WISCONSIN BANKERS ASSOCIATION
Compliance Journal

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Read "Special Focus" for a summary of recently enacted state legislation. Next turn to "Regulatory Spotlight" for CRA asset size and HMDA reporting thresholds. Then, check "Compliance Notes" for FFIEC's release of the 2014 HMDA and CRA data entry software notice, and revised Interagency examination procedures for RESPA and TILA. ■

SPECIAL FOCUS

Summary of Recently Enacted State Legislation

Notice 2014-01

There are several recently enacted state legislative items which directly impact financial institutions. The following article highlights select provisions of the items. For more comprehensive information on these items, please review the applicable Act.

2013 Wisconsin Act 66: Mortgage Satisfaction

2013 Wisconsin Act 66 repeals and replaces certain provisions of Wisconsin law relating to the satisfaction of mortgages. Under previous Wisconsin law, the holder of any type of mortgage was required to record a satisfaction of mortgage within 30 days after the mortgagor completed full performance of the conditions of the mortgage. However, if the mortgage was fully performed and the mortgage holder received by certified mail a written request from the mortgagor for a full satisfaction, the mortgage holder was required to record a satisfaction of mortgage within seven days. If the mortgage holder did not do so, the holder was liable to the mortgagor for actual damages plus penalty damages of $100 for each day that the violation remained uncorrected, with a limitation of $2,000 in penalty damages.

Under Act 66, a secured creditor with a security interest in real property must record a satisfaction of the security instrument within 30 days after receiving full payment or performance of the secured obligation or payment as provided in a payoff statement provided by the secured creditor to the landowner or other person authorized to request a payoff statement. If a security instrument secures a line of credit or future advances, the secured obligation is fully performed only if, in addition to full payment or performance of the secured obligation or payment as provided in the payoff statement or corrected payoff statement, the secured creditor has received a notification requesting the secured creditor to terminate the line of credit or containing a statement sufficient to terminate the effectiveness of the provisions for future advances in the security instrument.

If the secured creditor does not record a satisfaction within the required time, the creditor is liable to the landowner for $500, plus any actual damages and reasonable attorney fees and court costs, but no punitive damages. A secured creditor is not liable for these particular penalties if all of the following apply: (1) the creditor established a reasonable procedure to achieve compliance with its obligations; (2) the creditor complies with that procedure in good faith; and (3) the creditor was unable to comply with its obligations because of circumstances beyond its control. The new provisions apply to all mortgages on real property, with the exception of the provisions regarding affidavits of satisfaction, discussed below. Act 66 became effective **December 14, 2013**.

Requests for Payoff Statements

Act 66 sets out the right of a settlement agent or a person who is obligated under a security instrument to request a payoff statement from the secured creditor. The obligated person or settlement agent, or his or her authorized agent, may request a payoff statement for a specified payoff date that is not more than 30 days from the date the request is made. The request must contain: (1) the name of the person entitled to make the request; (2) the name of the person giving notice of the request, if the request is made by an authorized agent of the entitled person; (3) direction whether to send the payoff statement to the entitled person or authorized agent; (4) the address, fax number, or e-mail address to which the payoff statement must be sent; and (5) sufficient information to enable the secured creditor to identify the secured obligation and the real property

encumbered by the security interest. The secured creditor must issue a payoff statement within seven business days after the effective date of a notice that contains the required information, or within a reasonably longer time if the affected real property is not residential real property.[1]

The payoff statement must contain: (1) the date on which it was prepared and the payoff amount as of that date; (2) the information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount, if applicable; (3) the payment cutoff time, if any; (4) the address or place where payment, including payment by electronic transmission, if available, must be made; and (5) any limitation as to the authorized method of payment. A secured creditor may not qualify a payoff amount or state that the payoff amount is subject to change before the payoff date. If a secured creditor determines that the payoff amount it provided in a payoff statement was understated, the secured creditor may send a corrected payoff statement. If the entitled person or the person's authorized agent receives and has a reasonable opportunity to act upon the corrected payoff statement before making payment, the corrected statement supersedes an earlier statement.

As has always been the case, secured creditors must be careful to review all possible relationships with a particular mortgagor to ensure the proper payoff amount is included within any payoff statement—this is even more important under Act 66 and Regulation Z. Under Act 66, if a secured creditor sends a payoff statement containing an understated payoff amount, the secured creditor may not deny the accuracy of the payoff statement as against any person that reasonably and detrimentally relies upon the understated payoff amount. The secured creditor must still record a satisfaction of the mortgage within 30 days, but may recover from the obligated party any amount that was incorrectly excluded in the payoff amount. For example, a secured creditor received a request for payoff and sent a timely payoff statement which identified a payoff amount of $55,000 as the amount required to be paid for full performance and payment to satisfy the secured creditor's interest in the identified real property. The landowner and others reasonably rely upon the $55,000 payoff statement provided by the secured creditor. However, the secured creditor failed to consider a $1,000 line of credit which, due to cross-collateralization language within loan documents, was also secured by the real property identified in the payoff request. The secured creditor did not send a corrected payoff statement. If the secured creditor receives payment as provided in the understated payoff statement, $55,000 in this example; and, as the secured creditor cannot deny the accuracy of the payoff statement the landowner and others reasonably relied upon, Act 66 requires the secured creditor to record the satisfaction of the mortgage within 30 days of receiving the $55,000 and separately recover from the obligated party the $1,000 that was incorrectly excluded in the payoff statement.

Secured creditors must provide, upon request, one payoff statement without charge during any two-month period. A fee of $25 may be charged for each additional payoff statement requested during a two-month period. However, a secured creditor may not charge a fee for providing a corrected payoff statement.[2] If a secured creditor does not send a timely payoff statement that contains the required information, the creditor is liable to the entitled person for any actual damages caused by the failure, plus $500. If a secured creditor does not pay such damages within 30 days of receiving a notice demanding payment, the creditor may also be liable for reasonable attorney fees and costs.

Affidavit of Satisfaction of Security Instrument

Act 66 creates a new option for satisfaction of mortgages on residential real property. A title insurance company acting directly or through an authorized agent may act as a satisfaction agent for a residential property owner. At any time after full performance of the mortgage or payment by the residential property owner as provided in a payoff statement, a satisfaction agent authorized by the property owner may notify the secured creditor that the satisfaction

[1]The requirement under Act 66 to provide an accurate payoff statement within seven business days after the effective date of a payoff request is in alignment with revised Regulation Z (Truth in Lending) section 1026.36(c)(3) regarding payoff statements in connection with a consumer credit transaction secured by a consumer's dwelling. However, institutions must provide an accurate payoff statement within five business days after receiving a payoff request for a high-cost mortgage under Regulation Z 1026.34(a)(9).

[2]Financial institutions must comply with the more restrictive Regulation Z 1026.34(a)(9) rules regarding whether a charge may be imposed when providing a payoff statement in connection with a high-cost mortgage.

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agent may record an affidavit of satisfaction of the security instrument against residential real property. The notice sent to the secured creditor must specify, among other things, that the satisfaction agent has reasonable grounds to believe that the property is residential real property and that the secured creditor has received full performance or payment as provided in a payoff statement. After providing the notice, with the secured creditor's authorization, the satisfaction agent may submit the affidavit of satisfaction to the register of deeds for recording. A recorded affidavit of satisfaction constitutes a satisfaction of the security instrument described in the affidavit. If the secured creditor does not provide authorization, the agent may nonetheless record the affidavit of satisfaction unless, within 30 days of the effective date of the notice, the secured creditor: (1) submits a satisfaction of the security instrument for recording; (2) notifies the satisfaction agent that the secured obligation remains unsatisfied; or (3) notifies the satisfaction agent that the secured creditor has assigned the security instrument, and identifies the name and address of the assignee.

If the satisfaction agent receives notice from the secured creditor that the security interest has been assigned, the satisfaction agent must provide notice to the assignee. Similarly, if the secured creditor notifies the satisfaction agent that the secured obligation has not been satisfied, the satisfaction agent may not file an affidavit of satisfaction unless the satisfaction agent has reasonable grounds to believe that a person paid an understated payoff amount in reasonable reliance on a payoff statement as outlined above. Act 66 creates penalties that may be imposed on a satisfaction agent who records an affidavit of satisfaction erroneously or with knowledge that the statements in the affidavit are false. The Act also authorizes a satisfaction agent to charge fees for providing the notice and preparing and executing the affidavit. In addition, Act 66 provides for the recording of a document of rescission, which rescinds an erroneously recorded satisfaction or affidavit of satisfaction, keeping the underlying security instrument in force.

Real Estate Transfer Fee

Under Wisconsin law, a real estate transfer fee must be paid when an ownership interest in real property is transferred. There are various exceptions to the payment of the real estate transfer fee, however, including when real property valued at or under a certain value is transferred. Under previous law, the exception applied to transfers of real property valued at or under $100. Act 66 increases the threshold amount for the exception to $1,000 or less. Act 66 may be found at: http://docs.legis.wi.gov/2013/related/acts/66.pdf.

2013 Wisconsin Act 92: Uniform Trust Code

2013 Wisconsin Act 92 repeals previous law regarding trusts and replaces it with the Wisconsin Trust Code (the Code), which is a modified version of the Uniform Trust Code, as amended in 2005. As such, Act 92 is a complete rewrite of Wisconsin's existing trust code. The Code is primarily a set of default rules that apply to certain trusts in Wisconsin. With some exceptions, the terms of a trust may override or modify the Code's default rules. There are, however, some mandatory provisions in the Code that may not be overridden or modified by the terms of a trust, including the requirements for creating a trust, the duty of a trustee to act in good faith, the effect of a spendthrift provision, limits on provisions that limit a trustee's liability, periods of limitation for commencing a judicial proceeding related to a trust, and the power of the court to take certain actions. The Code also includes default rules that are not included in the Uniform Trust Code, including rules related to a trustee's power to appoint assets to another trust, trust protectors, directed trusts, and life insurance contracts owned by trusts.

Under Act 92, the eleven articles of the Uniform Trust Code are created as subchapters of the Wisconsin Trust Code and a twelfth subchapter is created: (1) General Provisions and Definitions; (2) Judicial Proceedings; (3) Representation; (4) Creation, Validity, Modification, and Termination of Trust; (5) Creditor's Claims, Spendthrift and Discretionary Trusts; (6) Revocable Trusts; (7) Office of Trustee; (8) Duties and Powers of Trustees, Directing Parties, and Trust Protectors; (9) Investment Management of Trusts; (10) Liability of Trustees and Rights of Persons Dealing with Trustees; (11) Uniform Principal and Income Act; and (12) Miscellaneous Provisions.

Act 92 also changes provisions regarding recovery from non-probate property and estates for public assistance provided, as well as divestment and financial eligibility for Medical Assistance that were incorporated into 2013 Wisconsin Act 20, the 2013-15 biennial budget act. With exception to the estate recovery provisions, the Code is effective **July 1, 2014**. WBA will be conducting comprehensive training on the Code this Spring. Please see the Education section of the WBA website for more information regarding those programs, www.wisbank.com. Act 92 may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/92.pdf.

2013 Wisconsin Act 74: Local Regulation of Land Development Projects

2013 Wisconsin Act 74 freezes local regulations relating to land development, as applied to a specific project, at the time that the person proposing the project first applies for a local approval for the project. Under Act 74, if a person has submitted an application for a permit or authorization for building, zoning, driveway, stormwater, or other activity

related to residential, commercial or industrial development, the political subdivision must approve, deny or conditionally approve the application solely based on the regulations, ordinances, rules or other requirements in effect at the time the application is submitted, unless the applicant and political subdivision agree otherwise. "Political subdivision" is defined to mean a city, village, town or county.

If a project requires more than one approval, or approvals from more than one political subdivision, the regulations, ordinances, rules or other requirements that will apply to all approvals are those in effect in all of the jurisdictions at the time the first application is filed, unless the applicant and political subdivision agree otherwise. This provision applies only if the applicant identifies the full scope of the project at the time it files the first application.

Applications are considered submitted upon delivery to the political subdivision, or upon deposit with the U.S. Postal Service for mailing by certified mail. An application will expire 60 days after filing if: (1) the application does not comply with form and content requirements; (2) the political subdivision provides notice of the noncompliance; and (3) the applicant fails to remedy the noncompliance. Act 74 became effective **December 14, 2013**, and may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/74.pdf.

2013 Wisconsin Act 76: Landlord and Tenant Law/ Vehicle Towing

2013 Wisconsin Act 76 makes a number of miscellaneous changes to the statutes relating to landlords and tenants. The changes include: (1) how a landlord may dispose of personal property left behind by a tenant; (2) an exemption from civil liability to a landlord for providing a reference about the rental performance of an applicant for tenancy if the applicant or prospective landlord requests the landlord to provide a reference; (3) revision to rules regarding the return of security deposits; (4) a revised requirement that a landlord disclose any building or housing code violations for only those violations for which the landlord has received written notice of violation from a local housing code enforcement agency; (5) damages to a premises now includes infestation of insects or other pests; (6) limits the landlord-tenant provisions that, if violated, may constitute unfair methods of competition or unfair trade practices regulated by Wisconsin's Department of Agriculture, Trade and Consumer Protection to the provisions relating to withholding from and returning security deposits and the provisions that, if contained in a residential rental agreement, make it void and unenforceable; (7) who may commence or appear in an eviction notice; and (8) revised rules regarding content and use of standardized tenant check-in sheet.

Act 76 also revised existing rules which prohibit a municipality from enacting or enforcing certain ordinances related to landlords and tenants. Under current law, a city, village, town or county (collectively, municipality) is prohibited from enacting or enforcing certain ordinances related to landlords and tenants, such as an ordinance imposing a moratorium on eviction actions or an ordinance that places certain limitations on what information a landlord may obtain and use concerning a prospective tenant. Act 76 additionally prohibits a municipality from enacting or enforcing an ordinance that: (1) limits a tenant's responsibility, or a landlord's right to recover, for any damage to, or neglect of, the premises; (2) requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law; or (3) requires a landlord to communicate to the municipality any information concerning the landlord unless the information is required under federal or state law or is required of all residential real property owners. These rules are effective **March 1, 2014**.

Act 76 also revised rules related to the towing of vehicles illegally parked on private property. Current law prohibits the removal (towing) of a vehicle involved in trespass parking on a private parking lot or facility without the permission of the vehicle owner, unless a parking citation is issued by a traffic officer or a repossession judgment is issued.

Under Act 76, if a vehicle is parked without authorization on private property, the vehicle may be towed immediately, at the vehicle owner's expense and without the owner's permission, as follows: (1) from private property that is properly posted, whether or not a parking citation is issued; or (2) from private property that is not properly posted, only if a parking citation is issued or a repossession judgment is issued. "Properly posted" means there is clearly visible notice that an area is private property and that vehicles that are not authorized to park in this area may be immediately towed. A vehicle may be towed under Act 76 only by a towing service at the request of the property owner or property owner's agent or of a traffic officer or parking enforcer. Wisconsin's Department of Transportation is required to promulgate rules to establish reasonable charges for towing and storage of vehicles; expenses the vehicle owner will ultimately be responsible for paying. These rules are effective **July 1, 2014**. Act 76 may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/76.pdf.

2013 Wisconsin Act 80: Shoreland Zoning in Incorporated Areas

2013 Wisconsin Act 80 modifies the law relating to shoreland zoning ordinances applicable to shoreland that is annexed or that is part of land incorporated as a city or village. Under Wisconsin law, counties are required to enact shoreland zoning ordinances for all shorelands in their unincorporated areas. "Shoreland" is defined as an

area within a certain distance from the edge of a navigable water, as outlined in Wisconsin statute section 59.692(1)(b). Previously, with certain exceptions, if a city or village annexed a county shoreland area after a specified date and that area, before annexation, was subject to a county shoreland ordinance, then the county shoreland ordinance would continue to be in effect and would be enforced by the annexing city or village.

Act 80 eliminated the requirement that the annexing city or village continue to keep the ordinance in effect and enforce the ordinance. Instead, Act 80 requires cities and villages to enact shoreland zoning ordinances by **July 1, 2014**, that apply to any shoreland area annexed by a city or village after May 7, 1982, and any shoreland area that was subject to a county shoreland zoning ordinance prior to being incorporated as a city or village. The Act provides minimums for what the ordinance must contain. Act 80 also provides that provisions of a shoreland zoning ordinance that were applicable to shorelands prior to annexation or incorporation continue in effect until the city or village enacts its own shoreland zoning ordinance with the minimum requirements set forth in the Act. Lastly, Act 80 provides that a city or village shoreland zoning ordinance does not apply to lands adjacent to an artificially constructed drainage ditch, pond, or stormwater retention basin if the ditch, pond, or basin is not hydrologically connected to a natural navigable water body. Act 80 took effect **December 14, 2013**, and may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/80.pdf. ■

JUDICIAL SPOTLIGHT

Wisconsin Court of Appeals Case Makes Having Both Lender Name and Address on Real Property-Related Filing Documents A Best Practice

A recent decision of Wisconsin's Fourth District Court of Appeals may have a significant impact on mortgage lenders. The opinion in *Juneau County v. Associated Bank, N.A., et al*, 2013 WI APP 29 (January 31, 2013) upheld a lower court's decision that a county government in a tax lien foreclosure matter is not required to search outside of the records pertaining to the affected property in the office of the register of deeds in order to obtain the mortgage holder's address for the purpose of providing direct notice of the foreclosure to the mortgage holder.

Sebastian Madej owned two lots of real property in Necedah, Wisconsin, financed by notes and mortgages in favor of the Bank. The two mortgages were recorded in the County's office of the register of deeds on 08/12/2003. Neither recorded mortgage lists an address for the Bank.

Madej repeatedly failed to pay taxes on the two lots. In 2008, the Bank mailed a payment to the county treasurer to satisfy Madej's 2003 and 2004 delinquent taxes. The Bank's cover letter to the county treasurer, accompanying the payment, listed the Bank's address as "1305 Main Street, Stevens Point, Wisconsin 54481". The enclosed check listed the Bank's address "1200 Hansen Road, Green Bay, Wisconsin 54304."

In December 2009, Madej defaulted on the mortgages, prompting the Bank to file foreclosure actions in circuit court. The Bank recorded a lis pendens for each lot with the office of the register of deeds on 12/10/2009. The recorded lis pendens did not list an address for the Bank, but did list the circuit court case numbers for the corresponding foreclosure actions. The complaints filed in those foreclosure actions listed 1305 Main Street as an address for the Bank.

In April 2010, the circuit court entered default judgments in the Bank's foreclosure actions against Madej. Also in April 2010, the Bank mailed payment to the county treasurer to satisfy Madej's 2006 delinquent taxes. The county treasurer sent tax receipts to the Bank at the 1305 Main Street address reflected on the two checks comprising the payment. Before a sheriff's sale scheduled for 11/23/2010, the Bank settled with Madej and moved to vacate the foreclosure judgments. On December 2 and 6, 2010, the Bank recorded two discharges of lis pendens with the office of the register of deeds. No address for the Bank appeared on the recorded discharges of lis pendens. Neither Madej or the Bank paid the taxes owed on the two lots for 2007-2009.

On 11/30/2010, the County filed a notice of commencement of proceeding in rem to foreclose tax liens, along with a petition and list of ninety-four parcels with unpaid tax liens on which the County sought to foreclose. Madej's two lots were included on that list. In preparation for mailing foreclosure notices to interested parties, the County used the services of a title company to perform title searches to obtain the names and addresses of the owners and secured creditors of each affected parcel from the register of deeds' records to each parcel. The title insurance company reported that the Bank, a mortgage holder of Madej's two parcels, had an "unknown" address because none was found in the records relating to those parcels at the register of deeds office. The County published the foreclosure notice according to the statutory requirements, identifying the affected properties by parcel number, but did not attempt to

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Read "Special Focus" for a series of frequently asked questions and answers (FAQs) received by WBA regarding the mortgage rules which became effective in January. Next, turn to "Regulatory Spotlight" for a proposed rule to amend Regulation CC. Then, check "Compliance Notes" for OCC's supervisory expectations regarding secured consumer debt discharged in chapter 7 bankruptcy proceedings and FinCEN guidance to clarify BSA expectations for banks seeking to provide services to marijuana-related businesses. ■

SPECIAL FOCUS

Questions and Answers on CFPB's Mortgage Reform Rules

Notice 2014-02

WBA has received numerous questions regarding the mortgage reform rules issued by the Bureau of Consumer Financial Protection (CFPB), which became effective in January 2014. This article is a compilation of frequently asked questions and answers (FAQs). More information on each of the final mortgage reform rules, including various compliance aids and links to the rules themselves, may be found at: www.consumerfinance.gov/regulatory-implementation/.

ATR and QM Rules

Q1: Do loan renewals count toward the 500 loan threshold for purposes of determining whether a creditor is a "small creditor"?

A1: CFPB has not issued specific guidance on this matter. However, because of how the word "originated" is used in the definition of "small creditor", we believe the 500 loan threshold for determining whether a creditor is a small creditor is limited to closed-end residential mortgages that are subject to the ability to repay (ATR) requirements. As is outlined in a later FAQ, it is WBA's position that a true renewal of an existing loan is not subject to the ATR requirements, and therefore, a true renewal of an existing loan would not count towards the 500 loan threshold calculation.

Q2: What is the definition of "affiliate" for purposes of the "small creditor" exemption? If two banks are owned by the same holding company but have separate charters and operate in different areas, are they affiliates of each other?

A2: The final rules issued by CFPB do not provide a definition of the term "affiliate"; however, the existing definition of "affiliate" within section 1026.32(b) of Regulation Z references common ownership or control. Additionally, within CFPB's small entity compliance guide for the ATR and qualified mortgage (QM) rules, CFPB has confirmed that "affiliate" includes any company that controls, is controlled by, or is under common control with another company. As a result, two banks (even with separate charters and operating in different areas) would be considered affiliates because they are controlled by, or are under the common control of the same holding company.

Q3: Do the ATR and QM rules apply to loans secured by mobile homes?

A3: Yes. Section 1026.43(a) of Regulation Z provides the scope of the ATR and QM requirements, which apply to closed-end consumer credit transactions secured by a *dwelling*. Section 1026.2(a)(19) of Regulation Z defines the term "dwelling" as a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condo unit, mobile home, and trailer, if it is used as a residence.

Q4: Is a creditor required to consider the amount of a balloon payment in the ATR calculation?

A4: It depends. When calculating ATR for balloon loans under the general ATR standard (the small creditor balloon-payment QM rule is addressed in a later FAQ), creditors must use the maximum payment in the loan payment schedule. If a loan with a balloon payment is not a higher-priced loan, the ATR is calculated using the maximum payment scheduled during the first five years (60 months) after the date on which the first

regular periodic payment will be due. Consequently, if the balloon payment is scheduled to be paid during those first five years, the balloon payment is the maximum payment and must be used to calculate ATR. If the balloon payment is not scheduled within those first five years, it is not included in the ATR calculation.

If a loan with a balloon payment is a higher-priced loan, the creditor must use the maximum payment in the payment schedule, including the balloon payment, when calculating ATR. There are numerous calculation examples within the commentary to the ATR rule, section 1026.43 of Regulation Z.

Q5: What is a higher-priced loan, affecting whether the balloon payment must be included in the ATR calculation?

A5: Higher-priced loans are generally defined as having an annual percentage rate (APR) that, as of the date the interest rate is set, exceeds the Average Prime Offer Rate (APOR) for a comparable transaction by 1.5 percentage points or more, for loans secured by first liens, or by 3.5 percentage points or more, for loans secured by subordinate liens.

Q6: Is a small creditor required to consider the amount of a balloon payment when determining the consumer's ATR on a balloon-payment QM loan?

A6: No. The small creditor must determine whether the consumer has the ability to make all scheduled payments under the legal obligation, other than the balloon payment. There are calculation examples within the commentary to the ATR rule, section Regulation Z 1026.43(f).

Q7: Which QM loans receive the "safe harbor" and which loans receive a "rebuttable presumption of compliance"?

A7: If the QM loan is not a higher-priced covered transaction, it will receive the "safe harbor" treatment in that it will be conclusively presumed that the creditor made a good faith and reasonable determination of the consumer's ATR.
If the QM loan is a higher-priced covered transaction, the creditor is presumed to have complied with the ATR requirements, otherwise known as a "rebuttable presumption of compliance."

Q8: For purposes of the QM rule to determine whether the creditor would receive the treatment of safe harbor or rebuttable presumption of compliance, what is a higher-priced covered transaction?

A8: Separate from FAQ 5 above, for purposes of the QM rule to determine whether the creditor would receive the treatment of safe harbor or presumption of compliance, there are two thresholds used to determine whether a QM loan is a higher-priced covered transaction:

For creditors that meet the requirements to be considered a "small creditor", a loan secured by either a first lien or a subordinate lien is a higher-priced covered transaction if the APR exceeds the APOR for a comparable transaction by 3.5% or more.

For all other creditors, a loan secured by a first lien is a higher-priced covered transaction if the APR exceeds the APOR for a comparable transaction by 1.5% or more, and a loan secured by a subordinate lien is a higher-priced covered transaction if the APR exceeds the APOR for a comparable transaction by 3.5% or more. For purposes of the QM rule, if a QM loan is a higher-priced covered transaction, the creditor will receive a rebuttable presumption of compliance with the rule's requirements, rather than a safe harbor.

NOTE: The small creditor threshold outlined in this answer applies only for purposes of the ATR and QM rules, and does not determine whether the loan is a higher-priced mortgage loan (HPML) under Regulation Z section 1026.35, which triggers separate requirements under Regulation Z.

Q9: In order to qualify as a small creditor and have the ability to make balloon QM loans through January 10, 2016, a small creditor must have: (1) assets less than

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$2.028 billion (a figure that will be adjusted annually for inflation); and (2) together with its affiliates the small creditor must have originated no more than 500 first-lien covered transactions in the preceding calendar year.

With respect to the 500 first-lien covered transaction limit, does the small creditor include all originated loans, including those sold to an investor—such as Federal Home Loan Bank (FHLB), Freddie Mac, or Fannie Mae—or does the small creditor only count those loans held on the small creditor's books?

A9: The 500 first-lien covered transactions limitation includes all originated loans, including loans sold to an investor.

Q10: What requirements must be met in order for a small creditor to make balloon-payment QM loans after January 10, 2016?

A10: In order for a small creditor to be eligible to make balloon-payment QM loans after January 10, 2016, the small creditor must meet three requirements: (1) must have assets of less than $2.028 billion (a figure that will be adjusted annually for inflation); (2) together with its affiliates must have originated no more than 500 first-lien covered transactions in the preceding calendar year; and (3) must operate predominantly in a rural or underserved area. Operating predominately in a rural or underserved area means that more than 50% of the properties securing the small creditor's first-lien covered transactions originated in any of the three preceding calendar years must be located in areas deemed rural or underserved as defined by CFPB.

Q11: Does the 43% debt-to-income (DTI) ratio limitation apply to all QM categories?

A11: No. The 43% DTI limitation imposed by the final rule applies only to the general QM category. For other QM categories, as well as the general ATR standard, the final rule does not mandate a maximum DTI ratio, but requires the creditor to consider the applicant's DTI ratio or residual income.

Q12: Do the ATR and QM rules apply to existing balloon loans that mature after January 10, 2014, and are subsequently renewed?

A12: The ATR and QM rules do not apply to any change to an existing loan that is not treated as a "refinancing" under Regulation Z, section 1026.20(a). WBA has recommended procedures to follow to document that the bank is not refinancing (i.e. satisfying and replacing) an obligation, including stamping a prior note as renewed but not paid, retaining the original notes in the file, and indicating on the renewal note that the note is a renewal of a prior note, but does not satisfy or discharge the prior note. To date, WBA is not aware of any case in Wisconsin indicating that those procedures are not sufficient to avoid categorization as a refinancing under Regulation Z. Creditors should note that making certain changes to a variable rate transaction is a refinancing whether or not accomplished by cancellation of the old obligation and substitution of a new one under Regulation Z.

Q13: If a creditor is considered a small creditor for the purpose of the small creditor QM category, and a branch is sold, do the loans that are sold lose their QM status?

A13: Small creditor QM loans generally lose their QM status if the small creditor sells or otherwise transfers them less than three years after consummation. However, a small creditor QM loan retains its QM status if it meets one of these criteria: (1) it is sold more than three years after consummation; (2) it is sold to another creditor that meets the small creditor criteria regarding number of originated loans and asset size, at any time; (3) it is sold pursuant to a supervisory action or agreement, at any time; or (4) it is transferred as part of a merger or acquisition of or by the creditor, at any time.

Whether a particular sale of a small creditor's branch satisfies one of these criteria, and thereby retain small creditor QM status for the loans obtained in the sale is a matter that would further need be reviewed and analyzed by the small creditor's counsel involved in the branch sale.

Q14: Must a creditor's loan documents indicate whether the loan is a QM?

A14: WBA considers this a prudent practice for evidentiary purposes. CFPB has acknowledged that creditors may want to identify loans on their transaction systems with their definitional status under the rule (i.e. ATR, QM), which may involve creating new data elements within the creditor's processing systems. Likewise, CFPB has acknowledged that if the loan is a QM, the creditor will want to note which level of liability protection the creditor is receiving (i.e. safe harbor or rebuttable presumption of compliance). WBA suggests that creditor not include any such reference directly on the loan documents but rather to include separate documents in the loan file regarding these evidentiary suggestions.

Q15: CFPB's ATR/QM small entity compliance guide states that if a consumer has more income than, in the creditor's reasonable and good faith judgment, is

needed to repay the loan, the creditor is not required to consider and verify the extra income. However, creditors in Wisconsin have had a longstanding requirement to comply with Wisconsin's Marital Property Act to consider both applicant and non-applicant spouses' income for marital purpose debt—are creditors now prohibited from considering income of both spouses?

A15: Under the Wisconsin Marital Property Act, section 766.56, Wis. Stats. requires that when a married Wisconsin resident applies for marital purpose credit, the creditor must consider all marital property available to satisfy the obligation. The guidance issued by CFPB does not address any state marital property laws. While the ATR rule requires the creditor to document and verify income relied upon to determine an applicant's ability to repay, in the absence of a marital property agreement to the contrary, a creditor must also document and consider a non-applicant spouse's income in order to comply with Wisconsin law when a married Wisconsin resident applies for a marital purpose credit. A creditor's longstanding practice to consider and document both the applicant and non-applicant spouses' income for marital purpose credit need continue in order to comply with Wisconsin's Marital Property Act.

Q16: In order to take advantage of the statutory protection offered creditors under Wis. Stats. section 766.55(1) of Wisconsin's Marital Property Act, creditors have obtained a separately signed marital purpose statement signed by the obligated spouse as conclusive evidence that the obligation was incurred in the interest of the marriage of family ("marital purpose credit"). What is the impact of having an applicant sign a marital purpose statement, in connection with the ATR and QM Rules? Should this longstanding practice be continued?

A16: As stated in the answer directly above, guidance issued by CFPB does not address any state marital property laws. Creditors' current practices under 766.56(1) to obtain a separately signed marital purpose statement signed by the obligated spouse should continue. The ATR and QM rules should not change creditors' existing practices regarding the completion of a marital purpose statement.

Servicing Rules

Q1: In order to be a small servicer, a servicer must service 5,000 or fewer mortgage loans, for all of which the servicer or an affiliate is the creditor or assignee. If a bank services loans that it originated and sold to a secondary market investor, such as Fannie Mae or Freddie Mac, can the bank still be considered a small servicer?

A1: Possibly yes. There are two elements to the small servicer requirement. First, a servicer, together with any affiliates, must service 5,000 or fewer mortgage loans. Second, a servicer must service only mortgage loans for which it (or an affiliate) is the creditor or assignee. To be the creditor or assignee of a mortgage loan, the servicer (or an affiliate) must either currently own the mortgage loan or must have been the entity to which the mortgage loan obligation was initially payable (that is, the originator of the mortgage loan). A bank that retains servicing for loans it originated and sold to the secondary market may remain eligible for the small servicer exemption.

Q2: Are there any mortgage loans that are not counted toward the 5,000 loan threshold to qualify as a small servicer?

A2: Yes. Reverse mortgages and loans secured by an interest in a timeshare are not counted toward the 5,000 loan threshold. In addition, loans that are voluntarily serviced for a creditor or an assignee that is not an affiliate of the servicer, for which the servicer does not receive any compensation or fees, are not counted.

Q3: The final servicing rule states that a master servicer is the entity that owns the right to service a federally related mortgage loan, and a subservicer is an entity that does not own the right to perform servicing, but performs servicing on behalf of a master servicer. If a creditor sold mortgage loans to the Federal Home Loan Bank (FHLB) and performs the servicing for those loans, can the creditor still be considered a small servicer?

A3: Possibly yes. While the creditor's contract with FHLB may provide that the creditor is the "subservicer", this term may not carry the same meaning as it holds under the new servicing rules. The terms of the creditor's contract may dictate whether the creditor may still meet the conditions to be a small servicer; the creditor's counsel should review the agreement and provide an opinion whether the creditor is a small servicer. An advisory on this topic, issued by Mortgage Partnership Finance (MPF) on September 10, 2013, may be found at: www.fhlbmpf.com/docs/advisories/2013/PFI_Advisory_091013.pdf.

Q4: If a servicer that meets the requirements to be a small servicer currently sends periodic statements to its borrowers, must the periodic statements conform to the format and content requirements in the servicing final rule?

A4: No. Small servicers are exempt from the requirement to provide periodic statements. Within the preamble to the final servicing rule, CFPB has stated that a small

servicer not subject to the periodic statement requirements is free to continue sending periodic statements at its discretion, regardless of whether those periodic statements conform to the requirements in the final rule.

Q5: The servicing requirements under Regulation X prohibit a servicer from making the first notice or filing required for foreclosure until the borrower is at least 120 days delinquent. Does this prohibit the servicer from sending the borrower a Notice of Right to Cure until the borrower is 120 days delinquent?

A5: No. The Wisconsin Consumer Act's "Notice of Right to Cure" is not considered the "first notice or filing" for purposes of the Regulation X prohibition. Whether a document is considered the first notice or filing is determined on the basis of the foreclosure proceeding under the applicable state law. The Notice of Right to Cure is not a document required to be filed with a court or other judicial body to commence an action or proceeding in Wisconsin, so a servicer is not required to wait until the borrower is 120 days delinquent before sending the Notice of Right to Cure.

Q6: Does the prohibition on starting the foreclosure process until the borrower is at least 120 days delinquent prevent a creditor from starting the foreclosure process if the borrower is in default for other reasons, such as non-payment of property taxes?

A6: No. As CFPB has not provided guidance in the preamble to the rule or in the official commentary to indicate that the requirement is intended to apply other than when a consumer has missed a loan payment, WBA believes it is reasonable to interpret the requirement to apply only to delinquent loan payments and not to extend to other defaults, such as delinquent property taxes, provided the property taxes were not included in the loan payment through an escrow account.

HOEPA Rule

Q1: Are homeownership counseling requirements limited to loans covered by the Home Ownership and Equity Protection Act (HOEPA)?

A1: No. While certain homeownership counseling requirements apply to loans covered by HOEPA, a separate requirement applies to loans covered by RESPA, and yet another separate requirement applies to negative-amortization loans made to first-time borrowers. Creditors should be mindful that more than one of these requirements may apply to any given loan.

Q2: On the list of homeownership counseling organizations that must be provided to borrowers for loans covered by RESPA, can the servicer provide a list of all of the homeownership counseling organizations located in Wisconsin?

A2: No. In the preamble to the final rule, CFPB has stated that providing a list of all organizations in the state would be "overwhelmingly lengthy" and this practice cannot be used to satisfy the rule's requirement. The final rule requires the creditor to provide a list of the ten homeownership counseling organizations located closest to the "centroid" of the zip code of the applicant's current address. The CFPB website includes a tool that can be used to generate the list by entering a zip code: http://www.consumerfinance.gov/find-a-housing-counselor/.

ECOA Appraisal Rule

Q1: Is the notice of the borrower's right to receive a copy of the appraisal(s) required for a loan renewal?

A1: The Equal Credit Opportunity Act (ECOA) appraisal rule is somewhat ambiguous on this point, but CFPB has included the following statement in the small entity compliance guide published for the rule: "If you are unsure whether a transaction is covered, consider whether there is an 'applicant' or 'application' for an 'extension of credit' as required by Regulation B." Based on this statement, WBA believes CFPB has interpreted the requirement to apply to renewals of existing transactions. Regulation B, which implements ECOA, defines the term "extension of credit" to include 'the refinancing or other renewal of credit'.

Q2: While the rule is somewhat ambiguous regarding the delivery of the *notice* regarding the borrower's right to receive a copy of the appraisal(s) for a renewal, is the creditor required to provide a copy of the appraisal(s) for a loan renewal?

A2: Possibly yes. The commentary to section 1002.14(a)(1) of Regulation B provides that creditors are required to provide an appraisal or other evaluations when an applicant requests a renewal of an existing extension of credit and the creditor develops a new appraisal or other written valuation. Section 1002.14(a)(1) does not apply to the extent a creditor uses appraisals and other written evaluations that were previously developed in connection with the prior extension of credit to evaluate the renewal request.

Whether a new appraisal or other written evaluation is required to be created for a particular loan renewal depends upon requirements under the general

appraisal rules, such as the *Interagency Appraisal and Evaluation Guidelines*, published in December 2010.

HPML Appraisal Rule

Q1: Are the appraisal requirements for higher-priced mortgage loans (HPMLs) based upon a creditor's lien position in a particular dwelling?

A1: No. A creditor's lien position (i.e., first lien, or subordinate lien) in a particular dwelling is not a factor for determining the appraisal requirements for HPMLs. The general requirements apply to closed-end consumer credit transactions that are HPMLs and are secured by the consumer's principal dwelling. There are several exemptions to the appraisal requirements for HPMLs, please see Regulation Z section 1026.35(c)(2) for those exemptions.

Q2: Does a creditor use the same calculation to determine whether a loan is higher-priced under ATR and QM and an HPML under the HPML appraisal rule?

A2: No. Regulation Z section 1026.35 defines an HPML as a closed-end consumer credit transaction secured by the consumer's principal dwelling with an APR that exceeds the APOR for a comparable transaction as of the date the interest rate is set by: (1) 1.5 or more percentage points for a loan secured by a first lien; (2) 2.5 or more percentage points for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac (a "jumbo loan"); or (3) 3.5 or more percentage points for a loan secured by a subordinate lien.

Please see FAQs 5 and 8 within the ATR and QM Rules section of this article regarding how to calculate what is a higher-priced loan under ATR and a higher-priced covered transaction under QM rules.

Q3: Are QMs exempt from the HPML appraisal requirements?

A3: Yes. CFPB issued a supplementary final rule in December 2013 which clarifies that the exemption from the HPML appraisal requirements applies to all QM loans. Creditors should be mindful that while a transaction may be exempt from the HPML appraisal requirements, the separate ECOA appraisal requirements may apply to the transaction, as well as the Wisconsin law requirement to provide a copy of an appraisal when the applicant pays a fee for the appraisal.

Escrow Requirements for HPMLs

Q1: Creditors that meet four requirements outlined in the escrow final rule are exempt from the escrow requirement for higher-priced mortgage loans (HPMLs). If a creditor is located in a county that is designated as rural or underserved by CFPB, is the creditor exempt from the requirement?

A1: Not necessarily. To be exempt from the requirement to establish an escrow account in connection with an HPML: (1) the creditor, together with its affiliates, must have originated 500 or fewer consumer credit transactions secured by first liens on dwellings in the preceding calendar year; (2) the creditor's total assets must have been less than $2.028 billion as of the end of the preceding calendar year (a figure that will be adjusted annually for inflation); (3) more than 50% of the creditor's consumer credit transactions secured by dwellings originated in any one of the three preceding calendar years must have been secured by first liens on properties located in counties designated as rural or underserved; and (4) neither the creditor nor its affiliates may maintain an escrow account for any transaction secured by real property or a dwelling that the creditor or its affiliate services through at least the second installment date.

The fact that the creditor is located in a county that is rural or underserved does not impact whether the creditor meets the third requirement above; the locations of the properties securing the creditor's covered transactions determine whether the third requirement above is met.

Q2: If a creditor maintains escrow accounts for HPMLs that were established between April 1, 2010 and May 31, 2013, can the creditor still be exempt from the HPML escrow requirement?

A2: Possibly yes. The final rule creates two exceptions to the fourth requirement outlined in the answer to Q1 of this section. First, if a creditor maintains escrow accounts established between April 1, 2010 and May 31, 2013, in order to comply with HPML rules, continuing to maintain those escrow accounts does not make the creditor ineligible for the exemption. However, the creditor cannot establish new escrow accounts for transactions consummated on or after June 1, 2013, and must meet the remaining three criteria, in order to remain eligible for the exemption. Second, a creditor may establish an escrow account in order to help a troubled customer avoid default or foreclosure and remain eligible for the exemption, provided the other criteria are met.

Employment Compliance Deadline for Banks Approaching: New OFCCP Rules for Veterans and Individuals with Disabilities

Notice 2014-03

Banks and other federal contractors are facing a **March 24, 2014**, effective date for a number of changes under final rules issued by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") regarding the requirements for government contractors related to employment of veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and individuals with disabilities under Section 503 of the Rehabilitation Act (Section 503). Some of the changes required by these new rules must be in place by the March 24, 2014 effective date, while other changes must be implemented as part of a federal contractor's first required affirmative action plan cycle after March 24, 2014.

A. OFCCP Considers Banks to be Federal Contractors Subject to VEVRAA and Section 503

The OFCCP takes the position that banks are subject to VEVRAA and Section 503 (as well as the federal contractor rules under Executive Order 11246, which prohibits discrimination by federal contractors on the basis of race, color, religion, sex, or national origin). (See OFCCP FAQs section II: http://www.dol.gov/ofccp/regs/compliance/EO13496_faqs.htm.) In particular, OFCCP considers FDIC insurance to constitute a federal contract, and it therefore considers all insured banks to be subject to the federal contractor rules, including the affirmative action plan requirements if the employee threshold for those requirements is met.

In addition, the OFCCP also considers a bank to be a federal contractor if it issues and pays U.S. savings bonds, or holds deposits of federal funds. A bank might also be considered a federal contractor by virtue of holding a federal contract that meets the applicable dollar limits ($100,000 for VEVRAA and $10,000 for Section 503). The specific contract (or contracts) that bring a bank within the federal contractor rules may become important when reviewing the bank's subcontracts (discussed below).

B. New Rules Effective March 24, 2014

As noted above, the new Section 503 regulations (the "Disability Rules") and VEVRAA regulations (the "Veterans Rules") have an effective date of **March 24, 2014**. As such, banks must come into compliance with a number of changes by that date. This section addresses the changes that must be made by March 24, 2014. These changes apply to all banks. There are additional changes, which are discussed in the following section, that will go into effect after March 24, 2014. Those changes are applicable to banks with 50 or more employees.

1. Job Posting with ESDS

The new rules impose additional job-posting requirements for banks. Currently, banks are required to list most job openings with the state employment services delivery system (ESDS) and provide the ESDS with the name and location of each hiring location (positions for which no external candidates will be considered and certain senior-level, executive, and short-term positions are excluded from the listing requirement). (In Wisconsin, the ESDS is the Job Center of Wisconsin: https://jobcenterofwisconsin.com.) The new rules retain these requirements and add the following new requirements:

- Banks must provide job listings in the manner and format required by the ESDS (e.g., email, fax, etc.).
- Banks must submit the following to the ESDS at the time of their first job posting after March 24, 2014 (and this information must be updated with subsequent postings):
  - Notice of status as a federal contractor;
  - The name and location of each hiring location within the state and the name of the hiring contact at that location;
  - The identity of and contact information for any external job service organization used in the state; and
  - A request that the ESDS send "priority referrals" to the bank.

2. Job Posting Equal Opportunity Employer "Tagline"

The new rules introduce a revised "tagline" that must be included in job postings. Currently, banks are required to include a tagline that specifies that "all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin." The new rules require banks to add "disability status" and "protected veteran status" to this list.

3. Notice to Applicants and Employees

Banks are currently required to post notices in conspicuous places to notify employees and applicants of their rights and the bank's status as an equal opportunity employer with affirmative action obligations. The new rules retain this requirement and provide guidance regarding how banks may satisfy this obligation electronically for employees who work remotely. Banks may satisfy the posting requirement for remote employees by emailing the notice or posting it on an intranet site, so long as the bank provides those employees with computer access or otherwise knows that the employees have access to the posting.

In addition, the new rules specify that banks that use electronic or internet-based applications must include an electronic notice of employee rights and federal contractor

obligations as part of the application. This notice must be "conspicuously stored with, or as part of, the electronic application."

The new rules also provide new guidance regarding the requirement that notices be made available in a manner that is accessible and understandable to persons with a disability. The rules explain that a bank may be required to accommodate an individual with a disability by providing the notice in an alternative format, such as in Braille, large print, or an accessible electronic format.

4. Inclusion of Equal Opportunity Language in Subcontracts

The new rules provide specific language that must be included in federal "subcontracts." A subcontract includes any contract of $10,000 (Disability Rules) or $100,000 (Veterans Rules) or more for the purchase, sale, or use of personal property or nonpersonal services (e.g., construction, utility, transportation, research, or insurance) which, in whole or in part, is necessary to the performance of the federal contract. It also includes contracts under which the other party performs, undertakes, or assumes a portion of the bank's obligations under the federal contract. Banks should consider the specific contracts that bring them within the federal contractor rules and then determine whether they have any applicable subcontracts. Banks that have contracts that qualify as federal subcontracts must include the following mandatory language (in bold text) in the contract:

Veteran's Rules
This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

Disability Rules
This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

5. Qualification Standards

Banks are currently prohibited from using basic employment qualification standards to screen candidates where those qualifications tend to screen out protected veterans or individuals with disabilities, unless those qualifications are job-related for the position at issue and consistent with business necessity. The new rules expand on this prohibition by specifying that selection criteria that concern an essential job function may not be used to exclude an individual with a disability (including a disabled veteran) if that individual could satisfy the criteria with provision of a reasonable accommodation. The new rules also clarify that banks may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal job functions.

C. New Rules to be Implemented as Part of First Affirmative Action Plan Effective after March 24, 2014

Banks with 50 or more employees (counting both full-time and part-time employees) are currently subject to federal contractor affirmative action plan rules, under which they are required to follow an affirmative action plan that runs on a 12-month cycle. The new rules impose additional affirmative action plan requirements, and these changes must be put into place beginning with a bank's first affirmative action plan cycle beginning after **March 24, 2014**. (For banks with a calendar-year plan cycle, this means that the changes must be made part of the affirmative action plan that goes into effect as of January 1, 2015.) Banks with fewer than 50 employees are not subject to any of the requirements discussed in this Section C.

1. Self-Identification Requirements

Under the current rules, banks are required to invite applicants to self-identify as protected veterans or individuals with disabilities after extending an offer of employment but before the start of employment. Further, under these rules, it is illegal for a bank to ask an individual to self-identify disability status prior to receiving an offer of employment. The new rules change these self-identification procedures so that banks will now be required to invite applicants to voluntarily self-identify as protected veterans or individuals with disabilities at both the pre- and post-offer stages. The specific requirements are discussed in more detail below.

Banks should be careful not to implement these new self-identification procedures until the required compliance date (i.e., the start of the first affirmative action plan effective after March 24, 2014). The reason for this is that a pre-offer inquiry into disability status might be considered a violation of the Americans with Disabilities Act, unless it is mandated by law.

a. Pre-Offer

Banks with 50 or more employees must provide an invitation to self-identify disability status and protected veteran status at the time an applicant applies or is considered for employment. The disability inquiry must be made using a mandatory form provided by OFCCP, which is available from FIPCO as the new WBA 350C Voluntary Self-Identification of Disability (3/24/14).

There is no mandatory form for the protected veteran status inquiry, but there are specific requirements for the contents of the form, and the OFCCP has provided a model. The model language has been incorporated into the revised WBA 350A Voluntary Self Identification - Pre-Offer Applicants (3/24/14).

These self-identification forms must be separate from the employment application, but they may be included as part of the application materials.

b. Post-Offer

As under the current rules, banks with 50 or more employees must provide invitations to self-identify disability or protected veteran status after an offer of employment has been extended but prior to the first day of work. Under the new rules, banks will be required to use OFCCP's mandatory form (WBA 350C) for purposes of making the disability status inquiry. For purposes of self-identifying protected veteran status, banks may use the revised WBA 350B Voluntary Self Identification - Employees and Post-Offer Applicants (3/24/14), which incorporates model language provided by OFCCP.

The protected veteran status inquiry at the post-offer stage is somewhat different than at the pre-offer stage. While the pre-offer inquiry must ask about protected-veteran status generally, the post-offer inquiry must invite applicants to self-identify into the specific categories of protected veteran status that apply (i.e., disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed forces service medal veteran). In addition, if an applicant identifies himself or herself as a disabled veteran, a bank should inquire with the applicant regarding whether an accommodation is necessary, and if so, engage with the applicant regarding reasonable accommodation (all of which must be done in a manner consistent with the Americans with Disabilities Act).

c. Current Employees

The new Disability Rules require banks with 50 or more employees to invite current employees to self-identify as individuals with disabilities once every five years. This invitation must be made for the first time within the first year after the bank becomes subject to the new affirmative action plan requirements (i.e., the year of the bank's first affirmative action plan cycle after March 24, 2014). In extending this invitation, the bank is required to use OFCCP's mandatory form (WBA 350C). In addition, at least once during the five-year period between invitations to self-identify, the bank must remind employees that they may voluntarily update their disability status at any time.

d. *Confidentiality*

The new rules require that all self-identification information remain confidential and be used only in accordance with the affirmative action rules. Self-identification information may not be included in an individual's personnel or medical file (it must be maintained in a separate data analysis file), and the information should be made available only to appropriate employees. In addition, although the new rules retain the requirement that a bank make its affirmative action plan available for inspection by employees and applicants, it does not require that self-identification information (such as hiring benchmarks, utilization analysis, or annual hiring metrics) be made available. The rules also specify that a bank must provide self-identification information to the OFCCP upon request, but they do not address whether the confidentiality requirement precludes banks from providing self-identification information to other regulatory entities or in response to legal process.

2. Annual Statistical Analysis

Banks with 50 or more employees are required to collect, analyze, and retain for a period of three years, the following information for purposes of their affirmative action plans:

- The number of applicants who self-identified as protected veterans or individuals with disabilities, or who are otherwise known to fall into these categories;
- The total number of job openings and total number of jobs filled;
- The total number of applicants for all jobs;
- The number of protected veteran applicants hired; and
- The total number of applicants hired.

a. Identification of Disability Status by the Bank

Although banks with 50 or more employees may not compel an applicant or employee to self-identify disability status, banks may identify an individual as having a disability for purposes of their annual statistical analysis and review of utilization goals. Where an individual does not voluntarily self-identify, a bank may identify the individual as having a disability when: (1) the disability is obvious (e.g., someone is blind or missing a limb) or (2) the disability is known to the bank (e.g., an individual says that he or she has a disability or requests reasonable accommodation for a disability). However, a bank may not guess or speculate when identifying an individual as having a disability, nor may they assume that an individual has a disability because he or she ''looks sickly'' or behaves in an unusual way.

3. Hiring Benchmarks and Utilization Goals

The new rules require banks with 50 or more employees to set annual benchmarks for hiring of protected veterans and utilization goals for hiring individuals with disabilities. The OFCCP has clearly stated that there is no penalty for a bank that fails to meet a benchmark or utilization goal. However, banks with 50 or more employees are required to engage in outreach and recruitment efforts aimed at meeting their

benchmarks and utilization goals (as discussed in more detail below), and to evaluate and adjust those efforts on an annual basis based on the specific employment data collected as part of their affirmative action plan. The new rules provide specific guidance regarding how benchmarks and utilization goals should be set.

4. Required Outreach

The new rules require outreach and recruitment of protected veterans and individuals with disabilities. Banks with 50 or more employees have flexibility in determining the specific outreach efforts that they will undertake, but those efforts must be reasonably designed to effectively recruit qualified protected veterans and individuals with disabilities. The type of outreach efforts that are appropriate will depend on the circumstances of each particular bank (e.g., size, resources, adequacy of existing employment practices). The new rules provide a list of potential outreach and recruitment efforts.

Banks with 50 or more employees must document their outreach and recruitment efforts and complete an annual written assessment of the effectiveness of those efforts. There is no mandatory format for this report, but it must include an assessment of the annual hiring metrics data collected by the bank for the current year and the prior two years. The report must also document the criteria that the bank used in evaluating the effectiveness of its outreach and recruitment efforts and provide a conclusion regarding the effectiveness of the program. If the bank concludes that the totality of its efforts were not effective in identifying and recruiting qualified protected veterans or individuals with disabilities, it must identify and implement alternative efforts to fulfill its obligations.

Banks with 50 or more employees must also include their outreach policy in their policy manual or otherwise make the policy available to employees. Banks with 50 or more employees must also send written notice of their affirmative action policies to all subcontractors (as defined above) and request appropriate action on their part.

Documentation related to a bank's outreach efforts must be retained for a period of three years. Proper documentation of outreach and recruitment efforts, including documentation of the bank's analysis of the effectiveness of these efforts and any responsive adjustments, will be crucial to compliance, as OFCCP will closely examine these records as part of a compliance audit.

D. Checklist of Action Items

1. All Banks—Items to Complete by the March 24, 2014 Effective Date

- Prepare to provide new required information to the ESDS upon the first covered external job posting after the effective date.
- Update subcontracts (if any) with required equal opportunity clause language.
- Incorporate new equal opportunity tagline into job postings.
- Implement electronic notice requirements for remote workers.
- Update electronic applications to satisfy notice requirements, if necessary.
- Review and update basic qualifications and selection criteria to ensure that they are job-related and consistent with business necessity and that they do not otherwise improperly screen individuals with a disability (including disabled veterans).
- Update recordkeeping policies to comply with the new three-year record keeping requirements.

2. All Banks with 50 or More Employees—Items to Complete as Part of First Affirmative Action Plan Cycle after March 24, 2014

- Update invitations to self-identify and implement a process for pre-offer self-identification.
- Train employees on the new rules, as appropriate, and document that training.
- Develop outreach and recruitment efforts for protected veterans and individuals with disabilities.
- Review reasonable accommodation policies and procedures and modify as necessary to comply with the requirements of the new rules.
- Create a process for inviting current employees to self-identify.
- As part of the affirmative action plan, develop written reports analyzing benchmarks, utilization goals, and outreach and recruitment efforts, and take appropriate steps where benchmarks and utilization goals are not met.

E. Additional Resources

The OFCCP's website provides a great deal of helpful information regarding the new rules, including fact sheets, FAQs, training webinars, and other guidance:

- The Section 503 (Disability Rules) page can be found here: http://www.dol.gov/ofccp/regs/compliance/section503.htm.
- The VEVRAA (Veterans Rules) page can be found here: http://www.dol.gov/ofccp/regs/compliance/vevraa.htm.

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Read "Special Focus" for a summary of revisions to Wisconsin Administrative Code rules, and paying agent notification requirements under a new SEC rule. Next, turn to "Judicial Spotlight" for an article regarding how a lender in Illinois won a lawsuit against a guarantor and what that may mean for lenders in Wisconsin. Next, turn to "Regulatory Spotlight" for several rules regarding the Affordable Health Care Act. Then, turn to "Compliance Notes" for a reminder that an institution's modified HMDA LAR must be made publicly available. ■

SPECIAL FOCUS

Summary of Recently Revised Wisconsin Administrative Code

Notice 2014-04

2013 Wisconsin Act 136 was recently signed into law. Act 136, which became effective **March 13, 2014**, modifies and repeals various rules promulgated by Wisconsin's Department of Financial Institutions (DFI). This article highlights changes made by the Act.

Repeal of Chargeback

Under existing statutes and rules established by the Division of Banking (Division) in DFI or the Office of Credit Unions (OCU) in DFI, a bank, savings and loan association, savings bank or credit union (collectively, financial institution) may acquire, place, and operate, or participate in the acquisition, placement, and operation of, at locations away from the financial institution, what are variously referred to as customer bank communications terminals, remote terminals, or remote service units (collectively, remote terminals). A remote terminal is a terminal or other facility that is not located at a financial institution and through which customers of financial institutions may engage in electronic transactions that are incidental to the conduct of the business of financial institutions.

Under existing rules of the Division and OCU, when any sale of goods or services is paid directly through a remote terminal and involves an aggregate transfer of funds of $50 or more from an account of a financial institution customer to the account of another person, the financial institution must reverse the transaction and recredit the customer's account upon receipt of notice by the customer within three business days after the date of the sale. The process is referred to as a chargeback. Act 136 repeals this chargeback provision from the rules of the Division and OCU. Financial institutions are reminded that while Act 136 repeals state administrative code rules related to chargeback, other chargeback rules, such as those under Truth in Lending Act and credit card agreements, remain intact and are untouched by Act 136.

Customer Liability for Unauthorized Use of a Remote Terminal Access Card

Under existing rules of the Division and OCU, the liability of a customer of a financial institution for the unauthorized use of a plastic card or other means providing the customer access to a remote terminal (access card) may not exceed the lesser of the following: (1) $50; or (2) the amount of any money, property, or services obtained by the unauthorized use prior to the time the financial institution is notified, or becomes aware, of circumstances that lead to the belief that unauthorized access to the customer's account may be obtained.

Act 136 modifies this rule on customer liability for the unauthorized use of a remote terminal access card by aligning it with the consumer liability provisions of the Electronic Fund Transfers Act, as implemented by Regulation E. Under Act 136, if the customer notifies the financial institution within two business days after learning of the unauthorized use or of loss or theft of the access card, the customer's liability may not exceed the lesser of $50 or the amount of unauthorized transfers that occur before notice to the financial institution.

If a customer fails to notify the financial institution within two business days after learning of the unauthorized use or loss or theft of the access card, the customer's liability may not exceed the lesser of $500 or the sum of all of the following: (1) $50 or the amount of unauthorized transfers that occur within the two business days, whichever is less; and (2) the amount of unauthorized transfers that occur after two business days and before notice to the financial institution, if the financial institution establishes that these transfers would not have occurred had the customer notified the financial institution within that two-day period.

To avoid liability for subsequent transfers, the customer must report an unauthorized transfer from the unauthorized use of a remote terminal access card that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement. If the customer fails to do so, the customer's liability may not exceed the amount of the unauthorized transfers that occur after 60 days and before notice to the financial institution and that would not have occurred if the customer had notified the financial institution within the 60-day period. The customer may also be liable for the amounts specified in the paragraph directly above. If an agreement between the customer and the financial institution imposes less liability than is provided by rule, the customer's liability may not exceed the amount imposed under the agreement.

Transaction Receipt at Remote Terminal

Under existing rules of the Division and OCU, every transfer of funds through a remote terminal made by a customer of a financial institution must be evidenced by a written document (receipt) that is made available to the customer at the time of the transaction and that contains specified information, such as the customer's account number, the amount transferred, and the date of the transaction. Act 136 modifies these rules to create an exception so that a receipt is not required to be made available if the amount of the transfer is $15 or less. State law now provides for the same exemption allowed for under federal law, Regulation E section 1005.9(e).

Other Changes to Administrative Code

Act 136 also made changes to administrative code rules regarding: (1) collection agencies; (2) adjustment service corporations; (3) licensed mortgage banker, mortgage broker, or licensed mortgage loan originator name uses; (4) sales finance companies; (5) Division rule review procedures; and (6) technical corrections.

Conclusion

In light of the changes made by Act 136, financial institutions should review their policies and procedures to determine whether revisions need be made to incorporate the revised rules. For example, an institution's unauthorized debit card error resolution policy and procedure may need revision to accommodate changes to customer liability for the unauthorized use of a remote terminal access card, or to update remote terminal machines to no longer automatically generate transaction receipts for transactions of $15 and less.

Financial institutions should check with their forms vendor regarding possible revisions to consumer Regulation E disclosures, business debit card agreements, and other related forms as a result of changes made by Act 136. FIPCO® disclosures and documents are currently under revision to incorporate Act 136 changes and will be made available as soon as possible.

If a financial institution decides to make changes which could increase liability for consumers, institutions are reminded that any revised consumer unauthorized debit card error resolution procedures should not be implemented until the revisions are incorporated into disclosures and agreements and notice is made available to consumers as required under section 1005.8 of Regulation E. Regulation E requires a financial institution to provide a written notice to consumers, at least 21 days before the effective date, of any change in term required to be disclosed in the Regulation E disclosure when the change would result in: (1) increased fees for the consumer; (2) increased liability for the consumer; or (3) stricter limitations on the frequency or dollar amount of transfers. There is no specific form or wording required for the change-in-term notice. The notice may appear on a periodic statement, or may be given by sending a copy of a revised disclosure statement, provided attention is directed to the change (for example, in a cover letter referencing the changed term).

At time of print of this publication, 2013 SB 520 which would revise Wisconsin administrative code sections regarding record retention rules for financial institutions has yet be to signed into law. We will report on that rule change once SB 520 becomes law. Act 136 may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/136.pdf.

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Paying Agent Notification Requirements Can Affect Banks

Notice 2014-05

On January 23, 2013, the Securities & Exchange Commission (SEC) issued a final rule to amend Rule 17Ad-17 to implement the requirements of Section 929W of the Dodd-Frank Act, "Due Diligence for the Delivery of Dividends, Interest, and Other Valuable Property Rights". The rule requires "paying agents" to send a one-time notification to "unresponsive payees" stating that the agent has sent a securityholder a check that has not yet been negotiated. The compliance date of the final rule is **January 23, 2014**. The first potential notice to unresponsive payees is due no later than **August 23, 2014**. This article is intended to provide a brief overview of the requirements.

Background

Rule 17Ad-17 was adopted by SEC in 1997 to address situations where recordkeeping transfer agents have lost contact with securityholders. The rule requires transfer agents to exercise reasonable care to obtain the correct addresses of securityholders, including conducting database searches using the name or taxpayer identification number of the securityholder. The searches must be conducted without charge to the securityholder. The first search must occur between three and twelve months of the loss of contact, and subsequent searches must occur between six and twelve months after the first search. Searches are not required if: (1) the transfer agent has received documentation that the securityholder is deceased; (2) the aggregate value of assets listed in the securityholder's account is less than $25; or (3) the securityholder is not a natural person.

Loss of contact can be harmful to securityholders, as they no longer receive corporate communications or the interest or dividend payments to which they may be entitled. The final rule issued by SEC in 2013 defined the term "paying agent" in order to extend the rule's requirements to cover brokers, dealers, and other parties, in addition to recordkeeping transfer agents.

Definitions

For purposes of the rule, a "paying agent" can include any issuer, transfer agent, broker/dealer, investment advisor, indenture trustee, custodian, or any other person who accepts payments from an issuer of securities and distributes the payments to holders of the security. Issuers include banks that have issued equity or debt securities, whether or not the bank is publicly traded. For example, banks that pay dividends by check on their stock, common or preferred, or interest payments on their debt securities would be "issuers" required to comply with this rule.

A securityholder is considered an "unresponsive payee" when the paying agent sends the securityholder a check that is not negotiated by the earlier of: (1) the time the paying agent sends the next regularly scheduled check; or (2) six months or 180 days after the not-yet-negotiated check was sent. SEC has not limited the term "unresponsive payee" to include only natural persons; the definition also includes non-natural person securityholders. The term "regularly scheduled check" includes any regularly scheduled periodic payment from an issuer of securities to securityholders as a class, and is not limited to checks for interest and dividend payments.

Notification and Recordkeeping Requirements

A paying agent must send notice to the securityholder no later than seven months or 210 days after the not-yet-negotiated check was sent. Only one notification per check is required. The notice may be sent along with a check or other mailing subsequently sent to the securityholder. The notice is not required if the amount of the check is less than $25.

In the event multiple checks have not been negotiated by an unresponsive payee, paying agents are permitted to send either one notification per check, or one notification relating to multiple checks that have not been negotiated, provided that the applicable timing requirements are met with respect to each individual check. For a notice covering multiple checks, the notification must sufficiently identify each not-yet-negotiated check, and the notice must be sent to the unresponsive payee no later than seven months after the oldest check covered by the notice was sent.

A securityholder is no longer considered an unresponsive payee when the securityholder negotiates the check or checks that caused the securityholder to be considered an unresponsive payee.

A paying agent is not required to send a written notice to an unresponsive payee if such unresponsive payee would be considered a lost securityholder by a transfer agent, broker, or dealer. Rule 17Ad-17(b)(2) defines a "lost securityholder" to mean a securityholder: (1) to whom an item of correspondence that was sent to the securityholder at the address contained in the transfer agent's master securityholder file or in the customer security account record of the broker or dealer has been returned as undeliverable; provided, however, that if such item is sent within one month to the lost securityholder, the transfer agent, broker, or dealer may deem the securityholder to be a lost securityholder as of the day the re-sent item is returned as undeliverable; and (2) for whom the transfer agent, broker, or dealer has not recieved information regarding the securityholder's new address.

Paying agents must maintain records to demonstrate compliance with the rule, including written procedures describing the methodology for complying with the requirements, for at least three years.

The notification requirement has no effect on state escheatment laws.

The final rule may be found at: http://www.gpo.gov/fdsys/pkg/FR-2013-01-23/pdf/2013-01269.pdf. ■

JUDICIAL SPOTLIGHT

Lender Wins $17 Million Lawsuit In Illinois Against Guarantor

In a recent case decided by the United States Court of Appeals for the Seventh Circuit, located in Chicago, the court confirmed a decision made earlier by the U.S. District Court in Northern Illinois granting judgment for the lender and against a guarantor for $17 million. *Inland Mortgage Capital Corporation v. Chivas Retail Partners, LLC, et al.,* 740 F. 3d 1146 (decided January 29, 2014). Although the case was decided under Illinois and Georgia law, it nevertheless adds to the body of case law in several states, including Wisconsin, holding that guarantors are not beneficiaries of anti-deficiency statutes intended to benefit borrowers. The case may also be helpful to lenders in Wisconsin because the jurisdiction of the United States Court of Appeals for the Seventh Circuit includes the federal courts in Wisconsin.

The Facts

The lender, Inland Mortgage Capital Corporation, made a loan to Harbins Crossing TC in the amount of $60 million to buy a tract of land in Georgia on which Harbins wanted to build a shopping center anchored by a national retail store. The lender obtained a guaranty of the loan from Chivas Retail Partners, LLC. Harbins defaulted on the loan (apparently because the national retail store decided not to locate in the proposed shopping center) and the lender foreclosed on the mortgage securing the loan. The foreclosure proceeding was a nonjudicial proceeding, a proceeding which is not available to lenders under Wisconsin law.

The lender made a credit bid of $7 million at the foreclosure sale and became the owner of the property. Under Georgia law, a lender which obtains property in a nonjudicial foreclosure sale cannot obtain a deficiency judgment against the borrower unless a Georgia court confirms that the auction conformed to Georgia law. In Georgia a court cannot confirm the sale unless it is satisfied that the property sold at the auction sale at its true market value. The Georgia court denied the lender's request for confirmation of the sale apparently because the court thought the land was worth more than $7 million.

Since the Georgia court denied confirmation of the sale and the lender was unable to obtain a deficiency judgment against the borrower, the lender invoked the guaranty and brought a lawsuit against the guarantor in Illinois for the difference between what it had paid for the property (the $7 million credit bid) and the unpaid balance of the debt and other costs and expenses ($24 million). The lender sought the difference between $24 million and $7 million—an amount equal to $17 million—from the guarantor. The U.S. District Court in Northern Illinois awarded judgment against the guarantor for $17 million. The guarantor appealed the decision to the U.S. Court of Appeals. The U.S. Court of Appeals affirmed the judgment granted by the U.S. District Court against the guarantor in the amount of $17 million. The decision by the U.S. Court of Appeals in this case is the subject of this article.

The Law

The guarantor argues in this appeal to the U.S. Court of Appeals that the $17 million judgment against it is a "deficiency judgment" and since a Georgia court had determined the property was worth more than $7 million the lender is not entitled to **any** deficiency judgment against **anyone**, including the guarantor. The U.S. Court of Appeals disagreed and determined that the lender "is not seeking a deficiency judgment." According to the U.S. Court of Appeals, a deficiency judgment is sought against the borrower and the borrower in this case is Harbins, not the guarantor. According to the U.S. Court of Appeals, there is nothing to prevent the lender from suing the guarantor. Furthermore, according to the U.S. Court of Appeals, the purpose of a loan guaranty is to make the lender whole if the borrower is unable to repay the loan in full. The fact that a Georgia court prevented the lender from obtaining full repayment by the borrower is what triggered the guarantor's liability to the lender as a guarantor of the debt.

The guarantor also argued that the $17 million judgment was a windfall to the lender because it is likely to recover more than the amount of the debt and the amount it paid for the property. The U.S. Court of Appeals rejected this argument based on language in the guaranty that the guarantor agrees to pay the unpaid balance even if the collateral was worth more than what the lender paid for it. The guaranty agreement in this case included language helpful to the U.S. Court of Appeals in this case. The guaranty agreement provided that "if Lender forecloses on any real property collateral . . . the amount of the debt may

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Read "Special Focus" for recent revisions made to the Biggert-Waters Act and a summary of recently enacted state legislation. Next, turn to "Regulatory Spotlight" for a proposed rule on the registration and supervision of appraisal management companies. Then, turn to "Compliance Notes" for a new CFPB guide regarding the completion of the new integrated TILA/RESPA disclosures, several FDIC FILs regarding technology concerns, and several revisions to sections of OCC's Comptroller Handbook. ■

SPECIAL FOCUS

Homeowners Flood Insurance Affordability Act Amends Biggert-Waters Act and Flood Disaster Protection Act

Notice 2014-06

Numerous reforms to the National Flood Insurance Program (NFIP) were made when the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-Waters) was enacted on **July 6, 2012,** including the requirement to escrow funds used to pay flood insurance premiums and fees in connection with residential mortgage loans, as well as raising flood insurance rates to reflect true flood risk in an attempt to make NFIP more financially stable. The Homeowners Flood Insurance Affordability Act of 2014 (HFIAA) repeals and amends several provisions of Biggert-Waters, including delaying the requirement to escrow funds for residential flood insurance premiums, excluding several types of loans from the escrow requirement, and reinstating lower flood insurance rates for grandfathered properties that were repealed by Biggert-Waters. HFIAA also amends a provision of the Flood Disaster Protection Act. This article provides an overview of several of the changes made by HFIAA.

Delay of Escrow Requirement

Under Biggert-Waters, escrowing for flood insurance premiums and fees would have been required on **July 6, 2014**, for most residential loans outstanding on that date. HFIAA delays this escrow requirement until **January 1, 2016**, and amends the scope of the requirement to apply only to loans originated, refinanced, increased, extended, or renewed on or after **January 1, 2016**. Institutions with less than $1 billion in total assets are excepted from this requirement if, as of **July 6, 2012**, such institutions were not required by law to escrow for taxes and insurance, and did not have a policy of requiring escrow for those items. HFIAA also directs the federal banking regulatory agencies to write regulations requiring lenders and servicers to offer borrowers the option of escrowing for flood insurance premiums and fees.

In addition to delaying the requirement to escrow for flood insurance premiums and fees, HFIAA excludes several types of loans from the requirement: (1) loans secured by subordinate liens, if, at the time of origination of the subordinate lien loan, flood insurance is provided in connection with the loan secured by a first lien on the property; (2) loans secured by residential improved real estate or a mobile home that is part of a condominium, cooperative, or other project development, if the property is covered by a flood insurance policy provided by the condominium association, cooperative, homeowners association, or other applicable group; (3) business purpose loans secured by residential improved real estate or a mobile home; (4) home equity lines of credit; (5) nonperforming loans; and (6) loans with a term of less than 12 months.

Reinstatement of Grandfathering and Subsidized Premium Rates

HFIAA reinstates lower flood insurance premium rates for grandfathered properties upon the remapping of an area by the Federal Emergency Management Agency (FEMA), which had been repealed by Biggert-Waters. Upon the remapping of a property into a flood zone, HFIAA provides for preferred risk policy rates for the property. HFIAA also requires the refund of premiums for NFIP flood insurance coverage collected since **July 6, 2012** in excess of the rates required, as amended by HFIAA. Refunds are not required for policy holders who paid premiums reflecting the 25% annual increases that were not repealed, which are property owners of: (1) pre-Flood Insurance Rate Map (pre-FIRM) subsidized non-primary residences; (2) business properties; (3) severe repetitive loss properties; and (4) pre-FIRM buildings that were substantially damaged or improved. In addition, policy holders whose full-risk premium is less than the pre-FIRM subsidized premium will not receive refunds.

Provisions of Biggert-Waters were intended to increase the flood insurance premiums for certain pre-FIRM subsidized properties to reflect actuarial rates. However, HFIAA repeals the Biggert-Waters requirement that the flood insurance premium on a primary residence purchased after **July 6, 2012** reflect the full risk rate of the property. To enable purchasers to retain previous rates while FEMA develops new rate tables and guidelines, HFIAA permits the purchaser of the property to assume the existing flood insurance policy for the remainder of the policy's term. Upon renewal of the policy, the premium rates will increase between 5% and 18% annually until the premium reaches the full risk rate for the property. FEMA is directed to issue rate tables and guidance to implement HFIAA by **November 21, 2014**.

Under Biggert-Waters, FEMA was authorized to increase premium rates for all properties within a single risk classification by up to 20% annually. HFIAA lowers this cap to 15%, and limits the risk premium increase for any individual property to 18% annually. In addition to the cap, HFIAA requires FEMA to increase flood insurance premiums by at least 5% annually until each class premium reaches its full risk rate. HFIAA also directs FEMA to minimize the number of flood insurance policies with annual premiums in excess of 1% of the total coverage provided by the policy (*e.g.*, a $2,100 premium for a policy providing $200,000 of coverage).

In addition, HFIAA amends the Biggert-Waters provision that would have required property owners to pay a full risk rate premium if, as a result of the owner's "deliberate choice", the flood policy was permitted to lapse. HFIAA modifies this provision to add that if the policy holder permitted the lapse as a result of flood insurance no longer being required on the property, the property may continue to qualify for subsidized rates.

HFIAA also requires FEMA to make available optional flood insurance coverage for residential properties with a higher loss deductible, up to an including $10,000. FEMA must include a disclosure with this option informing the applicant of the option and clearly explaining the effect of a loss-deductible.

Detached Structures Excluded from Mandatory Purchase Requirement

HFIAA amends the Flood Disaster Protection Act to exclude from the mandatory purchase requirement a structure that is detached from a primary residence, such as a detached garage or other free-standing structure, so long as the structure is not used as a residence. HFIAA requires an amendment to the Special Information Booklet required by the Real Estate Settlement Procedures Act (RESPA), to include the following disclosure:

> Although you may not be required to maintain flood insurance on all structures, you may still wish to do so, and your mortgage lender may require you to do so to protect the collateral securing the mortgage. If you choose not to maintain flood insurance on a structure and it floods, you are responsible for all flood losses relating to that structure.

It is not clear from HFIAA whether this amendment requires an implementing regulation by the federal banking regulatory agencies or whether it is effective immediately.

Flood Insurance Affordability Study

Biggert-Waters required FEMA to conduct a flood insurance affordability study and submit the results of the study to Congress by **March 6, 2013**. The study was to be funded by an allocation of $750,000. FEMA did not complete the study, and cited the allocation of funds as insufficient. HFIAA increases the funding for the affordability study to $2.5 million, extends the deadline for submission to Congress to **September 21, 2015**, and requires additional items to be considered in the study.

Directions to Improve NFIP Transparency and Outreach

HFIAA directs FEMA to make several changes to the transparency and outreach efforts regarding NFIP, including: (1) communicating the full flood risk to property owners, regardless of whether the premium rates are full actuarial rates; (2) notifying property owners of pending flood insurance rate increases at least six months in

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advance; (3) reporting to Congress on policy and claims data for NFIP; (4) designating a Flood Insurance Advocate within FEMA to answer policyholder questions regarding the flood mapping process and premium rates; (5) improving the accuracy and transparency of NFIP rate maps; and (6) reimbursing successful appeals of the FEMA mapping process, which provides incentive for FEMA to improve its mapping process.

Surcharges to Offset Cost of Act's Changes

The cost of the changes made by HFIAA will be offset by a $25 annual fee imposed on NFIP policies for primary residential properties, and a $250 annual fee imposed on policies for second homes and businesses. The fees will be imposed for all newly issued policies and renewals that occur after **March 21, 2014**, and will be charged until all pre-FIRM subsidies are eliminated.

Conclusion

The Homeowners Flood Insurance Affordability Act of 2014 amended several provisions of the Biggert-Waters Flood Insurance Reform Act, including delaying the requirement to escrow funds for the payment of flood insurance premiums in connection with loans secured by residential real property until **January 1, 2016**. HFIAA also reinstates subsidized premiums for several classifications of properties, and provides for the phase-in of premium increases until policies reach the properties' full risk rates. In addition, HFIAA amended the Flood Disaster Protection Act to exclude detached non-residential structures from the mandatory purchase requirement. HFIAA may be found at: http://beta.congress.gov/113/plaws/publ89/PLAW-113publ89.pdf. FEMA has published an overview of HFIAA, which may be found at: www.fema.gov/media-library/assets/documents/93074.

Summary of Recently Enacted State Legislation

Notice No. 2014-07

There have been six recently enacted state legislative items which directly impact financial institutions. The following article highlights those items.

Restricting Release of Credit Information: 2013 Wisconsin Act 78

Current law generally allows an individual, upon making a proper request, to prohibit a consumer reporting agency (CRA) from releasing the individual's credit report for any purpose related to the extension of credit without the individual's prior authorization. If so requested, the CRA must include a security freeze on the individual's credit report. There are various exceptions to these requirements. Further, current law allows an individual to authorize the release of the credit report subject to a security freeze and to request removal of a security freeze.

2013 Wisconsin Act 78 provides for additional security freezes by allowing a representative (a person with authority to act on behalf of a protected consumer) to obtain security freezes on behalf of the protected consumer. "Sufficient proof of authority" to act on behalf of a protected consumer includes: (1) a court order; (2) a power of attorney; or (3) a notarized statement describing the authority to act on behalf of a protected consumer. For purposes of Act 78, a "protected consumer" is either: (1) an individual who is under 16 years old; or (2) an individual for whom a guardian or conservator is appointed.

Under Act 78, a representative may request a security freeze for a protected consumer by providing a CRA with sufficient proof of authority and sufficient proof of identification of both the representative and protected consumer. The Act defines "sufficient proof of identification" to include: (1) a social security number (SSN) or copy of a social security card; (2) a certified or official copy of a birth certificate; or (3) a copy of a motor vehicle operator's license or identification card.

If a CRA receives a representative's request for a security freeze on behalf of a protected consumer, and the CRA already has a file on the protected consumer, the CRA must place a security freeze that prohibits the CRA from releasing the protected consumer's credit report or any information derived from the protected consumer's credit report, except as otherwise permitted. If the CRA does not have a file on the protected consumer, the CRA must place a security freeze by creating a record identifying the protected consumer so as to prohibit the release of a protected consumer's report, except as otherwise permitted. The CRA has 30 days after receiving the request for a security freeze to place the freeze. Act 78 requires a CRA to verify that it has no file by checking names and SSNs in its existing files.

Act 78 also does the following:

- Prohibits using the record of a protected consumer for credit considerations.
- Prohibits the CRA, upon placement of a security freeze, from releasing the protected consumer's credit report, any information derived from the credit report, or any record created under the Act, unless the security freeze is removed.
- Creates procedures for representatives and protected consumers to have CRAs remove security freezes and allows CRAs to remove security freezes based on material misrepresentation of fact by representatives or protected consumers.

advance; (3) reporting to Congress on policy and claims data for NFIP; (4) designating a Flood Insurance Advocate within FEMA to answer policyholder questions regarding the flood mapping process and premium rates; (5) improving the accuracy and transparency of NFIP rate maps; and (6) reimbursing successful appeals of the FEMA mapping process, which provides incentive for FEMA to improve its mapping process.

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Act 78 also does the following:

- Prohibits using the record of a protected consumer for credit considerations.
- Prohibits the CRA, upon placement of a security freeze, from releasing the protected consumer's credit report, any information derived from the credit report, or any record created under the Act, unless the security freeze is removed.
- Creates procedures for representatives and protected consumers to have CRAs remove security freezes and allows CRAs to remove security freezes based on material misrepresentation of fact by representatives or protected consumers.

- Allows CRAs to charge a reasonable fee not exceeding $10 for placing or removing security freezes, but prohibits fees in cases involving identity theft or protected consumers under 16 years old who already have files at CRAs.

- Creates exceptions from the Act's requirements, including the exceptions that apply to security freeze restrictions under current law, as well as exceptions for information used for criminal records, fraud prevention or detection, personal loss history information, or certain background screening purposes.

- Allows Wisconsin's Department of Agriculture, Trade and Consumer Protection (DATCP) and Wisconsin's Department of Justice (DOJ) to bring actions to enforce the Act's requirements.

- Subjects a person who violates Act 78 to a civil forfeiture of not more than $1,000 per violation.

Financial institutions should review any CRA credit report ordering policy to reflect the institution's procedures should it learn of a security freeze when working with a customer who meets the definition of a protected consumer. Act 78 was effective **01/01/2014**. 2013 Wisconsin Act 78 may be found at: http://docs.legis.wisconsin.gov/2013/related/acts/78.pdf.

Wisconsin's Social Media Protection Act: 2013 Wisconsin Act 208

2013 Wisconsin Act 208 (referred to as Wisconsin's Social Media Protection Act) relates to: (1) employer access to, and observation of, the personal Internet accounts of employees and applicants for employment; (2) educational institution access to, and the observation of, the personal Internet accounts of students and prospective students; and (3) landlord access to, and observation of, the personal Internet accounts of tenants and prospective tenants. This summary outlines the rules related to employers. For more information regarding the Act's requirements for educational institutions and landlords, please refer to the Act.

Under Act 208, a "personal Internet account" means an account created and used exclusively for personal purposes within a bounded system established by an Internet-based service that requires a user to input or store access information via an electronic device in order to view, create, use, or edit the user's account information, profile, display, communications, or stored data. For purposes of the Act, "access information" means a user name and password, login information, or any other security information that protects access to a personal Internet account.
Act 208 specifies that certain actions by an employer, educational institution, or landlord in accessing a person's personal Internet accounts are prohibited and may be subject to a forfeiture of up to $1,000 and enforcement by Wisconsin's Department of Workforce Development (DWD). A person who has been discharged, expelled, disciplined, or otherwise discriminated against in violation of the Act may file a complaint with DWD, which may take action to remedy the violation in the same manner as employment or housing discrimination complaints.

Act 208 specifies that, with exceptions, an employer may not request or require an employee or applicant to disclose access information, grant access, or allow observation, of a personal Internet account, as a condition of employment. An employer is also prohibited from discharging or otherwise discriminating against a person who refuses such a request or opposes such practices.

Under the exceptions to Act 208, an employer may do any of the following:

- Discharge or discipline an employee for transferring proprietary or confidential information, or financial data, to the employee's personal Internet account without authorization.

- Conduct an investigation of certain misconduct, if the employer has reasonable cause to believe that activity in the personal Internet account relating to the misconduct has occurred. Misconduct includes any: (1) alleged unauthorized transfer of proprietary or confidential information, or financial data; (2) other alleged employment-related misconduct; (3) violation of law; or (4) violation of the employer's work rules as specified in an employee handbook. In conducting an investigation, an employer may require an employee to grant access or allow observation of a personal Internet account, but may not require the employee to disclose access information for that account.

- Monitor, review, or access electronic data that is stored on an electronic communications device paid for in whole or in part by the employer or electronic data that is traveling through or stored on the employer's network.

- Comply with a duty to screen applicants for employment prior to hiring that is established under state or federal law or by a self-regulating organization, as defined under the federal Securities and Exchange Act of 1934.

- Restrict or prohibit a person's access to certain Internet sites while using a device or network that is supplied or paid for in whole or in part by the employer.

- View, access, or use information about an employee or applicant that is available in the public domain or that can be viewed without access information.

- Request or require disclosure of an employee's personal email address.

The Act explicitly states that its provisions do not create a duty for an employer to search or monitor the activity of a personal Internet account. Likewise, under Act 208, an employer is not liable for any failure to request or to require access or observation of a personal Internet account. Lastly, an employer that inadvertently obtains access information, through use of the employer's network or use of a device that is supplied or paid for in whole or in part by the employer, is not liable for possessing that information so long as the information is not used to access the employee's personal Internet account.

2013 Wisconsin Act 208 was effective **04/10/2014**. If an employee is affected by a collective bargaining agreement that contains provisions that are inconsistent with Act 208, the Act is effective when the collective bargaining agreement expires, or is extended, modified, or renewed. Financial institutions should review their employee and applicant policies to determine whether revisions need be made in light of Act 208. WBA will be incorporating Act 208 into the WBA Model Social Media Policy. 2013 Wisconsin Act 208 may be found at: http://docs.legis.wisconsin.gov/2013/related/acts/208.pdf.

Wisconsin's Telephone Solicitation "Do-Not-Call" List: 2013 Wisconsin Act 234

"Do-not-call" laws exist under both state and federal law, administered by Wisconsin's Department of Agriculture, Trade and Consumer Protection (DATCP) and the Federal Trade Commission (FTC), respectively. Under both laws, persons who do not wish to receive telephone solicitations may have their telephone numbers placed on a list (called a "directory" under Wisconsin's program and a "registry" under the federal program). With certain exceptions, telephone solicitors, or employees or contractors of a telephone solicitor (collectively, solicitors), are prohibited from calling telephone numbers on the directory or registry; exceptions to the prohibition are telephone solicitations made: (1) by nonprofit organizations; (2) in response to a recipient's request; and (3) to current clients of the person selling property, goods or services that are the reason for the solicitation.

2013 Wisconsin Act 234 eliminates the Wisconsin do-not-call directory and instead applies the prohibitions under current Wisconsin law to telephone numbers in the "state do-not-call registry," which is the portion of the federal registry that consists of telephone numbers with Wisconsin area codes. The Act authorizes DATCP to cooperate with FTC to add numbers from the current Wisconsin directory to the federal registry. Act 234 does not change the specific prohibitions applicable to telephone solicitations under existing Wisconsin law.

Prior to Act 234, solicitors were required to register with DATCP and pay specified fees for the use of the directory, to be used by DATCP for establishing and maintaining the directory. Act 234 specifies that fee revenues are for the administration and enforcement of the do-not-call law, and for consumer protection, information and education. Act 234 allows DATCP to establish a basis for the initial registration fee other than the number of lines used by the solicitor.

Lastly, Act 234 requires that DATCP rules require a solicitor to provide proof that the solicitor has obtained the Wisconsin do-not-call registry from FTC in compliance with federal law, and prohibits the possession or use of a copy of that registry obtained in violation of federal law. Financial institutions should review and update any current call campaign procedures as needed. 2013 Wisconsin Act 234 is effective **08/01/2014**, and may be found at: http://docs.legis.wisconsin.gov/2013/related/acts/234.pdf.

Repeal of DFI Prescribed Record Retention Requirements: 2013 Wisconsin Act 277

Record retention rules, and DFI's rulemaking authority to implement those rules, varied substantially as between different types of institutions. As a result, Act 277 revised many areas of Wisconsin law. This summary outlines the various changes imposed by the Act.

Under current statutes, a state bank, savings and loan association (S&L), or savings bank (collectively, institutions) may have its records reproduced by a photographic or optical imaging process that accurately and permanently reproduces the originals and then dispose of the originals after first obtaining the written consent of the Division of Banking (Division) within Wisconsin's Department of Financial Institutions (DFI). The reproduced records are thereafter treated the same as originals.

Under 2013 Wisconsin Act 277, after having its records accurately reproduced in this manner, institutions are not required to obtain the written consent of the Division to thereafter dispose of the originals.

Under current statutes, a state bank or an S&L may destroy or dispose of its records that have become obsolete after first obtaining the written consent of the Division. Act 277 repeals the statutory provisions relating to destruction of obsolete records.

Also under current statutes, the Division must, by rule, prescribe periods of time for which savings banks must retain records and after the expiration of which the savings bank may destroy these records. Under Act 277, the Division must by rule prescribe standards by which savings banks must retain records and may thereafter destroy those records.

Under current rules of the Division, each savings bank and S&L must retain its records in a manner consistent with prudent business practices and in accordance with other

provisions of state and federal law. Each savings bank and S&L must retain its records for at least the minimum period specified in a particular publication of the Financial Managers Society, Inc. (FMS). A savings bank or S&L may destroy its records at the end of the applicable minimum retention period specified in the applicable FMS publication unless a longer retention period is required by other state or federal law. In the destruction of records, the savings bank or S&L must take reasonable precautions to assure the confidentiality of information in the records. Act 277 modifies the rules of the Division to eliminate the requirement that savings banks and S&L records must be retained for at least the minimum period specified in the applicable FMS publication.

The Division's current rules for state banks include a detailed schedule setting forth minimum record retention periods according to record type. A state bank may destroy its records after the applicable minimum retention period has expired. Act 277 eliminates the Division's rule establishing a schedule of required minimum retention periods, according to record type.

Act 277 specifies that, subject to the requirement that records be retained in a manner consistent with prudent business practices and in accordance with other provisions of state and federal law, institutions may destroy its records. In the destruction of records, institutions must take reasonable precautions to assure the confidentiality of information in the records. For state banks, S&Ls, and savings banks Act 277 specifies that the record retention system must be able to accurately produce records.

2013 Wisconsin Act 277 was effective **04/18/2014**. Financial institutions which have the *2003 WBA Record Retention Guidelines* may still use that manual as reference to many federal record retention requirements, what to consider for a record retention policy, and electronic record retention. Institutions should work with their legal counsel to determine, from a risk perspective—such as from litigation—how long to retain certain records which do not have a prescribed retention period under applicable state or federal law. 2013 Wisconsin Act 277 may be found at: https://docs.legis.wisconsin.gov/2013/related/acts/277.pdf.

Patent Trolls: 2013 Wisconsin Act 339

2013 Wisconsin Act 339 regulates written communications attempting to enforce or assert rights in connection with a patent or pending patent. Persons making such attempts have been commonly referred to a "patent trolls". Under the Act, such a written communication is called a "patent notification"; a "target" of a patent notification is an individual who is a Wisconsin resident or a company that is domiciled in or does substantial business in Wisconsin and who receives a patent notification or has customers who receive a patent notification concerning a product, service, process, or technology of the target.

Act 339 provides that a patent notification must contain certain information, including: (1) a number and a copy of each patent or pending patent that is the subject of the patent notification; (2) an identification of each patent claim being asserted and the target's product, service, process, or technology to which that claim relates; and (3) the basis for each theory of each patent claim being asserted and how that claim relates to the target's product, service, process, or technology. The Act provides a 30-day opportunity for a person to supplement a patent notification with any required information the person fails to include in the initial patent notification. A patent notification may not contain false, misleading, or deceptive information.

Act 339 provides that Wisconsin's Department of Agriculture, Trade, and Consumer Protection (DATCP) or the attorney general (AG) may investigate an alleged violation of the Act's requirements. The Act also authorizes the AG to initiate a court action for an injunction of a violation of the Act's requirements, and in such an action, authorizes the court to make any necessary orders to restore any person any pecuniary loss the person may have suffered as a result of the violation. The Act also authorizes the AG to seek forfeiture to Wisconsin of up to $50,000 for each violation of the Act's requirements.

Act 339 further creates a private right of action for a target or other person aggrieved by a violation of the Act's requirements. The target or other person may seek an injunction restraining further violation and may recover an appropriate award of damages not to exceed $50,000 for each violation or three times the aggregate amount of actual damages and costs and attorney fees awarded by the court, whichever is greater. 2013 Wisconsin Act 339 will become effective one day after publication and may be found at: https://docs.legis.wisconsin.gov/2013/related/enrolled/sb498.pdf

Revision to DFI's SAFE Act Rules: 2013 Wisconsin Act 360

2013 Wisconsin Act 360 makes revisions to Wisconsin's Department of Financial Institutions' (DFI's) rules regarding the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). DFI's SAFE Act rules, adopted **01/01/2010**, include provisions requiring that certain state licensing and registration functions be conducted through the Nationwide Mortgage Licensing System and Registry (NMLSR). Since 2010, depository institutions are exempt from the definition of mortgage broker and mortgage banker under DFI's rules. In addition, a subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency is exempt from the definition of mortgage broker and mortgage banker. This exemption remains—2013 Wisconsin Act 360 does not affect this exemption.

Under current Wisconsin law, a mortgage loan originator is defined to mean an individual who, for compensation or gain or in the expectation of compensation or gain, does any of the following: (1) takes a residential mortgage loan application; and (2) offers or negotiates the terms of a residential mortgage loan application. A residential mortgage loan application means an application for any loan primarily for personal, family or household use that is secured by a lien or mortgage, or equivalent security interest, on a dwelling or residential real property located in Wisconsin.

Since inception, DFI's SAFE Act rules have provided that an employee of, and acting for, a depository institution, a subsidiary owned or controlled by a depository institution and regulated by a federal banking agency, or an institution regulated by a federal banking administration is exempt from the *licensing* provisions in the law related to mortgage loan originators, *provided that* the individual is registered with and maintains a unique identifier through NMLSR.

While Act 360 modifies the definitions of mortgage loan originator, mortgage broker, and mortgage banker, reorganizes several sections of statute 224, and creates new sections to the statute, the rules which exempt employees of a depository institution, a subsidiary owned or controlled by a depository institution, or an institution regulated by a federal banking administration from the *licensing* provisions in the law—as outlined in the paragraph immediately above—remain unchanged.

Much of Act 360 relates to licensing requirements. Because of the exemption from licensing requirements for employees of depository institutions, or a subsidiary thereof, as outlined above, this article does not summarize all of the revisions made to DFI's SAFE Act licensing requirements. For more information regarding licensing requirement revisions, please review Act 360 in more detail.

Act 360 eliminates exceptions to the definition of mortgage loan originator and recreates them as licensing exemptions. The Act merely reorganizes existing licensing exemptions into a revised section of statute 224 and expands the licensing exemptions to also include certain employees of a government agency, housing finance agency, or bona fide nonprofit organization. Also under Act 360, an individual (other than an individual who is specifically exempt) must be licensed as a mortgage loan originator if the individual regularly engages in business as a mortgage loan originator.

Act 360 defines the new term "regularly engage," with respect to an individual, to mean that any of the following applies: (1) the individual engaged in the business of a mortgage loan originator on more than 5 residential mortgage loans, in Wisconsin or another state, in the previous calendar year or expects to engage in the business of mortgage loan originator on more than 5 residential mortgage loans, in Wisconsin or another state, in the current calendar year; (2) the individual is acting on behalf of a person who is, or is required to be, licensed as a mortgage lender, mortgage banker, or mortgage loan originator in Wisconsin or another state; or (3) the individual is acting on behalf of a registered entity. The term "registered entity" means a depository institution that voluntarily registered with DFI for the purpose of sponsoring *licensed* mortgage loan originators that are under the depository institution's direct supervision and control.

Act 360 allows a licensed mortgage originator to associate with (be sponsored by) a depository institution, rather than a mortgage banker or mortgage broker, if the depository institution first registers with DFI. If the depository institution applies to DFI and meets certain requirements, DFI must register the depository institution as a "registered entity" and the depository institution may then sponsor licensed mortgage loan originators under the depository institution's supervision and control.

The provisions of current law relating to the relationship between a mortgage banker or mortgage broker and a licensed mortgage loan originator also apply with respect to a registered entity that sponsors a mortgage loan originator. A registered entity must also submit reports of condition to the NMLSR and cooperate with, and provide access to records and documents required by, DFI to carry out examinations of licensed mortgage loan originators sponsored by the registered entity. Certain acts or practices that are prohibited by a mortgage banker or mortgage broker with respect to a mortgage loan originator are also prohibited by a registered entity.

Current law requires each mortgage banker, mortgage broker, and licensed mortgage loan originator to annually submit to the NMLSR a report of condition containing information required by NMLSR. While Act 360 requires registered entities to submit to the NMLSR reports of condition, it eliminates the requirement that reports of condition be submitted to the NMLSR annually; thus leaving unspecified the frequency of submissions.

Act 360 also prohibits a mortgage banker, mortgage broker, or mortgage loan originator from using any solicitation or advertisement that: (1) misrepresents that the provider is, or is affiliated with, any governmental entity or other organization; (2) misrepresents that the product is or relates to a government benefit, or is endorsed, sponsored by, or affiliated with any government or government-related program; or (3) does not clearly and conspicuously identify the name of the mortgage broker or mortgage banker or, if a mortgage loan originator is sponsored by a registered entity, the registered entity. The Act also repeals a provision prohibiting an individual engaged solely in loan processor or underwriter activities from representing to the public that the individual can or will perform the activities of a mortgage loan originator.

Act 360 revises existing rules regarding use of a mortgage loan originator's unique identifier and signatures. The revised rule, formerly found in section 224.73(4) and now found in section 224.77(1)(sn), will require a mortgage banker, mortgage broker, and mortgage loan originator to clearly place his, her or its unique identifier on all residential mortgage loan application forms, solicitations, and advertisements—including business cards, Internet sites, email signature blocks, and on all other documents specified by rule of DFI; including one's unique identifier within an email signature block is a new requirement. 2013 Wisconsin Act 360 will become effective one day after publication and may be found at: https://docs.legis.wisconsin.gov/2013/related/enrolled/sb534.pdf ■

REGULATORY SPOTLIGHT

Agencies Issue Supervisory Guidance on Implementing Company-Run Stress Tests for Large Institutions.

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 supervisory guidance which outlines principles for implementation of the stress tests required under section 165(i)(2) of the Dodd-Frank Act (DFA). The guidance is applicable to all bank and savings and loan holding companies, national banks, state member banks, state nonmember banks, federal savings associations, and state-chartered savings associations with more than $10 billion but less than $50 billion in total consolidated assets. The guidance discusses supervisory expectations for DFA stress test practices and offers additional details about methodologies that should be employed by financial institutions. The supervisory guidance is effective: (1) FRB: **04/01/2014**; (2) FDIC: **03/31/2014**; and (3) OCC: **03/31/2014**. Copies of the supervisory guidance may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-03-13/pdf/2014-05518.pdf. *Federal Register*, Vol. 79, No. 49, 03/13/2014, 14153-14169.

Agencies Issue Proposed Rule on Registration and Supervision of Appraisal Management Companies.

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), National Credit Union Association (NCUA), Bureau of Consumer Financial Protection (CFPB), and Federal Housing Finance Agency (FHFA) (collectively, the Agencies) have jointly proposed a rule to implement the minimum requirements in the Dodd-Frank Act (DFA) to be applied by states in the registration and supervision of appraisal management companies (AMCs). The proposed rule also implements the DFA requirement for states to report to the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (FFIEC) the information required by the Appraisal Subcommittee to administer the new national registry of appraisal management companies. In conjunction with this implementation, FDIC has proposed to integrate its appraisal regulations for state nonmember banks and state savings associations. Comments are due **06/09/2014**. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-04-09/pdf/2014-06860.pdf. *Federal Register*, Vol. 79, No. 68, 04/09/2014, 19521-19543.

FRB Issues Final Rule on Application of Revised Capital Framework to Capital Plan and Stress Test Rules for Bank Holding Companies.

The Board of Governors of the Federal Reserve System (FRB) has issued a final rule to: (1) require a bank holding company with total consolidated assets of $50 billion or more to estimate its tier 1 common ratio using the existing definition for purposes of FRB's capital plan and stress test rules; (2) defer until **10/01/2015**, the use of FRB's advanced approaches rule for purposes of FRB's capital planning and stress testing rules; (3) maintain the one-year transition period in the current stress test cycle during which bank holding companies and most state member banks with more than $10 billion but less than $50 billion in total consolidated assets are not required to incorporate FRB's Basel III-based revised regulatory capital framework that FRB approved on **07/02/2013**, (revised capital framework); and (4) make minor, conforming changes to FRB's capital plan rule and stress test rules. The final rule is effective **04/15/2014**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-03-11/pdf/2014-05053.pdf. *Federal Register*, Vol. 79, No. 47, 03/11/2014, 13498-13515.

FRB Issues Final Rule on Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations.

FRB has issued a final rule to adopt amendments to Regulation YY to implement certain of the enhanced prudential standards required to be established under

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Read "Special Focus" for an article regarding common compliance examination trends shared by OCC and FDIC at the February WBA Compliance Forum and an article regarding possible future overtime pay changes for certain employees. Next, turn to "Regulatory Spotlight" for proposed rules to: amend Regulation Z mortgage rules; eliminate the annual mailing of Regulation P privacy notices in certain circumstances; and extend the temporary exception for certain remittance transfer disclosures. Then, turn to "Compliance Notes" for the new CFPB eRegulation tool for Regulation Z. ■

SPECIAL FOCUS

Common Compliance Examination Trends from OCC and FDIC

Notice 2014-08

Representatives from the Office of the Comptroller of the Currency (OCC) and Federal Deposit Insurance Corporation (FDIC) recently shared common compliance examination trends with attendees of the WBA Compliance Forum this past February. This article outlines information and comments shared by those representatives at that program.

OCC

Jonathan March, CRCM, Bank Examiner – BSA/Consumer Compliance with OCC addressed a number of common compliance trends, including: current compliance and Community Reinvestment Act (CRA) ratings; violations of law and matters requiring attention (the latter referred to as "MRAs"); compliance examination procedures; and areas of OCC's continued and increased exam focus.

Background

OCC's central district consists of sixteen field offices in nine states: Ohio, Michigan, Indiana, Kentucky, Illinois, Wisconsin, Minnesota, North Dakota and Missouri. There are 512 national banks, trust companies, thrifts and technology service providers (TSPs) with assets totaling over $190 billion in OCC's central district. The main Wisconsin OCC office is located in Milwaukee, and there is a satellite office in Iron Mountain, Michigan. OCC regulates 37 institutions in Wisconsin (including 6 TSPs) with assets totaling nearly $15 billion. OCC regulated institutions in Wisconsin are approximately seven percent of the district's institutions and eight percent of the assets in the district.

Current Ratings

March shared the following comparison ratings issued by OCC's central district and the Milwaukee field office for the areas of compliance and CRA.

OCC Compliance Ratings				
Rating	**1**	**2**	**3**	**4/5**
Central District	20%	76%	4%	0%
Milwaukee Field Office	26%	71%	3%	0%

OCC CRA Ratings				
Rating	**Outstanding**	**Satisfactory**	**Needs Improvement**	**Substantial Non-compliance**
Central District	17%	82%	1%	0%
Milwaukee Field Office	26%	71%	3%	0%

Violations of Law and MRAs

March also outlined that five Wisconsin institutions examined by the Milwaukee field office were cited for seven open violations of law. The seven break down as: three Flood Disaster Protection Act (FDPA) violations; two Home Mortgage Disclosure Act (HMDA) violations; one Equal Credit Opportunity Act (ECOA) violation; and one Truth in Lending Act (TILA) violation. March explained to the group that the FDPA violations were a result of institutions failing to provide required flood insurance notifications to borrowers and for failing to properly retain the Standard Flood Hazard Determination Form (SFHDF). The two HMDA violations were due to key LAR field errors which March also stated has been identified by OCC, as unfortunately, an increasing trend. The ECOA-related violation was related to inaccurate adverse action notifications; the TILA violation was due to not complying with advertising requirements for closed-end real estate loans.

March next explained that OCC's Milwaukee field office also issued eight MRAs in seven institutions. As part of OCC's review of an institution's overall risk assessment system if examiners identify significant weaknesses the examiner in charge may recommend either formal or informal action be taken, or as the acronym suggests, may identify "matters requiring attention", to ensure an institution takes timely corrective action to reduce or eliminate the identified weakness. The eight MRAs consisted of: two compliance management systems MRAs; five enterprise-wide (including consumer compliance) audit MRAs; and 1 FDPA compliance MRA. March cautioned that the audit and flood MRA could also indicate that an institution has a weakened compliance management system.

March offered a number of reasons OCC believes may be the cause for compliance-related MRAs. These reasons include: (1) inadequate management/board oversight; (2) lack of formalized policies, procedures and processes; (3) lack of or inadequate compliance resources/staffing; (4) inadequate staff communication and training; and (5) informal or non-existent compliance monitoring (quality control/assurance) and compliance audit functions. March stressed the fact that management and board oversight is critical so as to ensure an institution has properly conducted a compliance risk assessment and has identified potential risks to the institution based upon its size, resources, diversity and complexity of operations. March reminded the group that OCC expects a bank's board of directors and management to be able to recognize the scope and implications of laws and regulations that apply to their bank. OCC also expects bank board and senior management to periodically review the effectiveness of their institution's compliance management system, and to take prompt, capable management response to identified weaknesses to make the necessary changes.

Full Scope Compliance Examinations

March explained how OCC has taken a full-scope approach in compliance examinations and provided a list of regulations and OCC compliance program requirements which examiners are required to review in each compliance examination cycle. The following is that list:

- Review and evaluate an institution's compliance program, including any key changes, new products, training and other matters which may be new for the institution since its last examination
- Flood Disaster Protection Act
- Servicemembers Civil Relief Act
- BSA/AML/OFAC; March also reminded the group that since 2012 BSA findings have been incorporated into the management rating of an institution's exam report
- Fair Lending risk assessment
- Examiners will expand the examination review as needed based upon risk and/or regulatory change
- Assess an institution's compliance risk and assign risk ratings. The breakdown of those risks and the possible risk rates are:
  - Quantity of risk (low, moderate, high)
  - Quality of risk management (weak, satisfactory, strong)
  - Aggregate risk (low, moderate, high)
  - Direction of risk (decreasing, stable, increasing)
- Assign the compliance rating (1 – 5).

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Areas of OCC's Continued and Increasing Exam Focus

March stated that OCC recognizes that the industry is currently experiencing an extreme amount of new and revised regulatory requirements, which has resulted in much change for all areas of an institution. He mentioned that while OCC is required to regulate institutions, OCC is also there to help and invited institutions who are regulated by OCC to contact the Milwaukee field office when they have questions. March explained that one area of OCC's continued exam focus will be the recent regulatory changes. In particular, OCC will be in review of: ECOA's revised appraisal requirements; TILA's new ability to repay and qualified mortgage rules, revised higher-priced and high-cost mortgage rules; the various mortgage servicing rules; and Regulation E remittance transfer requirements.

OCC will continue its increased examination focus on: HMDA reporting to ensure data integrity of reported information; CRA; fair lending; and BSA/AML. With respect to BSA/AML, March explained that OCC will generally focus the exam on the areas of: (1) management and board oversight; (2) the institution's customer due diligence and enhanced due diligence for higher-risk customer monitoring and procedures, and suspicious activity reporting; and (3) whether the institution's audit coverage includes minimum OCC requirements—which is risk-based.

FDIC

Several representatives from FDIC were also present at the February WBA Compliance Forum to also share: statistics for FDIC compliance and CRA ratings; common FDIC examination violations; and FDIC's 2014 examination focus. Participants at the Forums heard presentations from FDIC's Scott Alexander, Field Supervisor - Division of Depositor and Consumer Protection, Wisconsin Territory; Doreen Robertson, Compliance Examiner; and Angela School, Compliance Examiner.

Background

Similar to OCC, FDIC shared statistical information to help establish a background to understand how FDIC-regulated institutions in Wisconsin compare both regionally and nationally. FDIC's Chicago region consists of six states: Illinois, Indiana, Kentucky, Michigan, Ohio and Wisconsin. The Chicago region supervises 901 banks with total supervised assets of $253 billion. In Wisconsin and the upper peninsula of Michigan, FDIC supervises 196 banks with total supervised assets of $41 billion. Nationally, FDIC supervises 4,295 institutions with total supervised assets of $2 trillion.

Ratings and Trends

FDIC shared the following comparison ratings for Wisconsin, the Chicago region and nationally for the areas of compliance and CRA. The data is as of 12/31/2013. FDIC shared that for those institutions that received a compliance rating of "4" the vast majority of those institutions started with a compliance rating of "3" but were downgraded to the lower rating because the institutions failed to complete to FDIC's expectation what was required under formal corrective action. FDIC was quick to recognize the good work Wisconsin institutions have done with CRA requirements since none fell into the "needs improvement" or "substantial non-compliance" CRA-rating categories.

FDIC Compliance Ratings

Rating	1	2	3	4
Wisconsin	16%	70%	12%	2%
Chicago Region	22%	70%	7%	1%
Nation	28%	66%	5%	1%

FDIC CRA Ratings

Rating	Outstanding	Satisfactory	Needs Improvement	Substantial Non-compliance
Wisconsin	6%	94%	0%	0%
Chicago Region	4%	95%	1%	<1%
Nation	5%	94%	1%	<1%

FDIC also shared statistical information of how compliance and CRA ratings have migrated from previous years.

FDIC Compliance Rating Migration			
Compliance Rating	**Unchanged**	**Improved**	**Declined**
Wisconsin	54%	25%	21%
Chicago Region	62%	21%	17%
Nation	66%	20%	14%

FDIC CRA Rating Migration			
CRA Rating	**Unchanged**	**Improved**	**Declined**
Wisconsin	94%	3%	3%
Chicago Region	92%	21%	4%
Nation	91%	3%	6%

Common Exam Violations

FDIC next shared information regarding the most common exam violations. From 01/01/2013 through 12/31/2013, FDIC conducted seventy-six compliance exams in Wisconsin, including the upper peninsula of Michigan. FDIC cited violations in ninety-nine percent of those exams. This was a higher percentage than violations cited by the Chicago region and nationally. The Chicago region conducted 334 compliance exams during the same time period and cited violations in ninety-three percent of those exams; nationally—1,493 compliance exams were conducted, ninety percent of those exams cited violations.

FDIC provided the following specific information regarding reasons for the most common exam violations for the seventy-six compliance exams mentioned directly above:

- Truth in Lending Act (TILA): cited in 53 exams (70% of exams). Exam findings include: (1) open-end credit: HELOC disclosures were not complete or did not match actual HELOC contract terms; and (2) closed-end credit: APR violations due to incorrect calculations. 15 exams (20% of exams) required reimbursement.

- Real Estate Settlement Procedures Act (RESPA): cited in 53 exams (70%). Exam findings include: (1) errors in GFE "important dates" section; (2) reissued GFE without change-in-circumstance; and (3) HUD Settlement Statement "comparison chart" did not match information from GFE.

- Truth in Savings Act (TISA): cited in 50 exams (60%). Exam findings include: (1) content of disclosures were not clear and conspicuous; and (2) bank practices did not match what was disclosed to consumers in TISA disclosures.

- Flood Disaster Protection Act (FDPA): cited in 40 exams (53%). Exam findings include: (1) no notice of flood insurance requirement to borrower at time of loan renewal; and (2) no flood insurance or inadequate flood insurance when otherwise required under the Act.

- Equal Credit Opportunity Act (ECOA): cited in 33 exams (43%). Exam findings include: collection of government-monitoring information (GMI) when the information should not have been collected.

- Fair Credit Reporting Act (FCRA): cited in 34 exams (45%). Exam findings include: credit score disclosure on adverse action notice disclosures was marked or included when a score was not used in the determination to deny a credit request.

- Electronic Funds Transfer Act (EFTA): cited in 30 exams (39%). Exam findings include: too lengthy a time period between when consumers reported an electronic fund transfer error and when the institution's investigation and other error resolutions procedures were actually acted upon.

- Home Mortgage Disclosure Act (HMDA): cited in 22 exams (29%). Exam findings include: (1) data integrity; and (2) omission errors.

- Safe and Fair Enforcement for Mortgage Licensing Act (SAFE Act): cited in 21 exams (28%). Exam findings include: no written SAFE Act policy or procedures in place.

2014 Examination Focus

FDIC representatives outlined that their 2014 examination approach will continue to focus on consumer harm. FDIC explained how their examination approach is a risk-focused review of whether an institution's practice, or lack of practice, may result in consumer harm. Areas of consumer harm can include: (1) quantifiable harm, such as undisclosed fees that are assessed consumers; (2) non-quantifiable harm, such as discrimination or holding funds too long when the funds should have otherwise been released from a Regulation CC funds availability hold; and (3) potential harm, such as not obtaining sufficient flood insurance coverage as required under FDPA.

FDIC's focus on consumer harm is incorporated into their examination supervisory strategies, examination risk-scoping activities, examination procedure, and ultimately FDIC's supervisory actions. Similar to OCC's approach, FDIC's examination focus will be on new products offered by institutions since their last exam, any change in fees, and any new service provider relationship. FDIC continues to be concerned over third party relationships, including relationships involving: (1) overdraft protection programs; (2) credit cards; (3) EFTA or TILA error resolutions; (4) revenue enhancements or overlay products; and (5) payment processing. Because of this concern, FDIC will continue to carefully scrutinize third party relationships in examinations.

FDIC shared that their 2014 examination focus will also include a review of the new mortgage rules, CRA and fair lending, and UDAP. FDIC stated that they are learning the new mortgage rules along with the industry and routinely interact with the Bureau of Consumer Financial Protection (CFPB) for guidance and examination procedures. FDIC also stated that if the institution has been strategizing and planning on how to implement and comply with the new mortgage rules, the institution should generally meet FDIC's examination expectation; there would be no downgrade because of a technical violation or misinterpretation of the new mortgage rules so as to allow FDIC-regulated institutions some time to "get-up-to-speed" with the new regulations.

FDIC stated that during initial examination for compliance with the new mortgage rules, FDIC examiners would generally expect institutions to be familiar with the mortgage rules' requirements and have a plan for implementing the requirements. Implementation plans should have clear timeframes and benchmarks for making necessary changes to compliance management systems and relevant programs. FDIC examiners will consider the overall efforts of the institution and will generally take into account progress the institution has made in implementing its plan.

FDIC examination focus of the past recent years has been on UDAP. However, FDIC has made a slight change in that approach in 2014 examinations. FDIC representatives stated that FDIC will likely only cite a UDAP violation if there is no other consumer regulation or egregious violation with direct consumer harm. For example, if an examiner has determined that a bank violated EFTA due to untimely investigation into a consumer's complaint of an unauthorized electronic funds transfer, FDIC will likely cite a violation under EFTA rather than UDAP.

Examination Classification System and Common CMS Weaknesses

During the presentation, FDIC reminded institutions of their revised examination classification system which expanded the grading categories from two to three levels: level 3 – high severity, level 2 – medium severity, and level 1 – low severity. Level 3 ties back to a finding of compliance management system (CMS) weaknesses, large consumer harm, restitution, and fair lending concerns. Level 2 is similar to the former "significant" category that FDIC previously used; whereas level 1 would be a rating given typically for a "one-off" technical violation. For more information regarding FDIC's examination classification system, please review Financial Institution Letter (FIL) 41-2012 which may be found at FDIC's website, www.fdic.gov.

FDIC also discussed what they believe are reasons for common CMS weaknesses which appear similar to the reasons OCC believed an OCC-regulated institution may receive a compliance-related MRA: (1) lack of board and management oversight; (2) repeat violations and recommendations; (3) procedural weaknesses; (4) inadequate training and knowledge; (5) ineffective internal monitoring; and (6) no audit program. FDIC stressed the importance of having a strong CMS as they believe a strong CMS will result in engaged board and management oversight, a reduction in violations, a better handle on training, and more thorough monitoring and auditing to ensure an institution has incorporated all compliance requirements into its business processes.

Conclusion

The insights of both OCC and FDIC representatives were helpful to better understand recent compliance examination performances by Wisconsin institutions, common violations, and regulator expectations. Clearly, the focus by both regulators was that an institution must have a strong compliance management system (CMS). Both OCC and FDIC have created many resources regarding CMS, including examination overviews and objectives which may be found for OCC and FDIC at the following links, respectively: http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/cms.pdf and http://www.fdic.gov/regulations/compliance/manual/pdf/II-2.1.pdf.

To also assist institutions with understanding regulator expectations and to improve the quality of examinations, be

sure to take advantage of the free Regulatory Feedback Initiative. The Regulatory Feedback Initiative is a powerful tool in the form of a confidential electronic survey which allows bankers to anonymously provide details on their most recent examination or visit, creating a new level transparency in the examination process. Survey results are aggregate and analyzed to identify discrepancies in how banking regulations are enforced, and to help avoid misguided regulatory treatment. More information about the free Regulatory Feedback Initiative can be found at: http://www.allbankers.org/initiative.html.

Overtime Changes on the Horizon?

Notice 2014-09

The federal Fair Labor Standards Act ("FLSA") governs the payment of wages, including overtime pay. Under the FLSA, employers are generally required to pay overtime wages (time and one half the employee's regular rate of pay) to employees who work in excess of 40 hours in a defined work week. The FLSA exempts certain categories of employees from the overtime requirements, including employees "employed in a bona fide executive, administrative, or professional capacity." These exemptions, known sometimes as the "white collar exemptions," require both that the employee is paid according to certain legal requirements and that the employee's regular job duties meet specified standards.

On March 13, 2014, President Obama directed the Department of Labor to "update" and "modernize" the overtime exemptions with an eye toward increasing the number of American workers who are eligible for overtime pay. The Department of Labor will engage in a formal rulemaking process to enact such changes to the law. While it is unclear what issues the Department of Labor will pinpoint to pursue President Obama's objectives, it is likely the Department will look to increase the minimum weekly salary that must be paid to an exempt employee (which currently stands at $455 per week). In addition, the Department of Labor may focus on tightening the types and/or percentage of duties that are considered exempt "professional," "administrative," or "executive" work.

Of particular relevance to banks, there is speculation that the Department of Labor will formalize its position that mortgage loan officers ("MLOs") are non-exempt and are entitled to overtime pay. Historically, many banks treated MLOs as exempt under the administrative exemption and did not pay them overtime. In 2010, the Department of Labor issued an "Administrator's Interpretation" declaring that employees who perform typical MLO duties do not qualify as bona fide administrative employees and thus are not exempt from overtime requirements. As discussed in the October 2013 edition of *Wisconsin Banker,* a federal court of appeals later ruled that the Department of Labor's Administrative Interpretation was invalid because the Department failed to engage in the formal rulemaking process that would have allowed for a period of public notice and comment. As of the writing of this article, it is unknown whether the U.S. Supreme Court will review the case.

If the Department of Labor indeed moves forward with significant changes to the overtime rules, it is likely that it will specifically address the overtime status of MLOs. The WBA will keep you apprised of developments on the possible expansion of overtime eligibility. ■

WBA wishes to thank Jennifer S. Mirus, attorney with the Boardman & Clark LLP Law Firm, for providing this article.

REGULATORY SPOTLIGHT

Agencies Issue Final Rule on Regulatory Capital for Large Bank Holding Companies.

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 adopted a final rule to strengthen the Agencies' supplementary leverage ratio standards for large, interconnected U.S. banking organizations. The final rule applies to any U.S. top-tier bank holding company (BHC) with more than $700 billion in total consolidated assets or more than $10 trillion in assets under custody (covered BHC) and any insured depository institution (IDI) subsidiary of these BHCs (together, covered organizations). In the revised regulatory capital rule adopted by the Agencies in July 2013 (2013 revised capital rule), the Agencies established a minimum supplementary leverage ratio of 3 percent, consistent with the minimum leverage ratio adopted by the Basel Committee on Banking Supervision, for banking organizations subject to the Agencies' advanced approaches risk-based capital rules. The final rule establishes enhanced supplementary leverage ratio standards for covered BHCs and their subsidiary IDIs. Under the final rule, an IDI that is a subsidiary of a covered BHC must maintain a supplementary leverage ratio of at least 6 percent to be well capitalized under the Agencies' prompt corrective action framework. FRB has also adopted in the final rule a supplementary leverage ratio buffer for covered BHCs of 2 percent above the minimum supplementary leverage ratio requirement of 3 percent. The leverage buffer functions like the capital conservation

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WISCONSIN BANKERS ASSOCIATION
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Read "Special Focus" for an article regarding the increase in maximum flood insurance coverage for "Other Residential Buildings", and a reminder of changes specific to Wisconsin's law regarding trusts. Next, review "Regulatory Spotlight" for the Consumer Financial Protection Bureau's spring rulemaking agenda. Finally, turn to "Compliance Notes" for the deadline to submit the FDIC's annual survey of branch office deposits. ■

SPECIAL FOCUS

Reminder of Increased Maximum Flood Insurance Coverage for Other Residential Buildings

Notice 2014-10

On **May 30, 2014**, the Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Farm Credit Administration, and National Credit Union Administration (collectively, the Agencies) released an interagency statement (Statement) regarding the increase in maximum flood insurance coverage for certain types of properties. The new flood insurance coverage limits are effective **June 1, 2014**.

Section 100204 of the Biggert-Waters Flood Insurance Reform Act increased the maximum limit of building coverage available for non-condominium residential buildings designated for use for five (5) or more families, classified as "Other Residential Buildings" by the National Flood Insurance Program (NFIP) from $250,000 per building to $500,000 per building. The maximum contents coverage for all policies covering Other Residential Buildings will remain $100,000 per policy.

The change in flood insurance coverage limits for Other Residential Buildings may have an impact on financial institutions' flood insurance coverage requirements for loans secured by Other Residential Buildings. As further discussed below, institutions may want to review their loan portfolios to identify loans which may be affected by the increase.

For example, the Agencies have flood insurance regulations which all require that, when a financial institution makes, increases, extends, or renews a loan secured by property located in a Special Flood Hazard Area (a "designated loan"), the property must be covered by flood insurance for the term of the loan. The amount of insurance required by the Agencies is the lesser of:

- The outstanding principal balance of the loan(s); or
- The maximum amount of insurance available under NFIP, which is the lesser of:
  - the maximum limit available for the particular type of structure; or
  - the "insurable value" of the structure.

Considering the Agencies' flood insurance coverage requirements, the increase in the maximum amount of flood insurance coverage available under NFIP pursuant to the Biggert-Waters Act could affect the minimum amount of flood insurance required for both existing and future loans secured by Other Residential Buildings. This could require the property owner to purchase additional flood insurance.

According to the Statement issued by the Agencies regarding the increased maximum flood insurance coverage for Other Residential Buildings, the Federal Emergency Management Agency (FEMA) has directed insurers that issue NFIP policies to provide all Other Residential policyholders with a letter prior to June 1, 2014, informing them of the new policy limits. The letter is intended to notify building owners who may be affected by the increased limits. The Statement also mentions that the Agencies understand that insurers may provide notification of the new policy limits to any lender named on the borrower's flood insurance policy at the same time the policyholder is notified. Additionally, the Statement declares that FEMA has also instructed insurers to include a message on the Renewal Notice advising affected policyholders that higher limits are available. A policyholder may purchase increased coverage through a change endorsement on an existing policy as of May 1, 2014, to ensure that the increased coverage amount goes into effect as of June 1, 2014. An endorsement is a written document attached to an insurance

policy that modifies the policy by changing the coverage afforded under the policy.

In the Statement, the Agencies expressed that if a financial institution or its servicer receives notification of the increased flood insurance limits available for an Other Residential Building securing a designated loan, the Agencies expect supervised institutions to take any steps necessary to determine whether the property will require increased flood insurance coverage. The Agencies further state that although a financial institution is not required to perform an immediate full file search of its loan portfolio, for safety and soundness reasons, an institution may want to review its loan portfolio to determine whether additional flood insurance coverage is required for certain properties in light of the availability of increased flood insurance coverage for Other Residential Buildings. To further illustrate the Agencies' expectations regarding the matter, the Agencies reference in the Statement previously issued guidance— item seven (7) of the *Interagency Questions and Answers Regarding Flood Insurance*, issued July 2009. In particular, when asked whether a lender is required to perform a review of its, or of its servicer's, existing loan portfolio for compliance with the flood insurance requirements under the regulations which implement the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as revised by the National Flood Insurance Reform Act of 1994, the Agencies offer the following answer:

> Apart from the requirements mandated when a loan is made, increased, extended, or renewed, a regulated lender need only review and take action on any part of its existing portfolio for safety and soundness purposes, if it knows or has reason to know of the need for NFIP coverage. Regardless of the lack of such requirement in the Act and Regulations [Acts listed above and the Agencies' implementing regulations], however, sound risk management practices may lead a lender to conduct scheduled periodic reviews that track the need for flood insurance on a loan portfolio.

The Agencies concluded the May 30th Statement by instructing that if, as a result of the increase in the maximum limit of building coverage for Other Residential Buildings, the financial institution or its servicer makes a determination on or after June 1, 2014, that the building securing the designated loan(s) is now covered by flood insurance in an amount less than the minimum requirement, the institution should take steps to ensure that the borrower obtains sufficient coverage. The Agencies instruct that if an affected borrower has not provided evidence of the increased flood insurance, the financial institution or its servicer must provide notice that the borrower should obtain additional flood insurance at the borrower's expense for the remaining term of the loan. If the borrower fails to obtain sufficient coverage within 45 days after notification, the financial institution or its servicer must purchase coverage on the borrower's behalf. The Agencies further state that the institution or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance, including premiums and fees incurred for coverage beginning on the date on which flood insurance coverage was insufficient.

To further assist financial institutions with flood insurance coverage requirements, the following is a listing of flood insurance coverage resources:

(1) Interagency Statement on Increased Maximum Flood Insurance Coverage for Other Residential Buildings: www.federalreserve.gov/bankinforeg/caletters/caltr1403.htm;
(2) FEMA Memorandum W-13070 which outlines June 1, 2014 NFIP changes: http://nfipiservice.com/Stakeholder/FEMA2/w-13070_Full.pdf;
(3) FRB, FDIC and OCC Flood Insurance Regulations, respectively: www.gpo.gov/fdsys/pkg/CFR-2012-title12-vol2/pdf/CFR-2012-title12-vol2-sec208-25.pdf; www.gpo.gov/fdsys/pkg/CFR-2011-title12-vol4/pdf/CFR-2011-title12-vol4-sec339-3.pdf; and www.gpo.gov/fdsys/pkg/CFR-2005-title12-vol1/pdf/CFR-2005-title12-vol1-sec22-3.pdf; and
(4) Interagency Questions and Answers Regarding Flood Insurance July 2009 and October 2011: www.gpo.gov/fdsys/pkg/FR-2009-07-21/pdf/E9-17129.pdf and www.gpo.gov/fdsys/pkg/FR-2011-10-17/pdf/2011-26749.pdf.

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State Law Reminders: Uniform Trust Code and DWD Data Match

Notice 2014-11

Wisconsin's Uniform Trust Code

Financial institutions are reminded of the **July 1, 2014**, effective date for Wisconsin's Uniform Trust Code (UTC) which revises Wisconsin Statutes Chapter 701. While the revisions will greatly impact practitioners creating and administering revocable and irrevocable trusts, the process of establishing and maintaining deposit and loan relationships with trusts and trustees for most financial institutions will remain relatively unchanged.

Section 701.19(11) of the Wisconsin Statutes has long held protections for third parties working with trustees when relying upon purported trustees' instructions when the third party does not have actual knowledge of the trustees' authorities; this type of protection will continue to exist under the UTC.

Newly created section 701.1012, Wis. Stats., will provide that a person (including a financial institution) other than a trust beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

The UTC will also provide for the creation of a Certification of Trust. Section 701.1013, Wis. Stats., is created to read that *instead of furnishing a copy of the trust instrument* to a person (including a financial institution) other than a trust beneficiary, the trustee may furnish to the person a Certification of Trust containing the following information: (1) a statement that the trust exists and the date the trust instrument was created; (2) the identity of the settlor(s); (3) the identity and address of the currently acting trustee; (4) the powers of the trustee(s); (5) whether the trust is revocable or irrevocable and the identity of any person holding a power to revoke the trust, if applicable; (6) the authority of co-trustees to act independently; (7) the name of the trust; and (8) a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the Certification of Trust to be incorrect. The Certification of Trust may be signed or otherwise authenticated by any trustee.

A Certification of Trust may be created for both existing trusts and new trusts created on or after the effective date of the UTC. Financial institutions will likely be presented with a Certification of Trust, rather than a trust agreement, when establishing a new banking relationship with a trustee. Persons who in good faith enter in transactions in reliance upon a Certification of Trust may enforce transactions against the trust property. As a result of the UTC, if presented with a Certification of Trust for purposes of establishing a deposit account or evaluating a request for credit, a financial institution may rely upon the information as set forth in the Certification of Trust and may make a copy of the Certification for its records.

Recipients of a Certification of Trust may request that the trustee furnish copies of excerpts from the original trust document or later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction. However, financial institutions need be mindful that a demand for copies of the trust agreement beyond the scope of those excerpts which confer the trustee with the power to act in the pending transaction in addition to a Certification of Trust may result in the institution being liable for costs, expenses, reasonable attorney fees and damages if a court determines that the institution did not act in good faith in demanding the copies.

WBA's forms subsidiary, FIPCO®, has long offered forms: (1) WBA 84 Declaration of Trustee Designating Depository; and (2) WBA 84A Declaration of Trustee Borrowing Authority, available for use as a means to collect necessary information about a trust when entering into a deposit or credit relationship with a trust without obtaining, retaining or reviewing trust documents so that financial institutions can take advantage of the protections given third parties under existing section 701.19(11), Wis. Stats. The forms' headings and content have been revised slightly to meet the requirements of a Certification of Trust. WBA recommends that institutions begin to use the new versions of the forms as soon as practicable.

Department of Workforce Development Data Match

WBA was recently made aware that the Wisconsin Department of Workforce Development (DWD) has mailed to financial institutions a service agreement regarding its Unemployment Insurance Financial Record Match Program. 2013 Wisconsin Act 36, enacted in July 2013, granted DWD the authority to conduct a data match program. At this time, WBA recommends financial institutions wait to sign the agreement.

WBA has been in contact with DWD regarding the content of the agreement. In certain matching situations, the agreement's provisions may be unnecessarily broad. For example, the agreement appears to allow DWD to conduct a compliance review of an institution's security procedures to protect confidential information. This grant of blanketed authority is overly broad, particularly with respect to a financial institution that elects to share data using the "state matching option".

WBA will continue to provide updates on the status of the agreement. ■

Interagency Guidance on HELOCs Nearing End-of-Draw Period.

Notice 2014-12

Recently, the Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), National Credit Union Administration (NCUA), and Conference of State Bank Supervisors (CSBS) (collectively, the Agencies) issued joint guidance on home equity lines of credit (HELOCs) nearing their end-of-draw periods. Within the statement, the Agencies acknowledge that as HELOCs transition from draw periods to full repayment, some borrowers may have difficulty making higher payments resulting from principal amortization or interest rate reset, and others may have difficulty renewing existing loans due to changes in financial circumstances or declines in property values. This article is intended to provide an overview of the guidance, which describes principles that should govern an institution's management in overseeing HELOCs nearing their end-of-draw periods, particularly for those borrowers who may have difficulty in meeting the terms of the HELOC agreement.

Risk Management Principles

Within the guidance, the Agencies have outlined that examiners will review financial institutions' end-of-draw risk management programs to determine whether five risk management principles are addressed. As further discussed below, the five principles are: (1) prudent underwriting for renewals, extensions and rewrites; (2) compliance with existing applicable guidance; (3) use of well-structured and sustainable modification terms; (4) appropriate accounting, reporting and disclosure of troubled debt restructurings (TDRs); and (5) appropriate segmentation and analysis of end-of-draw exposure in allowance for loan and lease losses (ALLL) estimation processes.

The Agencies expect that an institution's management will apply prudent underwriting and loss mitigation strategies when existing loan terms are modified. Prior to extending draw periods, modifying notes, or establishing amortization terms for outstanding balances, lenders are expected to conduct a thorough evaluation of the borrower's willingness and ability to repay the loan.

Criteria for HELOC underwriting and credit analysis should be consistent with existing guidance, which includes but is not limited to the *Interagency Credit Risk Management Guidance for Home Equity Lending*, issued in 2005, and the *Interagency Guidelines for Real Estate Lending Policies*, which is codified in the respective regulations of FRB, FDIC, and OCC. Underwriting criteria should include debt service capacity standards, creditworthiness standards, equity and collateral requirements, maximum loan amounts, maturities, and amortization terms. In addition, management should establish procedures for the review and approval of policy exceptions, as well as engage in ongoing timely and accurate portfolio reporting.

Modification terms offered to borrowers experiencing financial difficulties should be consistent with the nature of the borrower's hardship, have sustainable payment requirements, and promote the orderly, systematic repayment of amounts owed. The Agencies have stated that restructuring to interest-only payments or a balloon payment is generally inappropriate for higher-risk borrowers, as these terms do not directly address repayment issues. Management should review end-of-draw period modifications to identify TDRs and accrual status. TDR

treatment is appropriate when a lender grants a concession to a borrower, which would not otherwise be considered, because of the borrower's financial difficulties. Financial difficulties may include the borrower's probable inability to meet the loan terms, such as making a scheduled balloon payment, or the payment shock associated with a contractual increase in the monthly payments when the HELOC's draw period ends.

Estimates of the ALLL, including TDR impairment estimates, should reflect the impact of payment shock and loss of line availability associated with the end-of-draw period. When an institution's volumes warrant it, HELOCs approaching their end-of-draw periods should generally be a separate portfolio segment in the ALLL estimation process. Before significant volumes of HELOCs reach their end-of-draw periods, management should capture the necessary information and prepare analyses to clarify the nature and magnitude of the institution's exposures.

End-of-Draw Risk Management Expectations

The Agencies expect an institution's management to implement policies and procedures for HELOCs nearing their end-of-draw periods that are commensurate with the size and complexity of the institution's portfolio. Management should have a full understanding of end-of-draw contract provisions. To gain this understanding, a detailed inventory of contracts and provisions may be necessary, particularly if the institution's HELOC portfolio is the result of numerous mergers, acquisitions, or origination channels. A clear understanding of end-of-draw exposures is also necessary, including identification of higher-risk segments of the portfolio. Management reports should identify draw period transition dates for all HELOCs, in the aggregate and by significant segments of performing and non-performing borrowers. Segments may include product types, post-draw payment characteristics (such as interest-only payments, balloon payments, and amortization periods), origination channels, or borrower characteristics. The risk assessment may also include analyses of expected payoffs, attrition, utilization rates, delinquency or modification status of associated first liens, or other factors that may affect risk levels before the end-of-draw period.

All HELOC borrowers should be contacted by the institution well before their scheduled end-of-draw dates. The Agencies have stated that successful outreach efforts often begin six to nine months before end-of-draw dates, with simple, direct messages. Some HELOCs approaching their end-of-draw periods may warrant attention sooner than others, such as when line availability has been suspended due to a decline in collateral value or repayment problems.

Institutions are encouraged to work prudently with higher-risk borrowers to avoid unnecessary defaults. Thoughtfully designed workout and modification programs are often in the best interest of all parties, as the institution's losses can be minimized and borrowers can resume structured, orderly repayment. Borrowers experiencing financial difficulties should be provided with practical information explaining the options available, general eligibility criteria, and the process for requesting a modification. Loss mitigation steps and documentation requirements should be clearly defined to institution personnel, to facilitate the efficient processing of modification requests. Modified payment terms should be sustainable and promote the orderly and systematic repayment of principal. Eligibility and payment terms should be based on a thorough analysis of a borrower's financial condition and ability to repay; modification terms that do not amortize principal in a timely fashion should be avoided.

Institutions must ensure that regulatory reports and financial statements are prepared in accordance with generally accepted accounting principles and regulatory reporting instructions. Reporting should fairly present an institution's condition and performance, including an appropriate ALLL for HELOC exposures and accounting and disclosure for TDR loans. Institutions must also comply with applicable consumer protection laws, such as the Equal Credit Opportunity Act, Fair Housing Act, federal and state prohibitions of unfair or deceptive acts or practices, Real Estate Settlement Procedures Act, Service Members Civil Relief Act, and Truth in Lending Act, along with their respective implementing regulations.

Management should create end-of-draw period reports and distribute the reports to involved personnel to enhance understanding of exposures, activity, and performance

results. End-of-draw period actions and the subsequent account performance should be reported in the aggregate and by response type, including: (1) transition according to contract; (2) short term extensions; (3) temporary modifications; (4) permanent modifications; and (5) renewals into new draw periods or longer-term amortization.

Targeted testing of the institution's full process for managing end-of-draw transactions should be completed. Through such testing, management should confirm that: (1) draw terms and interest-only periods are not extended without credit approval; (2) servicing systems accurately consolidate balances, calculate required payments, and process billing statements for the full range of potential HELOC repayment terms that exist when draw periods end; (3) staffing and resources can efficiently handle expected volumes of end-of-draw period activities; (4) borrower notifications of draw period expirations are timely and made in accordance with contractual terms and institutional guidelines; and (5) reports provide reliable and timely information to facilitate the monitoring and evaluation of end-of-draw activities.

Conclusion

Recent interagency guidance on HELOCs nearing their end-of-draw periods describes core operating principles that should govern an institution's end-of-draw risk management program, as well as expectations for policies and procedures regarding such HELOCs. The Agencies expect that the guidance will be applied in a manner commensurate with the size and risk characteristics of an institution's HELOC portfolio. The guidance provides references to various other interagency guidance that has been previously issued and continues to apply. The guidance on HELOCs nearing their end-of-draw periods may be found at: www.federalreserve.gov/newsevents/press/bcreg/bcreg20140701a1.pdf. ■

CFPB Proposes to Revise HMDA Coverage & Reporting Requirements

Notice 2014-14

After much anticipation, the Bureau of Consumer Financial Protection (CFPB) has issued its proposed rule to revise Regulation C, which implements the Home Mortgage Disclosure Act (HMDA), to incorporate changes made by Congress under section 1094 of the Dodd-Frank Act. CFPB has stated it views the implementation of the Dodd-Frank Act changes to HMDA as an opportunity to assess other ways to improve upon the data collected, reduce unnecessary burden on financial institutions, and streamline and modernize the manner in which financial institutions collect and report HMDA data. As a result, CFPB has proposed to implement the Dodd-Frank Act HMDA amendments and make other changes to Regulation C. This article is meant to provide a summary of some of the key revisions proposed by CFPB. Comments on the proposed rule are due **October 22, 2014**.

Proposed Modification to Institutional and Transactional Coverage

CFPB has proposed modifications to the institutional and transactional coverage of Regulation C. CFPB claims the modifications are an attempt to better achieve HMDA's purpose in light of current market conditions and to reduce unnecessary burden on financial institutions. CFPB has proposed to adjust Regulation C's institutional coverage test to simplify the institutional coverage requirements by adopting, for all financial institutions, a uniform loan-volume threshold of 25 loans. Currently, Regulation C contains different coverage criteria for depository institutions and non-depository institutions. Under the proposal, depository and non-depository institutions that meet other criteria for a financial institution under Regulation C would be required to report HMDA data if they originated 25 covered loans, excluding open-end lines of credit executed in the previous calendar year. There would no longer be an asset threshold that determines HMDA coverage; any institution that originates 25 or more covered loans that has a home or branch office located in a metropolitan statistical area (MSA) would be required to report HMDA data.

CFPB has also proposed to expand the types of transactions subject to Regulation C, while eliminating the requirement to report unsecured home improvement loans. Currently, Regulation C requires reporting of three types of loans: (1) home purchase; (2) home improvement loans; and (3) refinancings. Reverse mortgages that are home purchases, home improvement loans, or refinancings are reported under Regulation C, but they are not separately identified and many data points do not currently account for the features of reverse mortgages. Home equity lines of credit (HELOCs) may be reported at financial institutions' option, but are not required to be reported. CFPB believes the current Regulation C transaction reporting has resulted in gaps in data regarding important segments of the housing market.

Under the proposal, financial institutions generally would be required to report all closed-end loans, open-end lines of credit, and reverse mortgages secured by dwellings. As mentioned above, unsecured home improvement loans would no longer be reported. Certain types of loans would continue to be excluded from Regulation C, including loans on unimproved land and temporary financing. Reverse mortgages and open-end lines of credit would be identified as such to allow for differentiation from other loan types. Further, CFPB has proposed modification to data points to take account of the characteristics of, and to clarify reporting requirements for, different types of loans. CFPB believes the proposal will yield more consistent and useful data.

Proposed Modifications to Reportable Data Requirements

CFPB stated in the proposed rule that it believes it can make HMDA compliance and data submission easier for HMDA reporters by aligning, to the extent practicable, Regulation C requirements with existing industry standards for collecting and transmitting data on mortgage loans and applications. Therefore, CFPB has proposed to align many of the HMDA data requirements with the Mortgage Industry Standards Maintenance Organization (MISMO) data standards for residential mortgages.

Unlike CFPB's recent rulemakings to implement Title XIV of the Dodd-Frank Act through amendments to various requirements under both the Truth in Lending Act (TILA)

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and the Real Estate Settlement Procedures Act (RESPA), the proposed rule provides no small creditor or small servicer exemption from the HMDA reporting requirements. As mentioned above, any institution that meets the institutional and transactional coverage tests would be required to report HMDA data.

CFPB has also proposed to add new data points to the reporting requirements established in Regulation C, as well as to modify certain existing data points. Some of the new data points are specifically identified by the Dodd-Frank Act. Others are proposed pursuant to CFPB's discretionary rulemaking authority to carry out the purposes of HMDA by addressing what CFPB believes are data gaps. The data points that CFPB is proposing to add or modify can be grouped into four broad categories and are listed below. Items specifically required by the Dodd-Frank Act are identified below in italics; the remaining items are additional data CFPB believes necessary to improve the integrity of the data reported.

Information about applicants, borrowers, and the underwriting process including:

- *age*,
- *credit score*,
- debt-to-income ratio,
- combined loan-to-value ratio,
- reasons for denial if the application is denied,
- *the application channel (retail, broker, other)*, and
- automated underwriting system (AUS) results.

Information about the property securing the loan including:

- construction method rather than property type,
- *postal address to satisfy the collection of parcel identifier*,
- *property value*,
- lien priority,
- occupancy type (principal residence, second residence, investment property with rental income, or investment property without rental income),
- the number of individual dwelling units in the property,
- additional information about multifamily housing (number of individual dwelling units that are income-restricted pursuant to federal, state, or local affordable housing programs), and
- additional information about manufactured housing (whether the home is legally classified as real or personal property and whether applicant rents or owns the real property where the home is situated.)

Information about the features of the loan including:

- *total points and fees*,
- total of all itemized amounts that are designated as borrower-paid at or before closing,
- the points designated as paid to creditor to reduce the interest rate,
- interest rate the borrower would receive if borrower paid no bona fide discount points,
- *loan term*,
- *difference between the loan's APR and the APOR for a comparable transaction as of the date the interest rate is set*,
- interest rate,
- *introductory rate period*,
- whether the loan is subject to Regulation Z Ability-to-Repay (ATR) provisions and whether it is a qualified mortgage (QM),
- *prepayment penalty term*,
- *nonamortizing loan features (balloon payment, interest only payment, negative amortization, or other term that would allow for payments other than fully amortizing payments)*,
- amount of the draw made at account opening for open-end credit or reverse mortgage, and
- the type of loan (cash-out refinancing, closed-end, reverse mortgage, open-end line of credit).

Certain unique identifiers including:

- *a universal loan identifier*, and
- *loan originator identifier*.

Proposed Modifications to Disclosure and Reporting Requirements

Regulation C requires financial institutions to submit their HMDA data to the appropriate federal agency by March 1 following the calendar year for which the data are compiled. CFPB has proposed to require financial institutions that report at least 75,000 covered loans, applications, and purchased covered loans, combined, for the preceding calendar year to submit their data to the appropriate agency within 60 calendar days after the end of each quarter, rather than on an annual basis. CFPB believes that quarterly reporting would allow regulators to use the data to effectuate the purposes of HMDA in a more timely and effective manner, would reduce reporting errors and improve the quality of HMDA data, and may facilitate the earlier release of annual HMDA data to the public. CFPB has also proposed to allow HMDA reporters to make their disclosure statements available by referring members of the public that request a disclosure statement to a publicly-available website.

Proposed Modifications to Clarify the Regulation

Financial institutions and other stakeholders have, over time, identified aspects of Regulation C that are unclear and confusing. CFPB believes that the implementation of the Dodd-Frank Act amendments is an opportunity to address many of these longstanding issues through improvements to the regulatory provisions, the instructions in Appendix A, and the staff commentary. Examples of these clarifications include guidance on what types of residential structures are considered dwellings; the treatment of

manufactured and modular homes and multiple properties; coverage of preapproval programs and temporary financing; how to report a transaction that involved multiple financial institutions; reporting the action taken on an application; and reporting the type of purchaser for a covered loan.

Conclusion

On 07/24/2014, CFPB issued a proposed rule to revise Regulation C to incorporate not only changes made to HMDA by Congress under section 1094 of the Dodd-Frank Act, but to also make changes CFPB believes would improve upon the data collected and streamline the manner in which financial institutions collect and report HMDA data. The bottom line—CFPB's proposal will require the collection and reporting of additional data by more financial institutions than ever before. While WBA routinely advocates directly with state and federal agencies on behalf of Wisconsin's financial institutions, it is imperative for all financial institutions to review CFPB's HMDA proposal and send comments to CFPB regarding the proposal's specific impact on the institution. To further assist in this process, WBA will make a draft comment letter available for members' use near the comment period deadline. In preparation for use of the draft letter, each institution must consider how it would be specifically impacted by the proposal so that the institution can incorporate specific examples and economic data into its letter (*e.g.*, estimated costs to the institution if new staff need be hired or trained as a result of the proposal). Specific information is *critically* important for CFPB to fully comprehend any impact which may occur as a result of what it has proposed. As mentioned above, comments are due **October 22, 2014**. The proposed HMDA rule may be found at: http://www.consumerfinance.gov/newsroom/cfpb-proposes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market/. ■

JUDICIAL SPOTLIGHT

Wisconsin Supreme Court Decides Two Important Collection Cases

In the first case, titled *Associated Bank N.A., and SB1 Waukesha County, LLC, v. Decade Properties, Inc.*, 2014 WI 62, decided on July 15, 2014, the Supreme Court addressed the priority of two competing unsecured judgment creditors, SB1 Waukesha County, LLC ("SB1"), and Decade Properties, Inc. ("Decade"). Each unsecured creditor had a judgment against a common defendant ("Collier"). SB1 was the first unsecured judgment creditor with a docketed money judgment against Collier and the first to levy on that judgment against specific personal property of Collier. Decade argued that when it served Collier with an order to appear at a supplemental proceeding to discover financial assets prior to the levy by SB1, it thereby perfected a common law creditor's lien on all of Collier's personal property and therefore had priority over SB1. This was a fight between two unsecured judgment creditors over rights to certain assets of the debtor. UCC Article 9 does not apply to this case. Although banks are often secured creditors and unaffected by this particular case, they may also be unsecured judgment creditors at times and these priority rules determined by the Supreme Court may be important to them and their lawyers.

The Supreme Court decided that Decade as an unsecured judgment creditor does not obtain a blanket lien on all personal property of the debtor simply because it served an order on the debtor to appear for supplement proceedings. Further, Decade had not entered its judgment in the lien docket records of the county due to a clerk error, and the Supreme Court decided that an undocketed judgment cannot obtain an execution against personal property of the debtor. So, Decade was not able to prevent SB1 from pursuing collection from Collier's personal property.

The Supreme Court noted that entering a judgment in the judgment and lien docket system in the county does not create a statutory lien on the debtor's personal property. Instead, the judgment creditor obtains an unsecured interest with regard to the debtor's personal property against which it may levy. A judgment creditor will typically have to take further steps to enforce the judgment, such as by levy on the personal property. The Supreme Court concluded that the judgment creditor which first identifies and levies against specific personal property of the debtor has a superior interest to other judgment creditors who have taken no such action regarding the identified personal property. The Supreme Court acknowledges that where there are two judgment creditors with docketed money judgments and each attempts to levy against identified personal property of the debtor, or when a perfected secured party's rights are at issue, further analysis may be necessary to determine priorities.

Accordingly, an order to appear for supplemental proceedings will not create an interest that is superior to the interest of a docketed judgment creditor which has levied against specific personal property, and a judgment creditor obtains an interest in the defendant's specific personal property superior to other unsecured creditors only when it dockets its money judgment, identifies the specific personal property and levies on that property. In this case,

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Read "Special Focus" for an article regarding relief granted by FDIC to S-Corporation Banks with respect to the Basel III Capital Conservation Rules and requirements. In addition, read an overview of the recent CFPB proposed rule to revise HMDA coverage and reporting requirements. Then read "Judicial Spotlight" for an article regarding two recent cases decided by the Wisconsin Supreme Court that impact collections. Next, turn to "Regulatory Spotlight" for an IRS final rule allowing for the use of truncated taxpayer identification numbers. Finally, review "Compliance Notes" for an announcement of continuous levies issued by the Wisconsin Department of Revenue and clarification of FDIC's supervisory approach for institutions establishing account relationships with third-party payment processors. ■

SPECIAL FOCUS

FDIC Grants S-Corporation Banks Relief Under Basel III Capital Conservation Rules

Notice 2014-13

On July 21, 2014, the FDIC issued Financial Institution Letter FIL-40-2014 clarifying its policy to allow FDIC supervised S-Corporation banks and saving associations to pay dividends to shareholders to cover taxes on pass-through earnings. Under certain circumstances, the FDIC will now allow dividend payments even if the payments are not permitted under the capital conservation buffer requirements found in the new Basel III rules. The letter can be found at: http://www.fdic.gov/news/news/financial/2014/fil14040.pdf.

This is an important development because S-Corporations are treated, for tax purposes as disregarded entities and do not pay federal income taxes. Instead, their shareholders are responsible for paying the tax on the S-Corporation's income, whether or not that income is distributed to them. Thus, under Basel III, a financial institution could have net income but not be allowed to pay a dividend which could result in shareholders not receiving cash to pay their individual tax liability on the bank's income.

Generally, a financial institution may not pay a dividend to its shareholders if the dividend payment would leave the financial institution undercapitalized. See 12 U.S.C. § 1831o (d)(1)(A). Under the new Basel III rules, a financial institution cannot pay dividends if its risk based capital ratios are less than 2.5 percentage points above the minimum amounts set forth in 12 CFR 324.10.

Under the new policy, the FDIC will consider requests from noncompliant financial institutions to pay dividends to cover taxes on pass-through earnings on a case-by-case basis after evaluating the following factors found in 12 CFR 324.11(a)(4)(iv):

- Whether the dividend is 40 percent of net income or less;
- Whether the financial institution believes the dividend payment is necessary for shareholders to satisfy tax obligations;
- Whether the financial institution has a CAMELS ratings of 1 or 2 and not otherwise subject to a written supervisory directive; and
- Whether the financial institution would remain adequately capitalized after the dividend payment.

Despite this relief from the FDIC, S-Corporation banks and saving associations should evaluate whether an S-Corporation election remains practical under the new Basel III rules.

This document provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

WBA wishes to thank the Quarles and Brady law firm for providing this article. If you have questions concerning this article, please contact James Friedman at (414) 277-5735 / jim.friedman@quarles.com, Stanley Orszula at (312) 715-5123 / stanley.orszula@quarles.com, James Kaplan at (312) 715-5028 / james.kaplan@quarles.com, Kathryn Kronquist at (414) 277-5397 / kathryn.kronquist@quarles.com, Don Martin at (602) 229-5700 / don.martin@quarles.com, or your Quarles & Brady LLP attorney. ■

WISCONSIN BANKERS ASSOCIATION
Compliance Journal

Volume 19, Number 4 September 2014

Read "Special Focus" for an article regarding the Wisconsin Department of Revenue issuing continuous levy orders and an overview of recent interagency guidance on unfair or deceptive credit practices. Next, turn to "Regulatory Spotlight" for annual adjustments to the Regulation Z coverage threshold and points and fees thresholds for 2015. Finally, review "Compliance Notes" for updated versions of the small entity compliance guide and other compliance resources issued by CFPB regarding the TILA/RESPA integrated disclosures final rule. ■

SPECIAL FOCUS

Department of Revenue Continuous Levy Orders

Notice 2014-15

The Wisconsin Department of Revenue (DOR) recently announced that it will issue continuous levy orders to financial institutions beginning **September 15, 2014**. A continuous levy order will require the financial institution to place an ongoing hold on all available balances that belong to the debtor identified in the levy order until the amount of the levy is paid in full or until the levy is released by DOR, whichever occurs first.

While DOR will begin to issue continuous levy orders in some instances, it will also continue to issue standard levy orders, which are single actions that require the surrender of available balances at the time the levy is received. It is critical that, upon receipt of a DOR levy, a financial institution identify whether the levy is a continuous or standard order. The title at the top of the levy notice will identify the levy type. Continuous levies will bear the title "Notice of Continuous Levy", while standard levies will be titled "Notice of Levy". DOR has stated that it anticipates only a small portion of its levy orders will be continuous levies.

Upon receiving a continuous levy, the financial institution should generally follow its existing procedure to locate balances that belong to the identified debtor. The institution must place a hold on those accounts subject to the levy to prevent any withdrawals or debits from the accounts. According to a notice issued by DOR, while a continuous levy is in effect, DOR will send correspondence to the financial institution every 30 days providing an updated levy balance and requesting payment of any funds held during the previous 30 day period.

A final rule issued by the Treasury Department protects certain federal benefit payments from a "garnishment order", which is defined in the final rule to include a DOR levy. If a debtor's account contains protected federal benefit payments, the institution should notify DOR of this fact. In a recent informational webinar on continuous levies, DOR stated that upon learning that a debtor's account receives direct deposits of protected federal benefit payments, DOR's policy is to issue a notice releasing the continuous levy order. More information on the Treasury Department's final rule protecting federal benefit payments can be found in the March 2011 and June 2013 editions of *WBA Compliance Journal.*

Interagency Guidance Regarding Unfair or Deceptive Credit Practices

Notice 2014-16

On **August 22, 2014**, the Board of Governors of the Federal Reserve System (FRB), Bureau of Consumer Financial Protection (CFPB), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Office of the Comptroller of the Currency (OCC) (collectively, the Agencies) issued guidance regarding certain consumer credit practices.

In the guidance the Agencies address the fact that while the Federal Trade Commission's (FTC's) Credit Practices Rule remains in effect, the credit practices rules for banks, savings associations, and federal credit unions are being repealed as a consequence of the Dodd-Frank Act (DFA). However, the Agencies remind financial institutions that notwithstanding the repeal of these regulations, the Agencies have supervisory and enforcement authority regarding unfair or deceptive acts or practices, which could include the practices previously addressed in the former credit practices rule. The Agencies may determine that statutory violations exist even in the absence of a specific regulation governing the conduct.

DFA also gave CFPB the authority to issue regulations—although CFPB has yet to act—governing unfair, deceptive, or abusive acts or practices (12 U.S.C. § 5531(b)).

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In the guidance the Agencies address the fact that while the Federal Trade Commission's (FTC's) Credit Practices Rule remains in effect, the credit practices rules for banks, savings associations, and federal credit unions are being repealed as a consequence of the Dodd-Frank Act (DFA). However, the Agencies remind financial institutions that notwithstanding the repeal of these regulations, the Agencies have supervisory and enforcement authority regarding unfair or deceptive acts or practices, which could include the practices previously addressed in the former credit practices rule. The Agencies may determine that statutory violations exist even in the absence of a specific regulation governing the conduct.

DFA also gave CFPB the authority to issue regulations—although CFPB has yet to act—governing unfair, deceptive, or abusive acts or practices (12 U.S.C. § 5531(b)).

Background

The FTC Act permits FTC to promulgate regulations that define with specificity acts or practices that are unfair or deceptive, including requirements prescribed for the purpose of preventing such acts or practices. Pursuant to that rulemaking authority, FTC issued its Credit Practices Rule (16 C.F.R. Section 444.1-.5). FTC's Credit Practices Rule is applicable to creditors that are within FTC's jurisdiction; it is not applicable, for example, to banks, savings associations, and federal credit unions. FTC's Credit Practices Rule generally prohibits: (1) the use of certain provisions in consumer credit transactions; (2) the misrepresentation of the nature or extent of cosigner liability; and (3) the pyramiding of late fees.

FRB, Federal Home Loan Bank Board (FHLBB)—the predecessor to the Office of the Thrift Supervision (OTS)—and NCUA subsequently issued regulations pursuant to the FTC Act that were substantially similar to FTC's Credit Practices Rule. These regulations applied to banks, savings associations, and federal credit unions, respectively. However, in 2010, DFA repealed the rulemaking authority of FRB, FHLBB/OTS and NCUA under the FTC Act. Consequently, those regulations are being repealed. In particular—at the time of release of this publication, FRB published in the *Federal Register* a proposed rule to repeal Regulation AA which implements FRB's credit practices rule. Additionally, pursuant to title III of DFA, rulemaking authority of OTS relating to all federal savings associations was transferred to OCC on July 21, 2011. OCC did not have authority at any time to promulgate regulations under Section 5 of the FTC Act either before or after enactment of DFA; therefore, OCC has omitted the OTS version of the credit practices rule when it republished the regulations application to federal savings associations. Thus, the OTS credit practices rule was effectively repealed as of July 21, 2011. NCUA also plans to repeal its version of the credit practices rule.

Guidance

The Agencies have issued guidance to clarify that the repeal of credit practices rules applicable to banks, savings associations, and federal trade unions should *not* be construed as a determination by the Agencies that the credit practices described in these former regulations are permissible. The regulations were issued on the basis of extensive findings that identified the unfair or deceptive practices prohibited by the rules.

The Agencies stated in the guidance that they believe that, depending upon the facts and circumstances, if banks, savings associations, and federal credit unions engage in the unfair or deceptive acts described in former credit practices rules, such conduct may violate the prohibition against unfair or deceptive practices in Section 5 of the FTC Act and Sections 1031 and 1036 of DFA. The Agencies specifically note that both FTC's Credit Practices Rule and the former credit practices rules applicable to banks, savings associations, and federal credit unions required creditors to provide a "Notice to Cosigner" explaining the cosigner's obligations and his or her liability if the borrower fails to pay. The Agencies believe that creditors have properly disclosed a cosigner's liability if, prior to the obligation, they continue to provide a "Notice to Cosigner."

As a brief reminder, Regulation AA provides that in connection with an extension of credit by banks to consumers to acquire goods, services or money for personal, family or household purposes, it is an unfair act or practice for a bank to obligate a cosigner unless the cosigner is informed prior to becoming obligated of the nature of the cosigner's liability. The rule does not apply to extensions of credit for the purchase of real property nor to business- or agricultural-purpose loans. The Regulation requires a particular disclosure ("Notice to Cosigner") be given in writing to the cosigner prior to becoming obligated.

Under Regulation AA, a "cosigner" is one who assumes liability for the loan but does so without receiving the goods, services or money in return. A cosigner includes a guarantor or other accommodation party. A cosigner generally does not include a joint applicant or a person who signs only the security agreement. The regulation required each cosigner for the loan be given a copy of the disclosure statement; the disclosure statement was also required at the time of any renewal or refinancing of a consumer loan unless the cosigner is contractually obligated for renewals and refinancings under the terms of the original transaction. Given the Agencies' statements within the guidance, including those regarding the continued use of the "Notice

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to Cosigner" as mentioned above, WBA recommends financial institutions continue their diligence to ensure they have not engaged in unfair or deceptive acts or practices, and to continue with banks' longstanding practices of providing a "Notice of Cosigner", when appropriate, despite the pending repeal of Regulation AA or elimination of other past Agency rules or authority. Included at the end of this article is a listing of resources banks should be familiar with regarding unfair or deceptive acts or practices given the Agencies' statements that they may determine that statutory violations exist even in the absence of a specific regulation.

The Agencies note that FTC's Credit Practices Rule remains in effect for creditors that are within FTC's jurisdiction. In addition to FTC enforcement, FTC's Credit Practices Rule is enforced by CFPB, and to the extent that FTC's Credit Practices Rule, applies to creditors that are within CFPB's enforcement authority.

Resources

- FTC Credit Practices Rule. 16 C.F.R. §§ 444.1 - .5: http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title16/16cfr444_main_02.tpl.
- Regulation AA. 12 C.F.R. §§ 227.11-.16: www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title12/12cfr227_main_02.tpl.
- Former OTS Regulations. 12 C.F.R. §§ 535.1-.5: www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title12/12cfr535_main_02.tpl.
- FRB Staff Guidelines on the Credit Practices Rule: www.federalreserve.gov/regulations/cg/crdtpracrul.htm.
- Interagency Guidance on Unfair or Deceptive Acts or Practices by State-Chartered Banks: www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf.
- Philadelphia Federal Reserve Understanding Unfair or Deceptive Acts or Practices Prohibited under Regulation AA and Section 5 of the FTC Act: www.philadelphiafed.org/bank-resources/publications/compliance-corner/2007/second-quarter/q2cc2_07.cfm.
- OCC Advisory Letter 2002-3 Guidance on Unfair or Deceptive Acts or Practices: www.occ.gov/static/news-issuances/memos-advisory-letters/2002/advisory-letter-2002-3.pdf.

The interagency guidance may be found at: www.federalreserve.gov/newsevents/press/bcreg/bcreg20140822a2.pdf.

Conclusion

Notwithstanding the repeal of the Agencies' regulations related to credit practices rules for banks, savings associations, and federal credit unions, the Agencies have supervisory and enforcement authority regarding unfair or deceptive acts or practices—including the practices previously addressed in the former credit practices rules. The Agencies may determine that statutory violations exist even in the absence of a specific regulation governing the conduct. Financial institutions should continue to be mindful to not engage in unfair or deceptive acts or practices despite the repeal of regulation and past Agency authority as a result of DFA. ■

REGULATORY SPOTLIGHT

Agencies Issue Final Rule to Revise Supplementary Leverage Ratio.

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 final rule modifying the definition of "denominator" for the supplementary leverage ratio within the risk-based capital rule. The final rule is consistent with recent changes agreed to by the Basel Committee on Banking Supervision. The revisions to the supplementary leverage ratio apply to all banking organizations subject to the advanced approaches risk-based capital rule. Certain public disclosures required by the final rule must be made starting in the first quarter of 2015 and the minimum supplementary leverage ratio requirement using the final rule's denominator calculations is effective **01/01/2018**. Copies of the final rule may be obtained from WBA or viewed at: http://occ.gov/news-issuances/news-releases/2014/nr-ia-2014-118a.pdf.

Agencies Announce Increases in Regulations Z and M Thresholds for 2015.

The Board of Governors of the Federal Reserve System (FRB) and Consumer Financial Protection Bureau (CFPB) (collectively, the Agencies) have announced increases in the dollar thresholds within Regulation Z, which implements the Truth in Lending Act, and Regulation M, which implements the Consumer Leasing Act, for exempt consumer credit and lease transactions. The Dodd-Frank Act requires the Agencies to adjust these thresholds annually by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers.

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Read "Special Focus" for two articles regarding the amendments to the MasterCard liability rules that expand zero liability protections to certain transactions and a FinCEN ruling which explains the application of regulations to individuals in connection with the transportation of currency. Then, read "Regulatory Spotlight" to learn about CFPB's proposed rule to amend TILA/RESPA integrated disclosure requirements. Finally, turn to "Compliance Notes" for a change in policy regarding Wisconsin's Department of Revenue (DOR) levy to include SEP and SIMPLE IRA plans in levy orders. ■

SPECIAL FOCUS

Amendments to MasterCard Liability Rules

Notice 2014-17

As of **October 17, 2014**, the MasterCard rules expand zero liability protections to transactions completed with the cardholder's personal identification number (PIN), subject to new conditions. The revised rules allow card issuers to add an expectation that card holders promptly report the loss or theft of a card in order to be entitled to zero liability protection.

Under the previous MasterCard rules, cardholders had zero liability protection for unauthorized signature-based transactions, but the protection did not extend to unauthorized PIN-based transactions. If the cardholder did not meet the conditions for zero liability protection, the cardholder's liability was limited to $50.

Under the revised rules, the cardholder must meet two conditions in order to receive zero liability protection on both unauthorized signature- and PIN-based transactions: the cardholder must have exercised reasonable care in safeguarding the card from loss or theft, and upon learning of the loss or theft, the cardholder must promptly report the loss or theft to the issuer.

The revised MasterCard rules also eliminate the overall $50 liability cap that previously applied if the cardholder did not meet the requirements for zero liability protection. The MasterCard rules do not provide a definition for the term "promptly"; card issuers may adopt a definition of "promptly", so long as the resulting cardholder liability does not exceed liability that would be imposed under Regulation E. Under Regulation E, if a consumer notifies the financial institution of an unauthorized electronic fund transfer(s) within two business days of learning of the loss or theft of the consumer's access device (i.e., card, code or other means to access the consumer's account), the consumer's liability is limited to $50 or the actual amount of the unauthorized transaction(s) that occurred before notice was given to the financial institution, whichever is less. If the consumer does not notify the financial institution within two business days, the consumer's liability shall not exceed the lesser of $500 or the sum of: (1) $50 or the amount of unauthorized transfers that occurred within the two business days, whichever is less, and (2) the amount of unauthorized transfers that occur after the close of two business days and before notice is given to the financial institution, if the financial institution establishes that those transfers would not have occurred had the consumer notified the financial institution within the two business day period. Regulation E also requires the consumer to report an unauthorized electronic fund transfer that appears on a periodic statement within sixty (60) days of the transmittal of the periodic statement, in order to avoid liability for subsequent unauthorized transfers.

Depending on how an electronic transaction is conducted, customers' liability for unauthorized transactions can be affected by Regulation E, the Wisconsin Department of Financial Institutions' (DFI's) Administrative Code, and the card vendor's (e.g., MasterCard) rules, all of which also impact financial institutions' debit card disclosures. In light of the revisions to the MasterCard rules, financial institutions should review their policies and disclosures to determine whether to make amendments. If a financial institution decides to amend its policy based on the revised MasterCard rules, the institution may be required by Regulation E to provide notice of the change at least 21 days in advance of the effective date of the change. If the changes have an adverse effect on consumers, advance notice is required. For example, if an institution wishes to take advantage of the elimination of the $50 cardholder liability limitation that previously applied under MasterCard rules, the institution must provide 21-day advance notice of this change, as it may result in increased consumer liability for unauthorized transactions.

FinCEN Ruling on Currency Transporters, Including Armored Car Services

Notice 2014-18

The Financial Crimes Enforcement Network (FinCEN) has recently issued an administrative ruling to clarify the application of FinCEN regulations to certain persons involved in the transportation of currency. The ruling, FIN-2014-R010, confirms that currency transporters who engage in transactions not covered by an exemption from "money transmission" are subject to the same regulatory obligations as other money transmitters.

Definitions and Background

The FinCEN ruling defines "currency transporter" as any person that physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency, and who is primarily engaged in such a business, including armored car services and some types of cash couriers. An employee who transports currency at the direction of his or her employer, or a natural person who transports currency as a one-time accommodation for another person, with no expectation of gain or profit, is not a "currency transporter" for purposes of the ruling.

The term "money transmitter" includes a person that provides money transmission services, or any other person engaged in the transfer of funds. The term "money transmission services" means the acceptance of currency, funds, or other value that substitutes for currency from one person *and* the transmission of currency, funds or other value that substitutes for currency to another location or person by any means.

The ruling also refers to other participants who may play a role in the currency transportation process. The ruling refers to a "shipper" as a person who initiates the transport by engaging the currency transporter for a fee. A "consignee" is a person appointed by a shipper to receive the valuables. A "currency originator" is a person who provides instruction to a shipper. Finally, a "currency recipient" is a final beneficiary to whom the valuables are delivered. The same person may play one or more of these roles in the same shipment transaction.

Traditionally, currency transporters operated under a contract with a financial institution to transport currency and other monetary instruments between the financial institution's customer's place of business and the various Federal Reserve Banks or the financial institution itself. The currency would be credited to or debited from the customer's account with the financial institution. Within this traditional business model, the financial institution had complete knowledge of the information necessary to comply with all Bank Secrecy Act (BSA) and Anti-Money Laundering (AML) requirements for each shipment, and no regulatory obligations were imposed on the currency transporter.

FinCEN has recognized that the traditional currency transporter business model has gradually evolved over time, and the occurrence of customer or third-party contracted shipments, the combination of physical and electronic transmittals of value, and the subcontracting of transportation and storage services have become much more common. These changes to the currency transporter business model have resulted in a need for clarification from FinCEN of the application of money transmitter requirements to currency transporters.

Money Transmitter Exemptions

Money services businesses (MSBs) encompass many different types of business entities, including those that engage in money transmission. FinCEN's ruling provides that whether a person is a money transmitter is a matter that is dependent on the facts and circumstances. The ruling identifies circumstances in which a person's activities would not make the person a money transmitter, providing three exemptions from the scope of the "money transmitter" definition.

Under the "currency transporter exemption", the definition of money transmitter will not apply to currency transporters that satisfy three elements:

1. the currency transporter is a person that is primarily engaged in a business in the physical transportation of currency or other value that substitutes for currency,

2. the currency transporter has no more than a custodial interest in the items transported at any time during the transportation, and

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3. the transportation is from one person to the same person at another location, or to an account belonging to the same person at a financial institution.

Another exemption applies when the shipper is a certain type of financial institution:

1. the shipment involves the physical transportation by a currency transporter of currency or other value that substitutes for currency, without the currency transporter obtaining more than a custodial interest in the valuables transported, and

2. the shipper is:

    A. a Federal Reserve Bank,

    B. a federally regulated bank, or

    C. a person registered with and functionally regulated by the SEC or CFTC that is subject to customer identification program regulations.

When the shipper fits one of the above three descriptions, and in turn is referred to as a federally regulated financial institution, FinCEN will consider the financial institution to be primarily responsible for AML compliance with respect to the transportation. In order to comply with its AML program obligations, the federally regulated financial institution must know the BSA/AML particulars about the currency transportation.

A third exemption applies when the currency transporter meets the following criteria:

1. the currency transporter never takes more than a custodial interest in the currency or other value that substitutes for currency at any point in the transportation, and

2. either: (a) the currency transporter picks up the shipment from *the shipper* and physically transports it to *the shipper* at the specified destination, or (b) the currency transporter picks up the shipment from *the shipper* and physically transports it to a financial institution, for final credit to *the shipper's* account with the financial institution.

This third exemption applies only when the same currency transporter physically transports the currency or other value that substitutes for currency from one location to another location of the shipper, or to the account of the shipper at a financial institution. The currency transporter must obtain information from the shipper confirming that the final beneficiary is not someone other than the shipper in order to determine whether the exemption applies.

Examples of Money Transmitter Status

The FinCEN ruling also provides four examples of circumstances in which a currency transporter would be deemed a money transmitter.
First, if the currency transporter delivers currency or other value that substitutes for currency to the vault of another currency transporter or a third party, so that the transportation is completed by another person, or if the currency transporter takes delivery into its vault from another currency transporter or third party and completes the transportation, the currency transporter is a money transmitter.

Second, if the currency transporter subcontracts with another currency transporter or a third party to pick up and/or deliver the shipment, or the currency transporter itself acts as a subcontractor for another currency transporter for the pick-up and/or the delivery of the shipment, the currency transporter is a money transmitter.

Third, if the currency transporter combines the physical transportation of currency with other means of transmission, such as an electronic transmittal of funds, the currency transporter is a money transmitter.

Fourth, if the currency transporter takes more than a custodial interest in the currency or other value that substitutes for currency transported at any point of the transportation, such as by depositing the currency or monetary instruments that it is transporting into its own operating account at a bank, or by using the currency transported to purchase a negotiable instrument, and then transporting the negotiable instrument, the currency transporter is a money transmitter.

Exception for Shippers Acting on Behalf of Currency Originators

In addition to the exemptions from the scope of "money transmitter" status noted above, FinCEN has the authority to create exceptions to the money transmitter requirements. FinCEN has created a conditional exception to the requirements to which a currency transporter may otherwise be subject when the shipper is acting on behalf of the currency originator. The exception applies when:

1. the shipment originates and ends within the United States, *and*

2. the currency transporter never takes more than a custodial interest in the currency or other value that substitutes for currency at any point in the transportation, *and*

3. the shipper is acting on behalf of the currency originator, *and*

4. either: (a) the currency transporter picks up the shipment from the financial institution and the sam currency transporter physically transports it to *the currency originator* at the specified destination, *or* (b) the currency transporter picks up the shipment from *the currency originator* and the same currency transporter physically transports it to a financial institution, for final credit to *the currency originator's* account with that financial institution.

Consequently, the exception applies when a shipper is acting on behalf of the currency originator to arrange for the physical transportation of value from the currency originator to another location of the currency originator. The exception *does not apply* when the shipper arranges the transportation from the currency originator to a third party.

FinCEN has granted this exception based on industry representations that currency transporters conduct due diligence on shippers before entering into their general transportation contracts, to cover business, operational, and reputational risk. To take advantage of the exception, the currency transporter must implement procedures and take reasonable steps to obtain information from the shipper about the facts and circumstances of a specific transportation, such as the identity of the currency originator and whether the shipment is wholly domestic in nature.

Application of FinCEN Requirements to Shipments Not Exempted or Excepted

When transactions are not covered by an exemption or exception, a currency transporter must comply with the rules for money transmitters, including registering with FinCEN as a money transmitter, assessing the money laundering risk involved in these types of transaction(s), and implementing an AML program to mitigate such risk. The currency transporter must also comply with the recordkeeping, reporting, and transaction monitoring requirements within FinCEN regulations.

The FinCEN ruling includes an attachment that provides an illustration of some of the recordkeeping and reporting requirements that various parties would have with respect to a cross-border transportation of currency from several foreign currency originators to accounts of several currency recipients at a U.S. bank.

The ruling may be found by following the link at: http://www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R010.pdf. ■

REGULATORY SPOTLIGHT

Agencies Issue Final Rule to Revise Supplementary Leverage Ratio.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller Corporation (OCC) (collectively, the Agencies) have issued a final rule to revise the definition of the denominator of the supplementary leverage ratio (total leverage exposure) within the Agencies' regulatory capital rules. The final rule: (1) revises total leverage exposure to include the effective notional principal amount of credit derivatives and other similar instruments through which a banking organization provides credit protection (sold credit protection); (2) modifies the calculation of total leverage exposure for derivative and repo-style transactions; and (3) revises the credit conversion factors applied to certain off-balance sheet exposures. The final rule also changes the frequency with which certain components of the supplementary leverage ratio are calculated and establishes the public disclosure requirements of certain items associated with the supplementary leverage ratio. The final rule applies to all banking organizations that are subject to the Agencies' advanced approaches risk-based capital rules, as defined in the 2013 revised capital rule, including advanced approaches organizations that are subject to the enhanced supplementary leverage ratio standards that the agencies finalized in May 2014 (eSLR standards). Consistent with the 2013 revised capital rule, advanced approaches banking organizations will be required to disclose their supplementary leverage ratios beginning **01/01/2015**, and will be required to comply with a minimum supplementary leverage ratio capital requirement of 3 percent and, as applicable, the eSLR standards beginning **01/01/2018**. The final rule is effective **01/01/2015**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-09-26/pdf/2014-22083.pdf. *Federal Register*, Vol. 79, No. 187, 09/26/2014, 57725-57751.

Agencies Issue Final Rule on Liquidity Coverage Ratio.

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 final rule to implement a quantitative liquidity requirement consistent with the liquidity coverage ratio standard established by the Basel Committee on Banking Supervision. The final rule establishes a quantitative minimum liquidity coverage ratio that requires a company subject to the rule to

requirements to be a qualified mortgage. The creditor or assignee can refund to the consumer the amount of the excess points and fees, with interest payable from consummation until the date the refund is given, and the loan will retain its QM status. The cure payment must be made within 210 days of consummation, or before the occurrence of any of three specified events. The cure provision is temporary; it applies to transactions consummated on or after **November 3, 2014**, and on or before **January 10, 2021**.

More information on the ATR/QM rule can be found in the July 2013 and February 2014 editions of *WBA Compliance Journal*. The final rule which provides the points and fees cure can be found at: http://www.gpo.gov/fdsys/pkg/FR-2014-11-03/pdf/2014-25503.pdf.

Alternative Delivery of Annual Privacy Notice Now Available

Notice 2014-20

The Consumer Financial Protection Bureau (CFPB) has issued a final rule to amend Regulation P, which requires, among other things, that financial institutions provide an annual disclosure of their privacy policies to their customers. Effective **October 28, 2014**, the amendment creates an alternative delivery method for this annual disclosure, which financial institutions will be able to use under certain circumstances.

Background

The Gramm-Leach-Bliley Act (GLBA) and its implementing regulation, Regulation P, require that financial institutions provide consumers with certain notices describing their privacy policies. Financial institutions are generally required to first provide an initial notice of these policies, and then an annual notice to customers every year that the relationship continues. These notices describe whether and how the financial institution shares customers' nonpublic personal information, including personally identifiable financial information, with other entities. In some cases, these notices also explain how consumers can opt out of certain types of sharing.

Section 502 of GLBA and Regulation P require that initial and annual notices inform customers of their right to opt out of certain financial information sharing of nonpublic personal information with some types of nonaffiliated third parties. For example, customers have the right to opt out of a financial institution selling the names and addresses of its mortgage customers to an unaffiliated home insurance company and, therefore, the institution would have to provide an opt-out notice before it sells the information. On the other hand, financial institutions are not required to allow consumers to opt out of the institutions' sharing involving third-party service providers, joint marketing arrangements, maintaining and servicing accounts, securitization, law enforcement and compliance, reporting to consumer reporting agencies, and certain other activities that are specified in the statute and regulation as exceptions to the opt-out requirement (collectively, Regulation P sections 1016.13, 1016.14, and 1015). If a financial institution limits its types of sharing to those which do not trigger opt-out rights, it may provide a "simplified" annual privacy notice to its customers that does not include opt-out information.

In addition to opt-out rights under GLBA, annual privacy notices also may include information about certain consumer opt-out rights under the Fair Credit Reporting Act (FCRA). The annual privacy disclosures under GLBA/ Regulation P and affiliate disclosures under the FCRA and Regulation V, its implementing regulation, interact in two ways. First, the FCRA imposes requirements on financial institutions providing "consumer reports" to others, but section 603(d)(2)(A)(iii) of the FCRA excludes from the statute's definition of a consumer report the sharing of certain information about a consumer among the institution's affiliates *if* the consumer is notified of such sharing *and* is given an opportunity to opt out. GLBA/ Regulation P requires financial institutions providing their customers with initial and annual privacy notices to incorporate into them any notification and opt-out disclosures provided pursuant to FCRA section 603.

Second, section 624 of the FCRA/Regulation V's Affiliate Marketing Rule provide that an affiliate of a financial institution that receives certain information (e.g., transaction history) from the institution about a consumer may not use the information to make solicitations for marketing purposes *unless* the consumer is notified of such use *and* provided with an opportunity to opt out of that use. Regulation V also permits (but does not require) financial institutions providing their customers with initial and annual privacy notices under Regulation P to incorporate any opt-out disclosures provided under section 624 of the FCRA and Subpart C of Regulation V into those notices.

CFPB's final rule does not change any content requirement within existing privacy notices; the rule merely provides a possible alternative for the delivery of the required annual privacy notice.

New Annual Privacy Notice Alternative Delivery Method

As mentioned above, CFPB has finalized a rule to allow financial institutions to use an alternative delivery method to provide annual privacy notices through posting the annual notice on their websites rather than mailing the annual notice to customers, if certain conditions are met. Specifically, financial institutions may use the alternative delivery method for annual privacy notices if:

1. the institution does not disclose the customer's nonpublic personal information to nonaffiliated third parties other than for purposes under Regulation P sections 1016.13, 1016.14, and 1016.15;
2. the institution does not include on its annual privacy notice an opt-out under FCRA section 603;

3. the opt-out notices required by FCRA section 624/ Regulation V have previously been provided, if applicable, or the annual privacy notice is not the only notice provided to satisfy such requirements;

4. the information included in the privacy notice has not changed since the customer received the immediately previous privacy notice (whether initial, annual, or revised); *and*

5. the institution uses the model form provided in Regulation P as its annual privacy notice.

To use the alternative delivery method, the financial institution must continuously post the annual privacy notice in a clear and conspicuous manner on a page of its website on which the content is the privacy notice, without requiring the customer to provide any information such as a login or password or agree to any conditions to access the notice.

To make customers aware that its annual privacy notice is available through these means, financial institutions must insert a clear and conspicuous statement at least once per year on an account statement, coupon book, or a notice or disclosure the institution issues under any provision of law. The statement must inform customers that: the annual privacy notice is available on the financial institution's website; the institution will mail the notice to customers who request it by calling a specific telephone number; and the notice has not changed. There is model language for the required statement. Lastly, the final rule requires the financial institution to mail its current privacy notice to those customers who request it by telephone within ten days of the request.

Financial institutions that cannot meet the conditions under the amendment cannot use the alternative delivery method as the means to satisfy GLBA/Regulation P requirements to deliver an annual privacy notice to customers; such institutions would be required to mail the annual privacy notice.

CFPB's final rule may be found at: http://www.gpo.gov/fdsys/pkg/FR-2014-10-28/pdf/2014-25299.pdf. ■

REGULATORY SPOTLIGHT

Agencies Publish Proposed Rule on Flood Insurance, Mandatory Escrow and Detached Structures Proposed Rule in *Federal Register*.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), Farm Credit Administration (FCA), and National Credit Union Administration (NCUA) (collectively, the Agencies) have published in the *Federal Register* a proposed rule to amend regulations regarding loans in areas having special flood hazards. The proposed rule would establish requirements for the escrow of flood insurance payments, and would incorporate an exemption from the mandatory flood insurance purchase requirement for certain detached structures. Comments are due **12/29/2014**. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-10-30/pdf/2014-25722.pdf. *Federal Register*, Vol. 79, No. 210, 10/30/2014, 64518-64538.

CFPB Publishes Final Rules in *Federal Register*.

- The Bureau of Consumer Financial Protection (CFPB) has published in the *Federal Register* a final rule to amend Regulation P, which requires financial institutions to provide an annual disclosure of their privacy policies to their customers. For more information regarding the final rule, please see the "Special Focus" section of this publication. The final rule is effective **10/28/2014**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-10-28/pdf/2014-25299.pdf. *Federal Register*, Vol. 79, No. 208, 10/28/2014, 64057-64082.

- CFPB has published in the *Federal Register* a final rule to amend its Ability-to-Repay/Qualified Mortgage (ATR/QM) rule, which would allow lenders to cure excess points and fees in limited circumstances. For more information regarding the final rule, please see the "Special Focus" section of this publication. The final rule is effective **11/03/2014**, except for amendatory instruction 5, which is effective **08/01/2015**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-11-03/pdf/2014-25503.pdf. *Federal Register*, Vol. 79, No. 212, 11/03/2014, 65299-65325.

CFPB Publishes Mortgage Servicing Transfers Guidance in *Federal Register*.

CFPB has published in the *Federal Register* guidance entitled "Compliance Bulletin and Policy Guidance –

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Read "Special Focus" for an article regarding CFPB's final rule which amends its ATR/QM requirements to allow creditors to cure excess points and fees charged in connection with a QM loan in specified circumstances. Read a second article regarding CFPB's amendments to Regulation P which creates an alternative delivery method to provide annual privacy notices, which financial institutions will be able to use under certain circumstances. Next, turn to "Regulatory Spotlight" for proposed amendments to CFPB's TILA/RESPA final rule and certain mortgage servicing rules issued in 2013. Finally, turn to "Compliance Notes" for final lists of rural counties and rural or underserved counties for use in 2015. ■

SPECIAL FOCUS

CFPB Allows Cure for QM Loans with Excess Points & Fees

Notice 2014-19

The Consumer Financial Protection Bureau (CFPB) has issued a final rule to amend its Ability-to-Repay/Qualified Mortgage (ATR/QM) requirements to allow creditors to cure excess points and fees charged in connection with a QM loan in specified circumstances. The final rule also amends the small creditor and small servicer exemptions from certain provisions in the Dodd-Frank Act Title XIV mortgage rules, to provide certain accommodations to non-profit entities. This article is intended to provide a brief overview of the points and fees cure provision.

Background

CFPB issued a final rule in January 2013 to establish ATR/QM requirements under the Truth in Lending Act (TILA), which is implemented by Regulation Z. The ATR/QM rule requires a creditor to make a reasonable, good faith determination, before consummating a mortgage loan, that the consumer has a reasonable ability to repay the loan according to its terms. Loans that meet the specifications to be QM loans provide the creditor with a safe harbor or rebuttable presumption of compliance with the ATR/QM rule's requirements. The ATR/QM rule became effective **January 10, 2014**.

The ATR/QM rule created five categories of QM loans: (1) general or standard QM; (2) temporary or "government patch" QM; (3) balloon loan QM by creditors serving rural or underserved areas; (4) small creditor portfolio loan QM; and (5) temporary small creditor balloon loan QM. In order to be a QM, under all five QM categories, the total points and fees payable in connection with a loan cannot exceed the limits outlined in the following table.

Loan Amount	Points and Fees Limit
$100,000 or higher	3% of the "total loan amount"
$60,000 - $99,999.99	$3,000
$20,000 - $59,999.99	5% of the "total loan amount"
$12,500 - $19,999.99	$1,000
Less than $12,500	8% of the "total loan amount"

The dollar amounts in the above table apply through **December 31, 2014**; the dollar amounts are adjusted annually for inflation. Effective **January 1, 2015**, the following limits apply:

Loan Amount	Points and Fees Limit
$101,953 or higher	3% of the "total loan amount"
$61,172 - $101,952.99	$3,059
$20,391 - $61,171.99	5% of the "total loan amount"
$12,744 - $20,390.99	$1,020
Less than $12,744	8% of the "total loan amount"

The term "total loan amount" is defined in Regulation Z, and it cannot be assumed that the "total loan amount" is the same figure as the amount of the note. With certain exceptions as outlined in Regulation Z, six categories of charges are included in the points and fees calculation: (1) all items included in the finance charge (with the exception of interest or time-price differential, mortgage insurance premiums, bona fide third-party charges not retained by the creditor, and bona fide discount points); (2) compensation paid by the creditor to a mortgage broker or a manufactured home retailer; (3) real estate-related fees; (4) premiums for credit insurance, credit property insurance, or other life, accident,

health or loss-of-income insurance where the creditor is the beneficiary; (5) the maximum prepayment penalty; and (6) the prepayment penalty paid in a refinance transaction.

Excess Points and Fees Cure

In October 2014, CFPB issued a final rule to provide a limited, post-consummation cure mechanism for loans that exceed the points and fees limit for QM status, but that meet the other QM requirements at consummation. The final rule became effective upon its publication in the *Federal Register*, and applies to transactions consummated on or after **November 3, 2014**. The cure provision is temporary; it will expire on **January 10, 2021**. CFPB made the cure provision temporary upon the notion that creditors will develop greater confidence in compliance systems over time, eliminating the need for the cure.

In order for the cure provision to apply, the loan must be consummated on or before January 10, 2021, and otherwise meet the requirements of one of the five QM categories discussed above. The creditor or assignee must also maintain and follow policies and procedures for post-consummation review of points and fees and for making the necessary cure payments to consumers.

To cure excess points and fees, the creditor or assignee must pay to the consumer an amount not less than the sum of: (1) the dollar amount by which the transaction's points and fees exceed the applicable limit; and (2) interest on that dollar amount. Interest is calculated using the contract interest rate applicable during the period from consummation until the cure payment is made to the consumer. The final rule permits creditors and assignees to make cure payments that exceed the amount required by the rule.

The cure payment must be made within 210 days of consummation, and before the occurrence of any of the following events:

- The initiation of litigation by the consumer in connection with the loan,
- The receipt by the creditor, assignee or servicer of written notice from the consumer that the transaction's total points and fees exceed the applicable limit, or
- The consumer becoming 60 days past due on the obligation.

CFPB limited the cure provision to 210 days after consummation and prior to the occurrence of the specified events in order to provide certainty to the market and increase access to credit, while also limiting the potential for abuses of the cure provision.

The official commentary to Regulation Z, added by the final rule, provides that for purposes of the cure provision, "past due" means the failure to make a periodic payment sufficient to cover principal, interest, and if applicable, escrow under the terms of the legal obligation. Other amounts, such as late fees, are not considered for the purpose of determining whether the consumer is 60 days past due on the obligation. For purposes of the cure, a creditor or assignee may treat a received payment as applying to the oldest outstanding periodic payment.

The cure payment may be made by any means acceptable to both the consumer and creditor or assignee, or it may be in the form of a check. If payment is made by check, the check must be delivered or placed in the mail to the consumer within 210 days after consummation, and before the occurrence of any of the three events specified above.

When a creditor complies with the cure provision and refunds the excess points and fees, plus interest, to the consumer, the loan retains its QM status. Restructuring of the loan is not required by the final rule.

HUD QM Rule Does Not Contain Cure Provision

The Dodd-Frank Act authorized several federal agencies, in addition to CFPB, to issue final rules to establish definitions of "qualified mortgage" for loans guaranteed or insured by those agencies. The Department of Housing and Urban Development (HUD) issued a final rule to define which loans guaranteed or insured by HUD are QM loans. HUD recently issued a notice to announce that it does not intend to adopt a points and fees cure provision within its QM rule.

Conclusion

CFPB has issued a final rule to allow creditors and assignees to cure excess points and fees charged in connection with a loan that otherwise meets the

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requirements to be a qualified mortgage. The creditor or assignee can refund to the consumer the amount of the excess points and fees, with interest payable from consummation until the date the refund is given, and the loan will retain its QM status. The cure payment must be made within 210 days of consummation, or before the occurrence of any of three specified events. The cure provision is temporary; it applies to transactions consummated on or after **November 3, 2014**, and on or before **January 10, 2021**.

More information on the ATR/QM rule can be found in the July 2013 and February 2014 editions of *WBA Compliance Journal*. The final rule which provides the points and fees cure can be found at: http://www.gpo.gov/fdsys/pkg/FR-2014-11-03/pdf/2014-25503.pdf.

Alternative Delivery of Annual Privacy Notice Now Available

Notice 2014-20

The Consumer Financial Protection Bureau (CFPB) has issued a final rule to amend Regulation P, which requires, among other things, that financial institutions provide an annual disclosure of their privacy policies to their customers. Effective **October 28, 2014**, the amendment creates an alternative delivery method for this annual disclosure, which financial institutions will be able to use under certain circumstances.

Background

The Gramm-Leach-Bliley Act (GLBA) and its implementing regulation, Regulation P, require that financial institutions provide consumers with certain notices describing their privacy policies. Financial institutions are generally required to first provide an initial notice of these policies, and then an annual notice to customers every year that the relationship continues. These notices describe whether and how the financial institution shares customers' nonpublic personal information, including personally identifiable financial information, with other entities. In some cases, these notices also explain how consumers can opt out of certain types of sharing.

Section 502 of GLBA and Regulation P require that initial and annual notices inform customers of their right to opt out of certain financial information sharing of nonpublic personal information with some types of nonaffiliated third parties. For example, customers have the right to opt out of a financial institution selling the names and addresses of its mortgage customers to an unaffiliated home insurance company and, therefore, the institution would have to provide an opt-out notice before it sells the information. On the other hand, financial institutions are not required to allow consumers to opt out of the institutions' sharing involving third-party service providers, joint marketing arrangements, maintaining and servicing accounts, securitization, law enforcement and compliance, reporting to consumer reporting agencies, and certain other activities that are specified in the statute and regulation as exceptions to the opt-out requirement (collectively, Regulation P sections 1016.13, 1016.14, and 1015). If a financial institution limits its types of sharing to those which do not trigger opt-out rights, it may provide a "simplified" annual privacy notice to its customers that does not include opt-out information.

In addition to opt-out rights under GLBA, annual privacy notices also may include information about certain consumer opt-out rights under the Fair Credit Reporting Act (FCRA). The annual privacy disclosures under GLBA/ Regulation P and affiliate disclosures under the FCRA and Regulation V, its implementing regulation, interact in two ways. First, the FCRA imposes requirements on financial institutions providing "consumer reports" to others, but section 603(d)(2)(A)(iii) of the FCRA excludes from the statute's definition of a consumer report the sharing of certain information about a consumer among the institution's affiliates *if* the consumer is notified of such sharing *and* is given an opportunity to opt out. GLBA/ Regulation P requires financial institutions providing their customers with initial and annual privacy notices to incorporate into them any notification and opt-out disclosures provided pursuant to FCRA section 603.

Second, section 624 of the FCRA/Regulation V's Affiliate Marketing Rule provide that an affiliate of a financial institution that receives certain information (e.g., transaction history) from the institution about a consumer may not use the information to make solicitations for marketing purposes *unless* the consumer is notified of such use *and* provided with an opportunity to opt out of that use. Regulation V also permits (but does not require) financial institutions providing their customers with initial and annual privacy notices under Regulation P to incorporate any opt-out disclosures provided under section 624 of the FCRA and Subpart C of Regulation V into those notices.

CFPB's final rule does not change any content requirement within existing privacy notices; the rule merely provides a possible alternative for the delivery of the required annual privacy notice.

New Annual Privacy Notice Alternative Delivery Method

As mentioned above, CFPB has finalized a rule to allow financial institutions to use an alternative delivery method to provide annual privacy notices through posting the annual notice on their websites rather than mailing the annual notice to customers, if certain conditions are met. Specifically, financial institutions may use the alternative delivery method for annual privacy notices if:

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Read "Special Focus" for an overview of the Integrated Mortgage Disclosures under TILA/RESPA, as the final rule will become effective in August. Then, turn to "Regulatory Spotlight" for CFPB's issuance of its Semi-Annual Regulatory Agenda and a proposed information collection on a consumer complaint system, which would allow companies to participate in CFPB's Company Portal. Finally, see "Compliance Notes" for a reminder of the 2015 revised thresholds and fee limitations under Regulations Z and M. ■

SPECIAL FOCUS

Integrated Mortgage Disclosures under TILA/ RESPA: An Overview

Notice 2014-21

On **December 31, 2013**, the Bureau of Consumer Financial Protection (CFPB) published in the *Federal Register* the much anticipated final rule regarding the integrated mortgage disclosures under the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA), referred to as the TILA/RESPA final rule.

Sections 1098 and 1100A of the Dodd-Frank Act (DFA) direct CFPB to publish rules and forms that combine certain disclosures consumers receive in connection with applying for and closing on a mortgage loan under TILA and RESPA. Consistent with this requirement, CFPB amended TILA's Regulation Z and RESPA's Regulation X to establish new disclosure requirements and forms in Regulation Z for most closed-end consumer credit transactions secured by real property. In addition to combining the existing disclosure requirements and implementing new requirements imposed by DFA, the TILA/RESPA final rule provides guidance regarding compliance with those requirements. The TILA/ RESPA final rule is effective **August 1, 2015**.

As the title suggests, this article is meant to provide a high-level overview of the TILA/RESPA final rule. Therefore, to gain a full understanding of the rule you will need to read the complete final rule which may be found, together with other resources regarding the rule, at: www.consumerfinance.gov/regulatory-implementation/tila-respa/. Future articles in the *WBA Compliance Journal* will provide overviews of the rules related to the Loan Estimate and Closing Disclosure, limits on closing cost increases, and other requirements and prohibitions under the TILA/RESPA final rule. Given that the final rule is essentially a complete overhaul of the mortgage disclosure process, it is imperative that lenders begin to analyze the rule now and begin to prepare for compliance on August 1, 2015.

TILA and RESPA Amendments

The TILA/RESPA final rule made several amendments to Regulation Z. The amendments include: (1) definition changes; (2) clarification that Regulation Z applies to certain types of trusts; (3) a new Loan Estimate disclosure which replaces RESPA's GFE and TILA's early Truth in Lending disclosure; (4) a new Closing Disclosure which replaces RESPA's Settlement Statement and TILA's final Truth in Lending disclosure; (5) special information booklet rules; (6) a new escrow account cancellation notice; (7) record retention requirements; (8) mortgage transfer disclosure changes; and (9) other technical changes and rules related to reverse mortgages and timeshares. This article will not cover the rules related to reverse mortgages and timeshares.

The final rule also made several amendments to Regulation X. The amendments include: (1) the elimination of the exemption for transactions secured by 25 or more acres; (2) revisions to the GFE and HUD-1/1A Settlement Statement forms; and (3) a partial exemption from certain disclosures (i.e., RESPA settlement cost booklet, RESPA GFE, RESPA settlement statement, and application servicing disclosure) for certain housing assistance loan programs for low- and moderate-income consumers for which the new integrated disclosures are required. This article will not cover the unique rules related to certain housing assistance loan programs for low- and moderate-income consumers.

Scope of the TILA/RESPA Final Rule

The TILA/RESPA final rule applies to most closed-end consumer credit transactions secured by real property ("covered transactions") and *includes* loans that are currently subject to TILA but not RESPA, such as: construction only loans; loans secured by vacant land; and loans secured by 25 acres or more. Credit that is extended to certain trusts for tax or estate planning, such as revocable trusts and land trusts, if made primarily for personal, family or household purposes and secured by real property—is *not exempt* from the TILA/RESPA final rule.

The TILA/RESPA final rule *does not* apply to: creditors who make five or fewer mortgage loans per year; home equity lines of credit (HELOCs); reverse mortgages; and chattel-secured loans, such as loans secured by a mobile home or other dwelling that are NOT secured by real property. Creditors need be mindful, however, when originating HELOCs, reverse mortgages or chattel-dwelling/non-real property secured types of loans that they must continue to use, as applicable, the GFE, HUD-1/1A, and other TILA disclosures required by current law. For example, the creditor must continue to provide to the consumer the TILA disclosure required by Regulation Z section 18(s) in a closed-end loan secured by a mobile home that is not attached to real property.

It follows, then, that for transactions not covered by the final rule, the creditor cannot use the integrated disclosure forms in place of the GFE, HUD-1/1A and other TILA disclosure forms for transactions that are otherwise covered by TILA or RESPA. The TILA/RESPA final rule does not, however, prohibit creditors from using the integrated disclosure forms on loans that are not covered by TILA or RESPA.

The Loan Estimate Disclosure

For covered transactions, the creditor must provide the consumer with a good faith estimate of the credit costs and transaction terms on the new disclosure titled "Loan Estimate," using that term.

The Loan Estimate is a three-page form which replaces two current federal forms - the GFE under RESPA and the "early" Truth in Lending disclosure under TILA. The first page of the Loan Estimate includes general information, loan terms, projected payments and costs at closing. The second page provides closing cost details and information about adjustable payments and adjustable interest rates, when applicable. The third page contains additional information about the loan, including: contact information, a comparison table, an other considerations table, and an optional signature statement for an acknowledged receipt. The Loan Estimate must be in writing and contain the information and format as prescribed in Regulation Z. The final rule and its commentary contain detailed instructions on how each line of the Loan Estimate should be completed.

Delivery

The creditor is required to deliver or place in the mail the Loan Estimate no later than the third business day after the creditor receives the consumer's application. For purposes of this delivery requirement, "business day" means the standard definition of business day—meaning a day on which the creditor's offices are open for substantially all of its business functions.

The TILA/RESPA final rule has revised the Regulation Z definition of the term "application" for purposes of determining when a Loan Estimate must be provided to the consumer. Once the consumer has submitted the following six pieces of information to the creditor, regardless of the format of that information, the creditor is required to provide the consumer a Loan Estimate: (1) consumer's name; (2) consumer's income; (3) consumer's social security number (or other unique identifier the creditor uses to obtain a credit report on the consumer); (4) the property address; (5) an estimate of the value of the property; and (6) the mortgage loan amount sought.

The amended definition does not prevent a creditor from collecting whatever additional information it deems necessary in connection with the request for the extension of credit; however, once the creditor has received the six pieces of information, it has an application which triggers the requirement to provide the consumer with a Loan Estimate. If the creditor determines within the three-business day period that the consumer's application will not or cannot be approved on the terms requested by the consumer or if the consumer withdraws the application within that period the creditor is not required to provide the Loan Estimate.

The creditor is also required to deliver or place in the mail the Loan Estimate not later than the seventh business day before consummation. For purposes of this delivery requirement, "business day" means the precise definition of business day—meaning all calendar days except Sundays and legal public holidays specified in 5 U.S.C. 6103(a) such as New Year's Day, the birthday of Martin Luther King Jr., Washington's birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day.

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The consumer may modify or waive the seven-business-day waiting period after receiving the Loan Estimate if the consumer has a bona-fide personal financial emergency that necessitates consummating the mortgage loan before the end of the waiting period; the same rule is currently available under Regulation Z. The TILA/RESPA final rule has added new commentary to further illustrate what may be considered a bona-fide personal financial emergency and who must sign the written waiver. Regulators have historically scrutinized the consumer's decision to shorten or waive this waiting period; WBA expects that same rigorous scrutiny to continue under the final rule.

Mortgage Broker Responsibilities

If a mortgage broker receives a consumer's application, either the creditor or the mortgage broker shall provide the consumer with a Loan Estimate. If the broker provides the disclosure the broker is required to comply with all relevant requirements of the Loan Estimate. The commentary to the final rule makes it clear that even if the mortgage broker issues the Loan Estimate, the creditor remains responsible for ensuring that the requirements of Regulation Z have been satisfied. For example, if a mortgage broker receives a consumer's application and provides the consumer with the Loan Estimate, the creditor does not satisfy the requirements related to providing a Loan Estimate if it provides duplicative disclosures to the consumer. In the same example, even if the broker provides an erroneous disclosure, the creditor is responsible and may not issue a revised disclosure correcting the error. The creditor is expected to maintain communications with the broker to ensure that the broker is acting in place of the creditor. Given the creditor's potential liability for a mortgage broker's disclosure errors, creditors should review, prior to the final rule's effective date, their application and disclosure processes for mortgage transactions involving mortgage brokers to determine how best to protect against such potential liability.

Limitation on fees

Consistent with current law, the creditor generally cannot charge any fees until after the consumer has been given the Loan Estimate and the consumer has indicated his or her intent to proceed with the transaction. There is an exception that allows creditors to charge a fee to obtain a consumer's credit report.

Written List of Providers

The TILA/RESPA final rule has retained the requirement for a creditor to provide the consumer with a written list of providers at the same time the Loan Estimate is provided if the consumer is permitted to shop for a settlement service. The creditor must identify at least one available provider for each settlement service for which the consumer is permitted to shop.

Special Information Booklet at Time of Application

Except as provided below, the creditor must provide a copy of the special information booklet required by RESPA to a consumer who applies for a consumer credit transaction secured by real property. The creditor is required to deliver or place in the mail the booklet no later than three business days after the consumer's application is received. For HELOCs, the creditor may provide the consumer with a copy of "When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit".

The creditor need not provide the booklet to the consumer for a consumer credit transaction secured by real property, the purpose of which is *not* the purchase of a 1-4 family residential property, including: refinancing transactions; closed-end loans secured by a subordinate lien; and reverse mortgages.

Revisions and Corrections to Loan Estimates

The TILA/RESPA final rule permits creditors to provide to the consumer revised Loan Estimates only in certain specific circumstances, including: (1) changed circumstances (as that term is defined in the final rule) that occur after the Loan Estimate is provided; (2) a consumer requested revision to credit terms or settlement; (3) the rate being locked after the consumer was provided with a Loan Estimate; (4) the consumer has indicated an intent to proceed with the loan more than ten business days after the Loan Estimate was originally provided; and (5) a new construction loan, when settlement is delayed by more than sixty calendar days if the original Loan Estimate contained a certain disclosure that the creditor may issue a revised disclosure.

The final rule requires creditors to deliver or mail a revised Loan Estimate no later than three business days after receiving the information sufficient to establish that one of the listed five reasons for Loan Estimate revision has occurred. The standard definition of business day applies to the issuance of a revised Loan Estimate. However, the TILA/RESPA final rule prohibits a creditor from providing a revised Loan Estimate on or after the date it provides the consumer a Closing Disclosure. The creditor must ensure the consumer receives the revised Loan Estimate no later than four business days prior to consummation. For purposes of this delivery requirement, "business day" means the precise definition of business day.

If there are less than four business days between the time a revised Loan Estimate would be required to be provided to the consumer and consummation, creditors may provide consumers with a Closing Disclosure which reflects any revised figures. For example, if the creditor is scheduled to meet with the consumer and provide the Closing Disclosure on Wednesday, and the APR becomes inaccurate on Tuesday, the creditor meets the requirements to provide

timely revised disclosures by providing the Closing Disclosure reflecting the revised APR on Wednesday. However, the creditor does not meet the requirement to provide timely revised disclosures if it provides *both* a revised version of the Loan Estimate reflecting the revised APR on Wednesday *and* also provides a Closing Disclosure on Wednesday.

Closing Disclosure

For covered transactions, the Closing Disclosure form replaces the current form used to close a loan, the HUD-1 under RESPA. It also replaces the Truth in Lending disclosure under TILA. The Closing Disclosure contains additional new disclosures required by DFA and a detailed accounting of the settlement transaction. The new disclosure is a five-page document which contains the following: (1) general information, loan terms, projected payments and costs at closing; (2) loan costs and other costs; (3) calculating cash to close, summaries of transactions, and alternatives for transactions without a seller; (4) additional information about the loan; and (5) loan calculations and other disclosures and contact information. The final rule and its commentary contain detailed instructions on how each line of the Closing Disclosure should be completed.

Timing

The creditor must deliver the Closing Disclosure to consumers so that they receive the form at least three business days before consummation. For purposes of this disclosure, the precise definition of "business day" applies. Similar to the seven-business-day waiting period after receiving the Loan Estimate, consumers may waive or modify the three-business day waiting period for receipt of the Closing Disclosure for a bona-fide personal financial emergency that necessitates consummating the mortgage loan before the end of waiting period.

If the creditor makes significant changes between the time the Closing Disclosure is given and consummation—specifically, if the creditor makes changes to the APR of more than 1/8 of a percent for most loans (and 1/4 of a percent for loans with irregular payments or periods), changes the loan product, or adds a prepayment penalty to the loan—the consumer must be provided with a revised disclosure and an additional three-business-day waiting period after receipt of such disclosure must be observed. Less significant changes can be disclosed on a revised Closing Disclosure provided to the consumer at or before consummation, without delaying consummation.

Settlement Agent

Under the TILA/RESPA final rule, the creditor is responsible for delivering the Closing Disclosure, but creditors may use settlement agents to provide the Closing Disclosure, provided that they comply with the final rule's requirements for the Closing Disclosure. As such, creditors and settlement agents may agree to divide responsibility with respect to completing any of the disclosure under Regulation Z; however, the creditor remains responsible for ensuring all applicable requirements are met. Creditors will want to discuss, prior to the final rule's effective date, settlement procedures with title companies or others who may act as settlement agent for the creditor to plan for any changes in the creation or delivery of information necessary to complete the Closing Disclosure.

Record Retention

The final rule generally requires creditors to retain evidence of compliance with the Loan Estimate and Closing Disclosure requirements for three years after the *later of* the date of consummation, or the date disclosures are required. Consistent with existing RESPA recordkeeping requirements, a creditor is required to retain the Closing Disclosure and documents related to such disclosure for five years after consummation.

Effective Date and Additional Resources

As mentioned above, most provisions of the TILA/RESPA final rule, including use of the new forms, apply to applications for closed-end consumer credit transactions secured by real property that are received on or after **August 1, 2015**. The new forms *cannot* be used for transactions where the application was received prior to August 1, 2015. Thus, the current separate TILA and RESPA forms must be used for transactions for which the application is received prior to August 1, 2015.

Certain provisions however, apply on August 1, 2015, *regardless* of the date the application for a covered transaction is received. The provisions include: (1) the prohibition on imposing fees on a consumer before the consumer has received the Loan Estimate and indicated an intention to proceed with the transaction; (2) the prohibition on providing written estimates of terms or costs specific to consumers without a written statement informing the consumer that the terms and costs may change before the consumer has received the Loan Estimate; (3) the prohibition on requiring submission of documents verifying information related to the consumer's application before providing the Loan Estimate; and (4) the final rule's effect on state laws and state exemptions.

As the final rule makes wide-reaching changes to mortgage disclosures under TILA and RESPA, lenders must begin to analyze the rule now in preparation for the August 1, 2015 effective date. The TILA/RESPA final rule may be viewed in the December 31, 2013, edition of the *Federal Register*: www.gpo.gov/fdsys/pkg/FR-2013-12-31/pdf/2013-28210.pdf. CFPB has also created a number of resources regarding the final rule, including guides and disclosure samples which may be found at:

www.consumerfinance.gov/regulatory-implementation/tila-respa/. In addition, WBA Education will be hosting another day-long seminar on the TILA/RESPA final rule in the Spring; registration for that program will be made available in the near future: www.wisbank.com/Web/Education/SearchEvents/tabid/98/Default.aspx. ■

REGULATORY SPOTLIGHT

CFPB Issues Semi-Annual Regulatory Agenda.

The Bureau of Consumer Financial Protection (CFPB) has published a semi-annual update to its rulemaking agenda. Under the Regulatory Flexibility Act, federal agencies are required to publish regulatory agendas twice per year. The agenda identifies several topics that are in either a prerule, proposed rule, or final rule stage. Copies of the agenda may be obtained from WBA or viewed at: http://www.consumerfinance.gov/blog/fall-2014-rulemaking-agenda/.

CFPB Proposes Amendments to Servicing Requirements under Regulations X and Z.

CFPB has issued a proposed rule to amend various servicing requirements under Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), and Regulation Z, which implements the Truth in Lending Act (TILA). The proposed amendments focus primarily on clarifying, revising, or amending provisions regarding force-placed insurance notices, policies and procedures, early intervention and loss mitigation requirements, and periodic statement requirements. The proposed amendments also address servicing requirements when a consumer is a potential or confirmed successor in interest, is in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act. Comments will be due 90 days after the proposed rule is published in the *Federal Register*. Copies of the proposed rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-12-15/pdf/2014-28167.pdf. *Federal Register*, Vol. 79, No. 240, 12/15/2014, 74175-74305.

CFPB Proposes Information Collection on Consumer Complaint Intake System.

CFPB has proposed an information collection entitled "CFPB's Consumer Complaint Intake System Company Portal Boarding Form Information Collection System." The form would allow companies to actively participate in CFPB's Company Portal, a secure, web-based interface between CFPB's Office of Consumer Response and companies which allows companies to view and respond to complaints submitted through CFPB's complaint handling system. Comments are due **02/02/2015**. Copies of the notice may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-12-04/pdf/2014-28511.pdf. *Federal Register*, Vol. 79, No. 233, 12/04/2014, 71984.

FRB Issues Final Rule on Reserve Requirements.

The Board of Governors of the Federal Reserve System (FRB) has issued a final rule to amend Regulation D to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2015. The final rule sets the amount of total reservable liabilities of each depository institution that is subject to a zero percent reserve requirement in 2015 at $14.5 million, which reflects an increase from $13.3 million in 2014. This amount is known as the reserve requirement exemption amount. The final rule also sets the amount of net transaction accounts at each depository institution, over the reserve requirement exemption amount that is subject to a three percent reserve requirement in 2015 at $103.6 million, which reflects an increase from $89.0 million in 2014. This amount is known as the low reserve tranche. The final rule is effective **12/17/2014**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-11-17/pdf/2014-27161.pdf. *Federal Register*, Vol. 79, No. 221, 11/17/2014, 68349-68351.

FRB Issues Final Rule on Concentration Limits for Large Financial Companies.

FRB has issued a final rule to implement section 622 of the Dodd-Frank Act, which establishes a financial sector concentration limit that generally prohibits a financial company from merging or consolidating with another company if the resulting company's liabilities would exceed 10 percent of the aggregate liabilities of all financial companies. The final rule also establishes reporting requirements for financial companies that do not otherwise report consolidated financial information to FRB or another appropriate federal banking agency. The final rule is effective **01/01/2015**. Copies of the final rule may be obtained from WBA or viewed at: http://www.gpo.gov/fdsys/pkg/FR-2014-11-14/pdf/2014-26747.pdf. *Federal Register*, Vol. 79, No. 220, 11/14/2014, 68095-68107.

FRB Issues Final Rule on Collection of Checks and Time of Settlement.

FRB has issued a final rule to amend subpart A of its Regulation J, Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers through Fedwire, to permit Federal Reserve Banks to require paying banks that receive presentment of checks from Reserve Banks to make the proceeds of settlement for those checks