deposits public moneys in a selected public depository that is part of a deposit placement program is relieved of liability for any loss of public moneys.

For copies of the referenced Wisconsin Acts, contact WBA's Jodi Zieske at 608/441-1207 or jzieske@wisbank.com.■

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Read "Special Focus" for articles on revisions to DFI Banking Letter 40, and revisions to FCC rules for autodialed or prerecorded telemarketing calls. Next check "Regulatory Spotlight" for numerous proposed rules regarding mortgage lending. Finally, turn to "Compliance Notes" for a new tool to help search compliance related topics in *WBA Compliance Journal* and other publications.■

# SPECIAL FOCUS

## Recently Revised DFI Banking Letter 40: Nonaccrual of Interest

**Notice No. 2012-12**

Beginning in early 2012 the Wisconsin Department of Financial Institutions (DFI) held a series of roundtable listening sessions with financial institutions across the state to discuss a number of topics, including: (1) updates on the conditions of Wisconsin banks; (2) current and upcoming banking and regulatory issues; and (3) the local economy. In direct response to bankers' questions during those roundtable discussions, and as a result of the subsequent advocacy efforts by WBA and the Community Bankers of Wisconsin (CBW), DFI has reissued Banking Letter 40 related to loans on nonaccrual. WBA and CBW appreciate DFI's prompt action in response to bankers' concerns as DFI made significant helpful changes for state-chartered banks in the revised letter—most notably in the provisions related to allowing for the return of loans to accrual status. DFI's revised Banking Letter 40 is provided below.

Banking Letter 40: Nonaccrual of Interest

The purpose of the letter is to advise banks of the accrual accounting procedures to be applied to loans in the event the borrower fails to make required principal or interest payments.

Loans and lease financing receivables are to be reported as being in nonaccrual status if: (1) they are maintained on a cash basis because of deterioration in the financial position of the borrower; (2) payment in full of interest or principal is not expected; or (3) principal or interest has been in default for a period of 90 days or more.

For the purpose of applying the third test for nonaccrual status listed above, the date on which a loan reaches nonaccrual status is determined by its contractual terms. If the principal or interest on a loan becomes due and unpaid for 90 days or more on a date that falls between call report dates, the loan should be placed in nonaccrual status as of the date it becomes 90 days past due and it should remain in nonaccrual status until it meets the criteria for restoration to accrual status described below.

The reversal of previously accrued but uncollected interest applicable to any asset placed in nonaccrual status and the treatment of subsequent payments as either principal or interest should be handled in accordance with generally accepted accounting principles. Acceptable accounting treatment includes a reversal of all previously accrued but uncollected interest applicable to assets placed in a nonaccrual status against appropriate income and balance sheet accounts.

In the following situations, a loan need not be placed on nonaccrual status: loans fully secured to cover principal and interest by U.S. government securities, securities of agencies of the U.S. government, marketable securities, bank deposits, verified cash surrender value of insurance policies; and those loans or portions thereof which are guaranteed as to principal and interest by a government agency.

A nonaccrual loan may be restored to accrual status when: (1) none of its principal and interest is due and unpaid, and the bank expects repayment of the remaining contractual principal and interest; (2) the loan has been formally restructured and qualifies for accrual status; or (3) the borrower has resumed paying the full amount of the scheduled contractual interest and principal payments on the loan that is past due and in nonaccrual status, even though the loan has not been brought fully current, and certain repayment criteria are met. Criteria to be evaluated must include consideration that the borrower has resumed making payments over a sustained period, generally a minimum of six months, in accordance with the contracted terms.

The revised Banking Letter 40 is effective as of **05/10/2012**, the date of issuance. As a result of the revisions made to

Banking Letter 40, Banking Letter 40A as a stand-alone Banking Letter has been eliminated. Bankers should carefully review the revised letter to understand its full impact on their specific institution. Copies of the DFI letter were mailed by DFI to each state-chartered bank. A copy of the letter may also be found at DFI's website at: www.wdfi.org/fi/banks/letters/Letter40.pdf.

## FCC Revises Telephone Consumer Protection Act Rule to Impose New Requirements for Autodialed and Prerecorded Telemarketing Calls

**Notice No. 2012-13**

The Federal Communications Commission (FCC) published a final rule in the *Federal Register* on **06/11/2012**, to revise its rules implementing the Telephone Consumer Protection Act (TCPA) of 1991. Specifically, the revised rules: (1) require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded calls to residential lines, and accordingly, eliminate the established business relationship exemption for such calls to residential lines while still keeping flexibility in the form of consent needed for purely informational calls; (2) require all prerecorded telemarketing calls to allow consumers to opt-out of future prerecorded telemarketing calls using an automated, interactive opt-out mechanism; and (3) limit permissible abandoned calls on a per-calling campaign basis. Many of the revisions adopted by FCC align with the Federal Trade Commission's (FTC's) Telemarketing Sales Rule (TSR). While financial institutions are not subject to FTC's rule, they are subject to FCC's rule. This article provides a brief overview of select revisions to FCC's rule that could affect financial institutions engaged in autodialed or prerecorded telemarketing calls.

**Prior Express Written Consent for Autodialed and Prerecorded Telemarketing Calls**

By way of background, FCC's rule has long provided that, subject to limited exceptions, no person or entity may: (1) initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an 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; or (2) initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party unless the call: (i) is made for emergency purposes; (ii) is not made for a commercial purpose; (iii) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a solicitation; (iv) is made to a person with whom the caller has an established business relationship at the time the call is made; or (v) is made by or on behalf of a tax-exempt organization.

The revised rule now prohibits a person or entity from initiating, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an 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, other than a call made with the prior express written consent of the called party, or the prior express consent of the called party when the call is made by, or on behalf of, a tax-exempt nonprofit organization, or is a call that delivers a "health care" message made by, or on behalf of, those who may fall within the narrow health care exemption of the revised rule.

The revised rule also prohibits a person from initiating any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call: (i) is made for emergency purposes; (ii) is not made for a commercial purpose; (iii) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a solicitation; (iv) is made by or on behalf of a tax-exempt organization; or (v) delivers a "health care" message made by, or on behalf of, those who may fall within the narrow health care exemption of the revised rule. Importantly, note that the revised rule eliminates the established business relationship exemption for these types of calls. This will require telemarketers and sellers to secure prior express written consent from

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consumers in circumstances that would not have required such consent under the previous rule.

In essence, the revised rule requires prior express written consent in connection with autodialed or prerecorded telemarketing calls.

The revised rule defines "prior express written consent" as an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice and the telephone number to which the signatory authorizes such advertisements or telemarketing message to be delivered. FCC does not require a particular form or format for this written agreement.

In adopting the written consent requirement for these calls, FCC permits consent that is obtained pursuant to the Electronic Signatures in Global and National Commerce Act (E-SIGN) as means to satisfy the requirement of the revised rule. This will permit telemarketers and sellers to obtain permission via an email, Web site form, text message, telephone keypress, or voice recording.

While FCC has revised its consent rules for autodialed or prerecorded telemarketing calls to wireless numbers and prerecorded telemarketing calls to residential lines, it has not changed the existing consent rules for non-telemarketing, informational calls, such as those by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that delivery purely informational messages such as school closings.

**Automated, Interactive Opt-Out Mechanism for Prerecorded Telemarketing Calls**

The revised rule also implements additional opt-out requirements for artificial or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines. Under the previous rule, FCC required that, at the beginning of all artificial or prerecorded message calls, the message identify the entity responsible for initiating the call (including the legal name under which the entity is registered to operate), and during or after the message, provide a telephone number that consumers can call during regular business hours to make a company-specific "do-not-call" request.

Under the revised rule, all of the above generally apply except that the opt-out mechanism must provide the consumer with the ability to opt-out of receiving additional calls immediately during the telemarketing call. In addition, the opt-out mechanism, when invoked, must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call. Where a call would be answered by the consumer's answering machine or voicemail service, the message must also include a toll-free number that enables the consumer to subsequently call back and connect directly to an automated opt-out mechanism. Telemarketers and sellers are required to retain records of both providing this feature and of consumers opting out of receiving autodialed or prerecorded telemarketing messages. FCC does not require a particular form or format evidencing the mechanism or its implementation.

**Abandoned Call Rate**

The FCC's rule considers an outbound telephone call to be "abandoned" if a person answers the telephone and the caller does not connect to a sales representative within two seconds of the called person's completed greeting. Prior to the revised rule, the seller or telemarketer would not be liable for violating the two second restriction if, among other things, it employed technology that ensured abandonment of no more than 3 percent of all calls answered by the called person (rather than an answering machine) measured over a 30-day period. The revised rule affects the measurement aspect of this requirement. Thus, the assessment of the call abandonment rate will be based upon a single calling campaign, and if a campaign is longer than 30 days, the rate will be calculated each successive 30-day period (or portion thereof during which the call campaign continues).

**Don't Forget About Federal and State "Do-Not-Call" Requirements**

While on the topic of telemarketing requirements, financial institutions are reminded that the revised rule is related to the federal "do-not-call" requirements. However, one must also remember that the State of Wisconsin has a very strict and narrowly interpreted "do-not-call" rule, too. Both federal and state requirements must be considered in the context of telemarketing and "do-not-call", and the most consumer friendly aspects of each law should be followed to avoid violations.

**Resources**

Wisconsin's "do-not-call" rule may be found in the Department of Agriculture Trade and Consumer Protection's administrative code, *Subchapter V of chapter ATCP 127, beginning at s. ATCP 127.80*: http://docs.legis.wisconsin.gov/code/admin_code/atcp/127.pdf. For further information on Wisconsin's "do-not-call" rules, please see the July 2004 edition of the *WBA Compliance Journal.*

The FCC's revised TCPA rule, effective **07/11/2012**, may be found at: www.gpo.gov/fdsys/pkg/FR-2012-06-11/pdf/2012-13862.pdf.■

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Read "Special Focus" for an article on amendments to Regulation E remittance transfer requirements. Next, check "Regulatory Spotlight" for numerous CFPB items. Finally, turn to "Compliance Notes" for an FDIC FIL regarding credit risk management practices for purchased loan participations, and a consumer alert regarding fraudulent emails.■

# SPECIAL FOCUS

## Amendments to Regulation E Remittance Transfer Requirements

**Notice No. 2012-14**

As previously reported in the March 2012 edition of *WBA Compliance Journal*, the Consumer Financial Protection Bureau (CFPB) issued a final rule amending Regulation E, which implements the Electronic Fund Transfer Act, to provide additional protections to consumers who send remittance transfers to foreign countries as set forth in the Dodd-Frank Act (DFA). On August 20, 2012, CFPB published a final rule ("August final rule") modifying its previous final rule issued on February 7, 2012 ("February final rule") to adopt a safe harbor with respect to determining whether a person is subject to the rule, and to revise several other aspects of the February final rule. Both final rules are effective **February 7, 2013**.

This article is intended to provide a brief overview of the August 2012 final rule, and does not cover every aspect of this rule nor the February final rule. To ensure an understanding of all the requirements that will be effective this coming February, consider reviewing the March 2012 *WBA Compliance Journal* article as well as this article. In addition, the August final rule may be found at: www.gpo.gov/fdsys/pkg/FR-2012-08-20/pdf/2012-19702.pdf.

**Remittance Transfer**

Regulation E defines "remittance transfer" as the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. The term applies regardless of whether the sender holds an account with the provider, and regardless of whether the transaction is also an electronic fund transfer. Transfers of $15 or less and securities and commodities transfers are excluded from the definition of "remittance transfer." "Designated recipient" is defined as any person specified by the sender as the authorized recipient of a remittance transfer to be received at a location in a foreign country. Examples of remittance transfers include a consumer providing cash or another form of payment and requesting that funds be sent to a specified location in a foreign country; consumer wire transfers to a designated recipient; international ACH transactions sent at the sender's request; and online bill payments and other electronic transfers that are scheduled in advance by the sender and are made by the sender's financial institution to a designated recipient at the sender's request. The term "remittance transfer" does not include a consumer providing a debit, credit or prepaid card directly to a foreign merchant as payment for goods or services; a consumer's deposit of funds to an account located in a State; or online bill payments and other electronic transfers made through a web site of a merchant located in a foreign country.

**Safe Harbor**

In connection with the February final rule, CFPB proposed the adoption of a safe harbor for determining whether a person provides remittance transfers in the "normal course of business," and is therefore a "remittance transfer provider." The August final rule states that if a person provided 100 or fewer remittance transfers in the previous calendar year and provides 100 or fewer remittance transfers in the current calendar year, the person is deemed not to provide remittance transfers in the normal course of its business. If a person crosses the 100 transfer threshold the person is then providing remittance transfers in the normal course of business. The August final rule permits a transition period of a reasonable time, not to exceed six months, within which the person must begin complying with the remittance transfer requirements. The safe harbor applies to the first 100 transfers the person provides during that calendar year, and compliance with the remittance transfer requirements is not required for any transfers for which payment is made during the transition period.

The August final rule clarifies that the number of remittance transfers provided in a calendar year does not include any transfers that are excluded from the definition of "remittance transfer" for reasons other than the safe harbor, such as small value transactions and commodities transfers. CFPB expects that many small providers will accurately track their remittance transfers to determine whether they qualify for the safe harbor. For those who do not qualify for the safe harbor, whether or not they are providing remittance transfers in the normal course of business will continue to depend on the facts and circumstances involved. CFPB also intends to monitor the 100 transfer threshold over time.

**Disclosures**

The February final rule requires a "pre-payment disclosure" of certain information at the time a remittance transfer is requested, and a receipt when payment for the transfer is made or authorized. Providers may issue a single "combined disclosure" if it is provided at the time the transfer is requested, and must then provide proof of payment when payment for the transfer is made. In connection with a "combined disclosure" for a transfer scheduled before the date of transfer, the August final rule allows the provider to provide a confirmation of scheduling in lieu of the proof of payment required by the February final rule. The confirmation of scheduling must be clear and conspicuous, provided in writing or electronically, and provided in retainable form. The provider is not required to provide additional proof of payment when the payment is later processed.

**Use of Estimates**

The February final rule established two circumstances in which the use of estimates for the exchange rate, the amount which will be transferred in the currency in which it will be received, third party fees and taxes, and the amount which will be received by the designated recipient in the currency in which the transfer will be received is allowed: (1) a temporary exception to apply through July 21, 2015, when a provider is unable to determine exact amounts for reasons beyond its control and the transfer is sent from the sender's account with the institution; and (2) a permanent exception to apply when the provider is unable to determine exact amounts at the time the disclosure is required due to the laws of the recipient country or the method in which the transfer is made in the recipient country. The August final rule establishes a third circumstance in which estimates for these items may be provided: for all remittance transfers scheduled 5 or more business days before the date of transfer. For transfers scheduled less than 5 business days before the date of transfer, estimates may not be used. CFPB believes consumers should receive accurate disclosures during that period as exchange rate risk is generally more manageable closer to the date of transfer.

The August final rule states that an estimated exchange rate provided in connection with a transfer scheduled five or more business days before the date of transfer must be the exchange rate that the provider would have used or did use that day in providing disclosures to a sender requesting a remittance transfer to be made on the same day. If the sender schedules the transfer five or more business days prior to the date of the transfer and the provider agrees to the sender's request to fix the amount to be transferred in the currency in which the transfer will be received, rather than the currency in which the transfer will be funded, estimates may also be provided for: (1) the amount to be transferred in the currency in which the transfer will be funded; (2) fees and taxes imposed by the provider in the currency in which the transfer will be funded; and (3) the total amount of the transaction in the currency in which the transfer will be funded.

If estimates are provided in connection with a transfer scheduled five or more business days prior to the date of transfer, a receipt with accurate figures must be provided no later than one business day after the date the transfer is made. If the transfer is funded by the sender's account held by the provider, the receipt may be provided on the next periodic statement regarding the account or within 30 days after the transfer if no periodic statement is provided. The final rule does not prevent a provider from providing the receipt prior to the date of transfer.

While the August final rule allows a provider to disclose an estimate of the total amount of the transfer when the transfer is scheduled five or more business days prior to the date of transfer and the provider agrees to the sender's request to fix the amount of the transfer in the currency in which it will be received, this estimated amount could be considered an "error" under the February final rule. The February final rule defines "error" as an incorrect amount paid by a sender in

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connection with a remittance transfer, and includes circumstances where a sender pays an amount that differs from the total amount of the transaction stated in the receipt. Fortunately, the August final rule revises the definition of "error" to exclude an estimate of the total amount of the transfer when the provider agrees to the sender's request to fix the amount of the transfer in the currency in which it will be received. In such a circumstance, the sender will receive a receipt which discloses the actual amount the sender paid for the transfer and may assert an error based on the disclosure of the amount paid in that receipt.

**Remittance Transfers Scheduled Before the Date of Transfer**

The August final rule imposes varying disclosure requirements depending on when a remittance transfer is scheduled. For any transfer scheduled at least three business days before the date of transfer, the provider must disclose the date of transfer in the receipt provided when payment is made, using the term "Transfer Date" or a substantially similar term. If subsequent transfers in a series will be made four or fewer business days after payment for the initial transfer in the series is made, the provider must disclose on the receipt provided for the initial transfer: (1) the date of the initial transfer; and (2) the dates on which subsequent transfers in the series will be made. For other subsequent preauthorized transfers, the August final rule provides flexibility as to whether the information regarding transfer dates is included in one or more receipts or standalone disclosures, so long as the information is provided in sufficient time to allow the consumer to exercise his or her cancellation rights.

With respect to a series of preauthorized transfers, the February final rule would have required a provider to issue a "pre-payment disclosure" within a reasonable time prior to the scheduled date of each subsequent transfer in the series, and a receipt no later than one business day after each subsequent transfer is made. The August final rule eliminates the requirement to provide a "pre-payment disclosure" for each subsequent transfer. Instead, the August final rule implements a requirement to disclose: (1) the date the provider will make the subsequent transfer, using the term "Future Transfer Date" or a substantially similar term; (2) a statement regarding the sender's cancellation rights; and (3) the name, phone number, and website of the provider. This information must be provided to the sender no more than 12 months and no less than 5 business days prior to the date of the subsequent transfer to which it pertains. For any preauthorized transfer for which payment is made four or fewer business days prior to the date of transfer, the information must be provided on or with the "combined disclosure" provided when the initial transfer in the series is scheduled, or on or with the receipt provided when payment is made or authorized.

With the exception of the date the funds will be available to the designated recipient, the transfer date, and to the extent estimates are permitted, the information provided in the receipt for the first transfer in a series will apply to all subsequent preauthorized transfers in the series. If the information changes, the provider must issue an updated receipt within a reasonable time prior to the scheduled date of the next transfer in the series. The receipt is deemed to be provided within a reasonable time if it is provided no later than five business days prior to the date of the next transfer. The updated receipt must contain all of the information generally required to be included in a receipt, and must clearly and conspicuously indicate that the information is updated. Barring further changes, the updated receipt will apply to subsequent transfers in the series.

**Cancellation Periods**

The February final rule generally allows senders a thirty minute period after payment for a transfer is made or authorized in order to cancel the transfer. For a transfer scheduled at least three business days in advance, the sender may cancel the transfer if the request is made three business days before the scheduled date of the transfer. The August final rule permits a provider to describe on a receipt both the three business day and thirty minute cancellation periods and either describe the transfers to which each deadline applies, or use a checkbox or other method to designate which cancellation period applies to the transfer. The provider is not required to state its business days on the receipt, but CFPB believes providers will generally make their business days available upon request. The final rule does not prohibit a provider from including only the applicable cancellation period on a receipt.

**Conclusion**

The August final rule modifies the remittance transfer requirements set forth in the February final rule. A safe harbor is adopted with respect to the phrase "normal course of business" in the definition of "remittance transfer provider," which determines whether a person is subject to the rules' requirements. Providers may use estimates of certain information required to be disclosed for transfers scheduled five or more business days in advance. In addition, providers may issue a receipt which describes both the thirty-minute and three business day cancellation periods and identifies which cancellation period applies to the transfer that is the subject of the receipt. The requirements of both the February and August final rules are effective **February 7, 2013**.■

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Read "Special Focus" for an article on protections for service members. Next, check "Regulatory Spotlight" for notices regarding publication of the RESPA and TILA proposed mortgage servicing rules. Finally, read "Compliance Notes" for items on the new regulatory capital estimation tool and FDIC's new violation citing system.■

# SPECIAL FOCUS

## Financial Protections Available to Service Members

**Notice 2012-15**

Creditors must be aware of the financial protections afforded to military service members by law, and stay current with changes to those protections. The Department of the Treasury recently released guidance on mortgage servicing practices with respect to military homeowners, and made changes to the Home Affordable Modification Program to provide more opportunities for mortgage assistance to military homeowners. WBA is taking this opportunity to provide a brief overview of many financial protections available to military service members, including information on the recent changes made by Treasury.

**Servicemembers Civil Relief Act Protections**

The Servicemembers Civil Relief Act (SCRA) was signed into law on December 19, 2003, replacing the Soldiers' and Sailors' Civil Relief Act of 1940. The SCRA is a federal law providing protections to service members who are entering "military service" as defined in the SCRA, and in some cases their spouses, dependents, and other persons subject to the service members' obligations. The SCRA definition of "military service" includes several subcategories: (1) for a service member who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, "military service" means full-time duty in the active military service of the United States, including full-time training duty, annual training duty, and attendance while in the active military service at a school designated as a service school by law or by the Secretary of the military department concerned; (2) for a member of the National Guard, "military service" means a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by Federal funds; (3) for a service member who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, "military service" is defined as active service; and (4) "military service" also includes any period during which a service member is absent from duty on account of sickness, wounds, leave, or other lawful cause.

The protections afforded by the SCRA include: (1) a maximum rate of interest that may be charged on obligations incurred by the service member individually or jointly with his or her spouse prior to entering military service; (2) postponements in the foreclosure process or eviction from a bank-owned property in the absence of a court order; (3) limitations on the exercise of rights under a life insurance policy pledged as collateral for a service member's loan; (4) a required notice to all military homeowners who are in default on a mortgage; and (5) a prohibition of taking adverse action based on a service member's exercise of his or her rights under the SCRA.

*Interest Rate Limitation*

The SCRA limits the interest rate on obligations incurred by the service member individually or jointly with his or her spouse prior to the service member's military service to no more than 6% per year for the duration of the military service. For obligations secured by a mortgage, trust deed, or other security in the nature of a mortgage, the interest rate limitation continues for a period of one year after the military service ends. The SCRA defines "interest" to include service charges, renewal charges, fees, or any other charges with respect to an obligation or liability, except bona fide insurance. Creditors must ensure that these items, as a whole, do not exceed the 6% maximum imposed by the SCRA. Interest in excess of 6% per year that would otherwise be incurred must be forgiven by the creditor. In addition, the amount of any periodic payment due under the terms of the obligation must be reduced by the amount of interest forgiven.

In order for the obligation to be subject to the interest rate limitation, the service member must provide written notice to the creditor along with a copy of the military orders calling the service member to military service not later than 180 days after the date the service member is released from military service. The creditor must retroactively apply the

interest rate limitation effective as of the date on which the service member is called to military service. The SCRA allows a creditor to petition a court for relief from the interest rate limitation based on the service member's ability to pay interest on the obligation at a rate in excess of 6% per year.

*Mandatory Postponements in Foreclosure or Eviction Process*

The SCRA originally prohibited a creditor from foreclosing upon or repossessing real or personal property which secures an obligation incurred prior to military service during the period of military service and for 90 days thereafter if the creditor did not have a court order authorizing the action. The Housing and Economic Recovery Act of 2008 extended the timeframe for obligations secured by a mortgage to include the period of military service and nine months thereafter. The extended timeframe was initially scheduled to sunset on December 31, 2010, but the Helping Heroes Keep Their Homes Act of 2010 provided a further extension through December 31, 2012. In addition, the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 extended the nine month timeframe to one year after the end of military service. The one year timeframe will apply from February 2, 2013 to December 31, 2014. However, as the nine month timeframe is scheduled to expire on December 31, 2012 and there is a brief statutory gap before the one year timeframe becomes effective on February 2, 2013, from January 1, 2013 through February 1, 2013, the time period, technically speaking, briefly reverts to 90 days after the military service ends. Having said this, before pursuing a foreclosure between January 1 and February 1, 2013 under the 90 day timeframe, WBA would strongly urge creditors to seek the advice of legal counsel and consider the reputational risks which would accompany the foreclosure action. In the absence of another extension, beginning January 1, 2015 the time period will again revert to 90 days after the military service ends.

If a creditor pursues a court order to proceed with foreclosure, the SCRA allows the court to postpone proceedings until the service member is available to attend or adjust the obligation to preserve the interests of all parties. Such adjustments may include, but are not limited to, extending the mortgage maturity date to facilitate lower monthly payments, granting foreclosure subject to the service member reopening the action, or extending the period during which the service member may redeem the property by paying the mortgage.

Similarly, in the absence of a court order, a landlord may not evict a service member or his or her dependents during the period of military service from premises that are intended to be occupied as a primary residence for which the monthly rent does not exceed a specified amount. The Act initially identified a monthly rent amount of $2,400, subject to yearly housing price inflation adjustments. The maximum monthly rental amount as of January 1, 2012 is $3,047.45. This prohibition applies to bank-owned properties rented to service members.

In contrast to the interest rate limitation, which applies upon the service member's written notice to the creditor, the service member is not required to take any action in order for the postponements in the foreclosure or eviction process to apply.

*Required Notice to Borrowers in Default*

The Housing and Urban Development Act requires creditors to provide notice of the availability of homeownership counseling to any eligible homeowner who fails to pay any amount by the date the amount is due on a mortgage loan. Among other requirements, the notice must explain the mortgage and foreclosure rights of service members and their dependents under the SCRA, and must be provided within 45 days of the borrower's failure to make a payment. The required notice was introduced in HUD's Mortgagee Letter 2006-28, "Mortgage and Foreclosure Rights of Servicemembers under the SCRA." In June 2011, HUD announced a revised notice that updated the extended timeframes for relief afforded to service members on active duty. The revised notice describes the interest rate limitation of 6% per year, as well as the service member's protection from foreclosure proceedings during, and within nine months after, the service member's period of military service.

*Life Insurance Pledged as Collateral for Service Member's Loan*

The SCRA also protects a life insurance policy on the life of a service member that is pledged as collateral for a loan to

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the service member. The assignee of the policy may not exercise any right or option obtained under the assignment during the period of military service and for one year thereafter, unless the assignee has obtained a court order. This prohibition does not apply when the premiums on the policy are due and unpaid, or upon the death of the insured service member.

*Prohibition of Adverse Action Based on Exercise of SCRA Rights*

The fact that a service member applies for or receives a stay, postponement, or suspension of obligations under the protections afforded by the SCRA may not be the basis for adverse action by the service member's creditor. In particular, the creditor may not: (1) make a determination that the service member is unable to pay the obligation according to its terms; (2) deny or revoke credit, change the terms of an existing credit arrangement, or refuse to grant credit to the service member in substantially the amount or on substantially the terms requested; (3) file an adverse report to a consumer reporting agency relating to the service member's creditworthiness; or (4) make a notation in the service member's record that the person is a member of the National Guard or a reserve component.

*Penalties for SCRA Violations*

The remedies available for SCRA violations include monetary damages, injunctive relief, attorney's fees and civil money penalties. The service member may bring a direct cause of action against a creditor, and the Department of Justice may bring suit against any person who engages in a pattern or practice of violating the SCRA, as well as any person who engages in a violation of the SCRA that raises an issue of significant public importance. Recent litigation between the Department of Justice and various lenders regarding SCRA violations has required the lenders to provide each of these remedies to service members.

In May 2011, the Department of Justice announced settlements with two lending institutions (lenders) under the SCRA to resolve allegations that the lenders wrongfully foreclosed on active duty service members' homes without first obtaining court orders. Both lawsuits alleged that the lenders did not consistently check the military status of borrowers before initiating foreclosure actions, and that the lenders knew or should have known about the military status of many of the borrowers. Under separate settlements, each of the two lending institutions agreed to establish separate multi-million dollar funds to compensate service members who were subjected to wrongful foreclosures. Creditors may verify a borrower's military status through the Department of Defense Manpower Data Center: https://www.dmdc.osd.mil/appj/scra/scraHome.do.

The federal banking regulators have published resources to facilitate SCRA compliance. The FDIC Compliance Manual may be found at: http://fdic.gov/regulations/compliance/manual/pdf/V-11.1.pdf; the OCC SCRA Handbook may be found at: http://occ.gov/publications/publications-by-type/other-publications-reports/scra.pdf; and the CFPB Supervision and Examination Manual may be found at: www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf.

**Talent Amendment**

In October 2006, President Bush signed the 2007 Defense Authorization Act, which contained a payday lending provision known as the Talent Amendment ("Amendment"). The Amendment was intended to restrict the ability of payday lenders to extend credit to service members and their dependents by establishing interest rate ceilings and other restrictions, but the limitations also apply to traditional financial institutions. The Amendment applies to closed-end credit offered or extended to a "covered borrower" primarily for personal, family or household purposes that are "payday loans", "motor vehicle title loans", or "tax refund anticipation loans", as those terms are defined in the Act. While the Amendment is narrow in scope and may not apply to the types of transactions typically entered into by traditional financial institutions, it is important for institutions to understand the rules. If an institution makes any of the types of loans covered by the Amendment, it must provide the required disclosures and comply with the restrictions imposed by the Amendment. For more information on the Amendment, please see the September 2007 edition of *WBA Compliance Journal*.

**Mortgage Servicing Practices for Service Members with PCS Orders**

Interagency guidance was issued in June 2012 regarding mortgage servicing practices for military homeowners with permanent change of station (PCS) orders. PCS orders require the service member to move to a new duty station, are non-negotiable, and impose short timelines.

Within the guidance, the agencies have identified mortgage servicer practices which may mislead or otherwise harm service members who have received PCS orders, including: (1) failing to provide a homeowner with accurate and clear information on assistance programs for which the homeowner may qualify; (2) asking a homeowner to waive legal rights under the SCRA or any other law as a condition of providing information about available assistance programs; (3) advising a homeowner who is current on his or her loan to skip payments to create an appearance of financial difficulty and obtain assistance for which he or she would not otherwise qualify; (4) failing to provide a reasonable means for homeowners to obtain the status of requests for assistance; and (5) failing to communicate in a timely manner the servicer's decision regarding a request for assistance along with an explanation of the reason for denial, when applicable. The interagency guidance may be found at: www.federalreserve.gov/newsevents/press/bcreg/bcreg20120621a1.pdf.

**Treasury Changes to HAMP**

In addition, the Department of the Treasury has made changes to the Home Affordable Modification Program (HAMP) to offer more opportunities for mortgage assistance to military homeowners. In the past, military homeowners with PCS orders were not eligible for a HAMP mortgage modification because, due to the PCS orders, the home was no longer their primary residence. In addition to the resulting financial difficulties, becoming delinquent on a mortgage loan can put a service member's security clearance at risk. Treasury's changes to HAMP provide that homeowners who are permanently displaced by a job-related move, such as PCS orders, may still qualify for a HAMP mortgage modification. To qualify, the borrower must: (1) be displaced due to an out-of-area job transfer; (2) have been occupying the home as a principal residence immediately prior to the displacement; (3) intend to return to the home at some point in the future; and (4) not own any other single-family real estate. Service members who do own other residential properties may qualify for a HAMP modification under expanded opportunities available for rental properties, or may qualify for a short sale through Treasury's Home Affordable Foreclosure Alternatives Program. A Treasury article regarding these changes to HAMP may be found at: www.treasury.gov/connect/blog/Pages/new-hamp-enhancements-will-help-military-homeowners.aspx/.

**Conclusion**

Various financial protections are afforded to military service members by law, and creditors must ensure they understand the limitations imposed by those laws. In addition to complying with the many requirements under the Servicemembers Civil Relief Act, creditors should avoid practices regulatory agencies have identified as concerning with respect to credit extended to service members.■

# REGULATORY SPOTLIGHT

## Agencies Reopen Comment Period for Proposed Rules Regarding Margin and Capital Requirements for Covered Swap Entities.

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Farm Credit Administration (FCA), and Federal Housing Finance Agency (FHFA) (collectively, the Agencies) have issued a notice to announce the reopening of the comment period for the proposed rule published in the *Federal Register* on **05/11/2011**, to establish minimum margin and capital requirements for uncleared swaps and security-based swaps entered into by swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants for which one of the Agencies is the prudential regulator. Comments are due **11/26/2012**. Copies of the notice may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-10-02/pdf/2012-24276.pdf. *Federal Register*, Vol. 77, No. 191, 10/02/2012, 60057-60059.

## CFPB Publishes Proposed Rules on Mortgage Servicing in *Federal Register*.

- The Bureau of Consumer Financial Protection (CFPB) has published in the *Federal Register* a proposed rule to amend Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA) and the official interpretation of the regulation. The proposal was first included in the August 2012 edition of this publication. The proposed amendments implement the Dodd-Frank Act (DFA) provisions regarding mortgage loan servicing. Specifically, the proposal requests comment regarding proposed additions to Regulation X to address seven servicer obligations. The proposed rule would also modify and streamline certain existing servicing-related provisions of Regulation X. Comments were due **10/09/2012**, comments on the Paperwork Reduction Act analysis are due **11/16/2012**. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-09-17/pdf/2012-19974.pdf. *Federal Register*, Vol. 77, No. 180, 09/17/2012, 57200-57315.

- CFPB has issued a proposed rule to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the official interpretation of the regulation. The proposed amendments implement the Dodd-Frank Act (DFA) provisions regarding mortgage loan servicing. Comments were due **10/09/2012**, comments on the Paperwork Reduction Act analysis are due **11/16/2012**. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-09-17/pdf/2012-19977.pdf. *Federal Register*, Vol. 77, No. 180, 09/17/2012, 57318-57406.

## CFPB Issues Notice on Generic Clearance for Compliance Costs and Other Effects of Regulations Information Collection.

CFPB has issued a notice soliciting comments concerning its proposed information collection titled, "Generic Clearance for Collection of Information on Compliance Costs and Other Effects of Regulations." The collection seeks qualitative information on the impact of regulations on providers of consumer financial products and services (Providers). CFPB seeks to better understand the compliance activities, burdens, and other economic costs and benefits associated with its potential rules and existing regulations.

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Read "Special Focus" for articles on the expiration of temporary unlimited deposit insurance for noninterest-bearing transaction accounts, and CFPB's delay of certain mortgage disclosures. Next, check "Regulatory Spotlight" for numerous CFPB items. Finally, read "Compliance Notes" for DFI's announcement of the 2013 Escrow Rate.■

# SPECIAL FOCUS

## Expiration of Temporary Unlimited Deposit Insurance Coverage

**Notice 2012-16**

As reported in the November 2010 edition of *WBA Compliance Journal*, the Dodd-Frank Act created a temporary category for FDIC deposit insurance coverage purposes which provided unlimited coverage for all noninterest-bearing transaction accounts beginning on December 31, 2010. This unlimited coverage is scheduled to expire on **December 31, 2012**. FDIC has issued a Financial Institution Letter regarding the expiration of the temporary unlimited coverage. This article is intended to provide an overview of the temporary unlimited coverage as well as its expiration. The letter itself, FIL-45-2012, includes a link to frequently asked questions and answers, and may be found at: http://fdic.gov/news/news/financial/2012/fil12045.html.

**Temporary Unlimited Deposit Insurance Coverage**

Section 343 of the Dodd-Frank Act (DFA) amended section 11 of the Federal Deposit Insurance Act to fully insure all noninterest-bearing transaction accounts (NIBTAs). NIBTA is defined to include a deposit or account maintained at an insured depository institution with respect to which: (1) interest is neither accrued nor paid; (2) the depositor is permitted to make unlimited transfers or withdrawals; and (3) the insured depository institution does not reserve the right to require advance notice of an intended withdrawal. Interest on Lawyer Trust Accounts (IOLTAs) are included as NIBTAs and qualify for the temporary unlimited insurance coverage. All depositors who hold NIBTAs, including consumers, businesses, and municipal entities, are eligible for the unlimited coverage, which is provided separate from, and in addition to, the coverage provided for other accounts at an insured depository institution.

When the unlimited deposit insurance coverage for NIBTAs that is provided for in DFA became effective, FDIC's final rule required an insured depository institution to post a notice in the lobby of its main office, in each domestic branch, and on its website regarding the unlimited coverage. The final rule provided prescribed language for the notice, titled "Notice of Changes in Temporary FDIC Insurance Coverage for all Transaction Accounts." Insured depository institutions have also been required to notify customers of any action that affects the deposit insurance coverage of their funds held in NIBTAs, including funds which are automatically transferred, or "swept" from a NIBTA to another account or product that does not qualify as a NIBTA.

Absent Congressional action to extend the temporary unlimited coverage, effective **January 1, 2013** this temporary category for FDIC deposit insurance will be eliminated. NIBTAs will then be aggregated with any other deposits held by the same depositor in the same ownership category at the same insured depository institution, and the total will be insured up to the Standard Maximum Deposit Insurance Amount of $250,000.

**Guidance Regarding the Expiration of Unlimited Coverage**

Within FIL-45-2012, FDIC has provided instructions for insured depository institutions in connection with the expiration of the temporary unlimited deposit insurance coverage.

*Removal of Notices Regarding Unlimited Coverage*

Institutions are instructed to remove the prescribed "Notice of Changes in Temporary FDIC Insurance Coverage for all Transaction Accounts" from their main offices, branches, and websites no later than **January 2, 2013**. Any other notices institutions have made available to customers should also be removed. Effective **January 1, 2013**, institutions will no longer be required to provide notice to customers if actions are taken with respect to a NIBTA that result in a loss of eligibility for unlimited deposit insurance coverage.

*Review of Account Agreements and Disclosures*

Institutions may have amended their deposit account agreements and disclosure statements to include information regarding the temporary unlimited deposit insurance coverage for NIBTAs. For this reason, FDIC has instructed institutions to review their account agreements and

disclosures used in connection with NIBTAs to ensure these documents accurately reflect FDIC insurance coverage for these accounts as of **January 1, 2013**. This review and the necessary adjustments should be completed promptly upon expiration of the unlimited coverage.

*Notice to Depositors Regarding the Expiration of Unlimited Coverage*

While DFA does not impose a specific notice requirement in connection with the expiration of the temporary unlimited coverage, FDIC has encouraged institutions to remind NIBTA depositors of the pending expiration and its impact on their deposit insurance coverage. Institutions may use any reasonable method of providing notice to depositors, such as individual written notices to each depositor, notices on periodic statements, or notice by electronic mail for those depositors who regularly receive account information by electronic mail. FDIC has provided the following model language which can be used to provide notice to depositors:

> **NOTICE OF EXPIRATION OF THE TEMPORARY FULL FDIC INSURANCE COVERAGE FOR NONINTEREST-BEARING TRANSACTION ACCOUNTS**
>
> By operation of federal law, beginning January 1, 2013, funds deposited in a noninterest-bearing transaction account (including an Interest on Lawyer Trust Account) no longer will receive unlimited deposit insurance coverage by the Federal Deposit Insurance Corporation (FDIC). Beginning January 1, 2013, all of a depositor's accounts at an insured depository institution, including all noninterest-bearing transaction accounts, will be insured by the FDIC up to the standard maximum deposit insurance amount ($250,000), for each deposit insurance ownership category.
>
> For more information about FDIC insurance coverage of noninterest-bearing transaction accounts, visit http://www.fdic.gov/deposit/deposits/unlimited/expiration.html.

Alternatively, the following shorter version may be used by institutions choosing to provide notice on periodic statements, which may involve space limitations:

> **NOTICE**: By federal law, as of 1/1/2013, funds in a noninterest-bearing transaction account (including an IOLTA/IOLA) will no longer receive unlimited deposit insurance coverage, but will be FDIC-insured to the legal maximum of $250,000 for each ownership category. For more information, visit http://www.fdic.gov/deposit/deposits/unlimited/expiration.html.

If an institution is not able to use the web link in its depositor notices due to spacing or other issues, the institution can use the following:

> For more information about FDIC insurance coverage of noninterest-bearing transaction accounts, visit "What's New" on www.fdic.gov.

Notice should be provided to depositors sufficiently in advance of the expiration of unlimited deposit insurance coverage to allow depositors adequate time to consider the impact of any change in coverage of their transaction accounts.

**Collateral for Public Deposits**

Within FIL-45-2012, FDIC reminds institutions that in accordance with applicable state law, sufficient collateral should be set aside to secure the accounts of government depositors to the extent those accounts exceed the Standard Maximum Deposit Insurance Amount of $250,000 after December 31, 2012. In Wisconsin, depository institutions are permitted, but are not required, to provide such additional collateral under section 34.07 of the Wisconsin Statutes.

**Regulatory Reporting**

Call Report items and instructions relating to accounts to which the temporary unlimited coverage applies will remain in effect for the December 31, 2012 Call Report. FDIC FIL-45-2012 outlines the revisions to the Call Report materials for the March 31, 2013 Call Report.

**Possible Congressional Action to Extend Program**

While not specifically addressed within the FIL, financial institutions should be aware that there are continued efforts by the industry to persuade Congress to extend the temporary insurance program. There is a very small chance and short window of time left in this legislative session for Congress to act in order to extend the program. WBA will

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report any Congressional action taken to extend the temporary program. FDIC has stated it will provide additional guidance if Congress modifies coverage for NIBTAs.

**Conclusion**

Absent a change in law, the temporary unlimited deposit insurance coverage for noninterest-bearing transaction accounts provided by the Dodd-Frank Act will expire **December 31, 2012**. FDIC has provided guidance to institutions regarding the expiration of the unlimited coverage. In connection with FDIC FIL-45-2012, FDIC issued a series of frequently asked questions concerning the expiration. For more information, institutions may visit www.fdic.gov or call the FDIC at 877-275-3342.

## CFPB Delays Implementation of Certain New Mortgage Disclosures

**Notice 2012-17**

The Bureau of Consumer Financial Protection (CFPB) has issued a final rule to amend Regulation Z (Truth in Lending Act) to, in effect, delay implementation of certain new mortgage disclosure requirements in Title XIV of the Dodd-Frank Act (DFA) that would otherwise take effect on **01/21/2013**. Instead, to avoid potential consumer confusion and reduce compliance burden for the industry, CFPB plans to implement the disclosures as part of the integrated mortgage disclosure forms proposed earlier in the year, which combine certain disclosures that consumer receive in connection with applying for and closing on a mortgage loan under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA).

DFA requires CFPB integrate certain disclosures from TILA and RESPA. DFA also establishes additional new mortgage disclosure requirements, which would automatically take effect on 01/21/2013, unless other action was taken. The new requirements include disclosures on cancellation of escrow accounts, on consumers' liability for debt payment after foreclosure, and on a creditor's policy for accepting partial payments. Though there is no deadline mandated by DFA for finalizing the TILA/RESPA integrated proposal, CFPB has stated they anticipate that final rules will be published by next year.

Accordingly, the final rule exempts persons from complying with these mortgage disclosure requirements and provides that such exemptions are intended to last only until the integrated mortgage disclosure forms take effect. At time *WBA Compliance Journal* went to print the final rule was not yet published in the *Federal Register*. The final rule is effective on the date the final rule is published in the *Federal Register*. The final rule may be found at: http://files.consumerfinance.gov/f/201211_cfpb_final-rule_title-XIV-disclosures-extension.pdf.■

# REGULATORY SPOTLIGHT

## Agencies Postpone Effective Date of Basel III Capital Rules.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC), (collectively, the Agencies) have issued a notice to announce the postponement of the effective date of three proposed rules that would revise and replace the current regulatory capital rules (Basel III). The previously published proposals suggested an effective date of **01/01/2013**. Many industry participants expressed concern that they may be subject to a final regulatory capital rule on **01/01/2013**, without sufficient time to understand the rule or to make necessary systems changes. In light of the volume of comments received and the wide range of views expressed during the comment period, the Agencies do not expect that any of the proposed rules would become effective on **01/01/2013**. As with any rule, the Agencies will take operational and other considerations into account when determining appropriate implementation dates and associated transition periods. Copies of the notice may be obtained from WBA or viewed at: http://www.fdic.gov/news/news/press/2012/pr12130.html.

## Agencies Seek Comment on Proposed Information Collection for Interagency Appraisal Complaint Form.

The Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and National Credit Union Administration (NCUA) (collectively, the Agencies) seek comment on a proposed information collection entitled Interagency Appraisal Complaint Form (Form). The Form was developed for those who wish to file a formal, written complaint that an entity subject to the jurisdiction of the Agencies or Board of Governors of the Federal Reserve System (FRB) has failed to comply with the appraisal independence standards or the Uniform Standards of Professional Appraisal Practice. The Form is designed to collect information necessary for the Agencies or FRB to take further action on a complaint from an appraiser, other individual, financial institution, or other entities. Each appropriate Agency or FRB will use the information to take further action on the complaint to the

report any Congressional action taken to extend the temporary program. FDIC has stated it will provide additional guidance if Congress modifies coverage for NIBTAs.

**Conclusion**

Absent a change in law, the temporary unlimited deposit insurance coverage for noninterest-bearing transaction accounts provided by the Dodd-Frank Act will expire **December 31, 2012**. FDIC has provided guidance to institutions regarding the expiration of the unlimited coverage. In connection with FDIC FIL-45-2012, FDIC issued a series of frequently asked questions concerning the expiration. For more information, institutions may visit www.fdic.gov or call the FDIC at 877-275-3342.

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Read "Special Focus" for an article on the Biggert-Waters Flood Insurance Reform and Modernization Act. Next, check "Regulatory Spotlight" for the 2013 Regulation Z exemption threshold amount. Finally, turn to "Compliance Notes" for information on the expiration of FDIC's temporary unlimited deposit insurance for noninterest-bearing transaction accounts.■

# SPECIAL FOCUS

## Biggert-Waters Flood Insurance Reform and Modernization Act of 2012

### Notice 2012-18

On July 6, 2012, President Obama signed into law the Biggert-Waters Flood Insurance Reform and Modernization Act of 2012 ("Biggert-Waters Act"), as part of a larger piece of legislation titled "Moving Ahead for Progress in the 21st Century Act," or "MAP-21." The Biggert-Waters Act reauthorized the National Flood Insurance Program (NFIP) for 5 years, through **September 30, 2017**, and made various reforms to the program by amending the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973. This article is intended to provide a brief overview of the reforms made by the Biggert-Waters Act. It should be noted, however, that several sections of the Act are somewhat unclear with respect to the effective dates, and may require implementing regulations. This article includes the information regarding effective dates which was available to WBA at the time of publication. The text of the Biggert-Waters Act may be found at: www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2012/third-quarter/Biggert-Waters%20Act.pdf.

### Increased Civil Money Penalties

The Flood Disaster Protection Act of 1973 provides for civil money penalties for failure to require flood insurance, escrow flood insurance premiums, or comply with notice requirements, and previously provided that the total amount of penalties against any single regulated institution could not exceed $100,000 in a single calendar year. The Biggert-Waters Act dramatically increases the maximum civil money penalty from $385 per violation to $2,000 per violation, and eliminates the annual cap on penalties. These increases were effective immediately upon enactment of the Act, **July 6, 2012**. In addition, a final rule implementing these changes was issued by the Board of Governors of the Federal Reserve System on **November 16, 2012**. Please see the "Regulatory Spotlight" section of this publication for more information.

### Requirement to Escrow Flood Insurance Premiums

The Biggert-Waters Act requires the federal regulators to mandate escrowing of all premiums and fees for flood insurance for any loan secured by improved residential real estate or a mobile home that is outstanding or entered into on or after **July 6, 2014**. The Act allows the regulators to write implementing regulations with an exclusion for institutions with less than $1 billion in assets if (1) the institution is not otherwise required by state or federal law to escrow taxes, insurance premiums and fees, and (2) the institution did not have a policy of consistently and uniformly requiring the escrow of taxes, insurance premiums and fees. For those loans that are classified as Higher-Priced Mortgage Loans (HPMLs), the escrow requirement for property taxes and mortgage-related insurance imposed by Regulation Z will continue to apply, regardless of this potential exclusion, and for those loans lenders or servicers must also require the borrower to escrow any flood insurance premiums and fees. Under the Flood Disaster Protection Act of 1973, if the lender requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by improved residential real estate or a mobile home, then all premiums and fees for flood insurance must also be escrowed. Such escrow accounts are subject to the escrow rules outlined in the Real Estate Settlement Procedures Act (RESPA).

The text of the Biggert-Waters Act applies the escrow requirement to "any loan secured by... improved real estate or a mobile home," creating the impression that the requirement applies to loans secured by either residential or commercial property. However, this is believed to be a drafting error; within the same section of the Biggert-Waters Act the text also refers to "residential improved real estate." This section of the Act also retains the definition of "residential improved real estate" included in the escrow provision of the Flood Disaster Protection Act of 1973. The Senate has passed a technical correction to clarify that the Act requires the escrowing of flood insurance premiums only on loans secured by residential property. Upon passage of the technical correction by the House of Representatives, concerns that regulators will begin requiring escrow

accounts on commercial loans will be resolved. WBA will report on future developments as warranted.

**Reform of Premium Rate Structure**

The Biggert-Waters Act provides for the elimination of subsidized premium rates for certain types of properties. It also doubles the amount by which a premium may increase each year; the current annual limitation of 10% has been increased to 20%. If an escrow account is not required by the lender or servicer of the loan, the Act expressly allows for the payment of flood insurance premiums either annually or on a more frequent basis. The Act provides that these changes became effective on **October 6, 2012**, 90 days after the enactment of the Act.

*Elimination of Subsidized Premium Rates*

The Biggert-Waters Act eliminates subsidized premium rates for certain properties, including (1) a residential property that is not the primary residence of an individual; (2) a severe repetitive loss property (defined below); (3) a property that has incurred flood-related damage in which the cumulative amount of payments under NFIP has equaled or exceeded the fair market value of the property; (4) business property; and (5) any property which on or after **July 6, 2012** has experienced or sustained either (a) substantial damage exceeding 50% of the fair market value of the property or (b) substantial improvement exceeding 30% of the fair market value of the property. The subsidy elimination will be phased-in over a four-year period, as premiums for affected properties shall be increased by 25% each year.

The Act provides two definitions for the term "severe repetitive loss property." In the case of a property consisting of 1-4 residences, the term means a property that is covered under a contract for flood insurance and has incurred flood-related damage: (1) for which four or more separate claims payments each exceeding $5,000 have been made under flood insurance coverage, and the cumulative amount of such claims payments exceeds $20,000, or (2) for which at least two separate claims payments have been made, with the cumulative amount of such claims exceeding the value of the property. In the case of a property consisting of five or more residences, the Director of FEMA shall provide by regulation the definition of the term "severe repetitive loss property."

The Act eliminates subsidies for (1) new flood insurance policies provided on or after **July 6, 2012**; (2) policies under the flood insurance program that have lapsed in coverage as a result of the deliberate choice of the policy holder; and (3) any prospective policy holder who refuses to accept any offer for mitigation assistance by the Administrator of FEMA, including an offer of mitigation assistance following a major disaster or in connection with a repetitive loss property or a severe repetitive loss property.

*Annual Limitation on Premium Increases*

The National Flood Insurance Act of 1968 provides for a maximum annual premium increase of 10% for flood insurance policies. The Biggert-Waters Act increases this annual limitation to a 20% premium increase.

*Annual or Installment Premium Payments Allowed*

While the Act imposes a general requirement to escrow flood insurance premiums and fees, as outlined above, the federal regulators may write an implementing regulation with an exclusion for certain institutions. For those borrowers who are not required to escrow their premiums and fees for flood insurance, the Act provides for the option to pay their flood insurance premiums annually or in more frequent installments.

*Potential Safety & Soundness Concerns*

As the Biggert-Waters Act provides for the elimination of a variety of existing flood insurance subsidies, as well as the phase-in of flood insurance premium rates that reflect the full flood risk, borrowers with properties in special flood hazard areas may experience significant premium increases. This may create financial challenges for borrowers, and could ultimately result in foreclosure, which may in turn result in asset problems for lending institutions. From a practical standpoint, lenders may want to consider taking a proactive approach to notify borrowers that they may experience significant increases in their flood insurance premiums due to the reforms made to the premium structure by the Biggert-Waters Act.

**Premium Adjustments to Reflect Current Risk of Flood**

Upon the effective date of any revised or updated flood insurance rate map, the risk premium rate for any property

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located in a special flood hazard area shall be adjusted to accurately reflect the current risk of flood to the property. Such increases shall be phased in over a 5-year period, at a rate of 20% for each year following the effective date of such a map update. For any property that has been newly mapped into a standard flood hazard area, the flood insurance premium itself will be phased in over a five year period, at a rate of 20% for each year following the effective date of the issuance, revision or update to the flood insurance rate map.

**Availability of Flood Insurance for Multi-Family Residential Properties**

Multi-family properties, meaning residential properties of 5 or more residences, will be eligible for flood insurance through NFIP. This section of the Biggert-Waters Act is silent as to the effective date, so it presumably requires an implementing regulation or other action by the federal banking regulators before it will become effective. The maximum amount of coverage for these properties will be the maximum coverage amount available for commercial properties, which is currently $500,000.

**Force Placement of Flood Insurance**

Under the amendments made by the Biggert-Waters Act, a lender or servicer may now charge the borrower for premiums and fees incurred for force-placed flood insurance beginning on the date on which coverage lapsed or an existing insurance policy did not provide sufficient coverage for the property. The requirement for the lender or servicer to provide notice to the borrower of the need for flood insurance and the 45-day waiting period before force-placement may occur still apply; the amendment merely allows the lender or servicer to charge the borrower for the cost of premiums and fees for coverage beginning on the date on which flood insurance coverage lapsed. It appears this section of the Biggert-Waters Act will become effective upon the issuance of an implementing regulation by the federal banking regulators.

Within 30 days of receiving confirmation of a borrower's existing flood insurance coverage, the lender or servicer must terminate any insurance purchased by the lender or servicer, and refund to the borrower all premiums and related fees paid by the borrower during a period in which the borrower's flood insurance coverage and the force-placed insurance coverage were both in effect. For the purpose of confirming a borrower's existing flood insurance coverage, a lender or servicer must accept an insurance policy declarations page that includes the existing flood insurance policy number and the identity of and contact information for the insurance company or agent.

**Required Notice in RESPA Special Information Booklet**

In addition to the amendments to the existing flood insurance-specific legislation, the Biggert-Waters Act amends section 5(b) of RESPA to require a notice within the Special Information Booklet that provides: "[a]n explanation of flood insurance and the availability of flood insurance under the National Flood Insurance Program or from a private insurance company, whether or not the real estate is located in an area having special flood hazards." The director of the Consumer Financial Protection Bureau (CFPB) is responsible for preparing the booklet at least once every five years, and must prescribe language for the required flood insurance notice. This section appears to require an implementing regulation before it will become effective.

**Acceptance of Private Flood Insurance**

Lenders and servicers will be required to accept private flood insurance to satisfy the flood insurance requirements if the private flood insurance meets the various requirements for coverage. This mandate will presumably apply when an implementing regulation is issued by the federal banking regulators. The Act provides a definition of "private flood insurance" that consists of various elements, including being issued by a licensed or otherwise approved insurance company, providing coverage at least as broad as the coverage provided under a standard flood insurance policy under NFIP, containing a requirement for the insurer to give 45 days' written notice of cancellation or non-renewal of flood insurance coverage to the insured and the lender, as well as containing cancellation provisions that are as restrictive as the provisions contained in a standard flood insurance policy under NFIP.

Lenders must also disclose to borrowers that (1) flood insurance is available from private insurance companies or directly from NFIP; (2) flood insurance that provides the same level of coverage as a standard flood insurance policy under NFIP may be available from a private insurance company; and (3) the borrower is encouraged to compare the flood insurance coverage, deductibles, exclusions, conditions and premiums associated with flood insurance policies issued on behalf of NFIP and policies issued on behalf of private insurance companies.

**Minimum Deductibles for Claims under NFIP**

The Biggert-Waters Act establishes minimum annual deductibles for damage to any structure covered by flood insurance, which became effective upon the date of the Act's enactment, **July 6, 2012**. The Act distinguishes between structures on which construction or substantial improvement occurred on or before December 31, 1974 or before the effective date of an initial flood insurance rate map published for the area in which the structure is located ("the first category"), and those on which construction or substantial improvement occurred after December 31, 1974 or after the effective date of an initial flood insurance rate map published for the area in which such structure is located ("the second category"). For a structure within the first category, if the flood insurance policy covers loss of or physical damage to the structure in an amount equal to or less than $100,000, the minimum annual deductible for damage to the structure is $1,500. If the flood insurance policy provides coverage in an amount greater than

$100,000, the minimum annual deductible for damage to the structure is $2,000. For those structures within the second category, if the flood insurance coverage is less than or equal to $100,000, the minimum annual deductible is $1,000. If the flood insurance coverage is greater than $100,000, the minimum annual deductible is $1,250.

**Creation of Technical Mapping Advisory Council**

The Act creates a Technical Mapping Advisory Council which will, among other duties, issue cost-effective recommendations to improve the accuracy and ease of use of flood insurance rate maps and risk data, as well as performance metrics and milestones required to effectively and efficiently map flood risk areas. The Council will consist of the Administrator of FEMA, the Secretary of the Interior, the Secretary of Agriculture, the Under Secretary of Commerce for Oceans and Atmosphere, and 16 additional members appointed by the Administrator of FEMA who are members of various specified types of organizations. The Act requires the Council to consult with scientists and technical experts to develop recommendations to ensure that flood insurance rate maps incorporate the best available climate science to assess flood risks, and to ensure that FEMA uses the best available methodology to consider the impact of a rise in sea level as well as future development on flood risk.

**Conclusion**

In addition to reauthorizing the National Flood Insurance Program through **September 30, 2017**, the Biggert-Waters Act made a number of reforms to the program. Most notably, civil money penalties for violations of the flood insurance requirements have been dramatically increased, there is now a general requirement to escrow flood insurance premiums, and the flood insurance premium rate structure has been reformed. In addition, after the required notice has been provided and 45-day waiting period has lapsed, the lender or servicer may force place a flood insurance policy and charge the borrower for all premiums and fees incurred as of the date the previous flood insurance coverage lapsed or became insufficient. Lenders and servicers are encouraged to review the various reforms and ensure their procedures comply with each of the requirements.

WBA plans to publish information in a future edition of *WBA Compliance Journal* regarding reforms made by the Dodd-Frank Act, particularly upon the finalization of rules amending RESPA and Regulation Z, which will also impact flood insurance compliance. For further general information on flood insurance requirements, as well as concerns which may be presented by cross-collateralization language in security documents, please refer to the following past editions of *WBA Compliance Journal*: April 2012, November 2008, December 2000, and September 1996. In addition, WBA recently presented a webinar in conjunction with BankersEd which detailed the reforms made by the Biggert-Waters Act. Recordings of the webinar are available for purchase. For more information, please contact WBA's Lori Kalscheuer at 608-441-1250 or lkalscheuer@wisbank.com.■

# REGULATORY SPOTLIGHT

## Agencies Issue Final Rules on Exemption Thresholds.

- The Board of Governors of the Federal Reserve System (FRB) and Bureau of Consumer Financial Protection (CFPB) (collectively, the Agencies) have issued a final rule to amend the official interpretations and commentary for the Agencies' Regulation M which implements the Consumer Leasing Act (CLA). Effective **07/21/2011**, the Dodd-Frank Act amended CLA by increasing the threshold for exempt consumer leases from $25,000 to $50,000 and requiring that, on or after **12/31/2011**, this threshold be adjusted annually by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). Accordingly, the exemption threshold was adjusted to $51,800 effective **01/01/2012**. Based on the annual percentage increase in the CPI-W as of **06/01/2012**, the Agencies are now adjusting the exemption threshold from $51,800 to **$53,000**, effective **01/01/2013**. The final rule is effective **01/01/2013**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2012-11-21/pdf/2012-27996.pdf. *Federal Register*, Vol. 77, No. 225, 11/21/2012, 69735-69736.

- The Board of Governors of the Federal Reserve System (FRB) and Bureau of Consumer Financial Protection (CFPB) (collectively, the Agencies) have issued a final rule to amend the official interpretations and commentary for the Agencies' Regulation Z which implements the Truth in Lending Act (TILA). Effective **07/21/2011**, the Dodd-Frank Act amended TILA by increasing the threshold for exempt consumer credit transactions from $25,000 to $50,000 and requiring that, on or after **12/31/2011**, this threshold be adjusted annually by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). Accordingly, the exemption threshold was adjusted to $51,800 effective **01/01/2012**. Based on the annual percentage increase in the CPI-W as of **06/01/2012**, the Agencies are now adjusting the exemption threshold from $51,800 to **$53,000**, effective **01/01/2013**. The final rule is effective **01/01/2013**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/