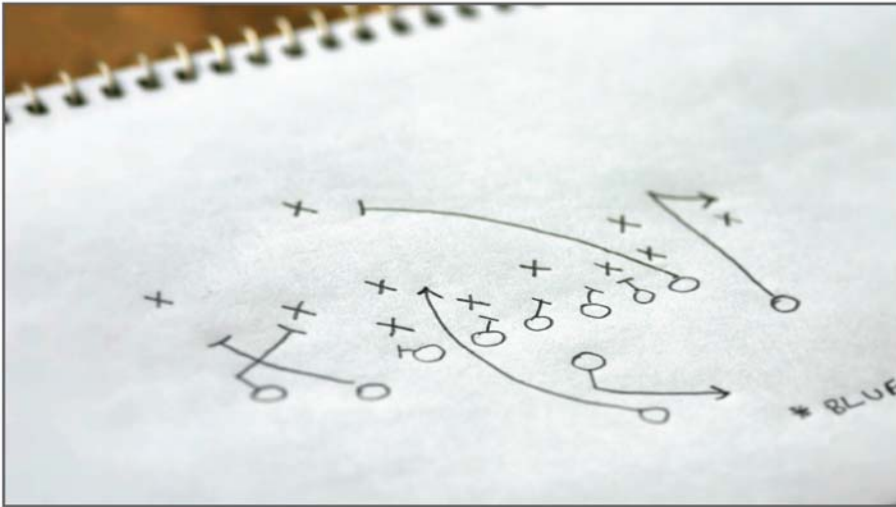
Dodd-Frank Wall Street Reform and Consumer Protection Act
Mortgage Servicing User Guide



This is the third of a series of user guides that will be published by Morrison & Foerster. The user guides provide an in depth discussion on specific topics raised by the Dodd-Frank Act. For our Dodd-Frank overview and brief alerts, please see our dedicated website at: http://www.mofo.com/resources/regulatory-reform/.

Introduction
This is a user guide for the mortgage servicing-related provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). More specifically, it covers Subtitle E (Mortgage Servicing) and Subtitle G (Mortgage Resolution and Modification) of Title XIV of the Dodd-Frank Act, which are part of the "Mortgage Reform and Anti-Predatory Lending Act."

Subtitle A (Residential Mortgage Loan Origination Standards), Subtitle B (Minimum Standards for Mortgages), Subtitle C (High-Cost Mortgages), Subtitle D (Office of Housing Counseling), and Subtitle F (Appraisal Activities) of Title XIV of the Dodd-Frank Act are covered by our separate mortgage origination user guide that was previously issued. Subtitle H (Miscellaneous Provisions) of Title XIV requires various surveys and provides for a number of housing-related grants. Because Subtitle H is expected to be of minimal interest to mortgage servicers, it is not covered by this user guide.

Use of this Guide
This guide is designed for use by executives and managers who are responsible for the mortgage servicing activities of banks, savings associations, and mortgage companies. It is intended to be a reference piece that provides pragmatic solutions for the implementation of the mortgage servicing provisions of the Dodd-Frank Act. When regulations are issued for the mortgage servicing provisions of the Dodd-Frank Act, the guidance provided by this guide will need to be refined accordingly. This guide does not provide legal advice and should not be relied upon as such.

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Organization of this Guide
For ease of reference, this guide will be organized by the various subtitles and sections of Title XIV of the Dodd-Frank Act. With each provision, we summarize the new law, discuss its linkages to existing law, and analyze some of the more important ramifications for mortgage servicers.

Note that certain federal agencies' consumer protection authorities under the "Enumerated Consumer Laws" will eventually be transferred to the new Bureau of Consumer Financial Protection ("Bureau"). These transfers of authority are not reflected in this guide. The "Enumerated Consumer Laws" are listed in § 1002(12) of the Dodd-Frank Act.

Section 1400. Short Title; Designation as Enumerated Consumer Law

(a) Short Title- This title may be cited as the `Mortgage Reform and Anti-Predatory Lending Act'.

(b) Designation as Enumerated Consumer Law Under the Purview of the Bureau of Consumer Financial Protection- Subtitles A, B, C, and E and sections 1471, 1472, 1475, and 1476, and the amendments made by such subtitles and sections, shall be enumerated consumer laws, as defined in section 1002, and come under the purview of the Bureau of Consumer Financial Protection for purposes of title X, including the transfer of functions and personnel under subtitle F of title X and the savings provisions of such subtitle.

(c) Regulations; Effective Date-

(1) REGULATIONS- The regulations required to be prescribed under this title or the amendments made by this title shall--

(A) be prescribed in final form before the end of the 18-month period beginning on the designated transfer date; and

(B) take effect not later than 12 months after the date of issuance of the regulations in final form.

(2) EFFECTIVE DATE ESTABLISHED BY RULE- Except as provided in paragraph (3), a section, or provision thereof, of this title shall take effect on the date on which the final regulations implementing such section, or provision, take effect.

(3) EFFECTIVE DATE- A section of this title for which regulations have not been issued on the date that is 18 months after the designated transfer date shall take effect on such date.

Analysis. Section 1400 is a "housekeeping" section that does the following:

- Designation as Enumerated Consumer Law Under the Purview of the Bureau of Consumer Financial Protection. Subtitles A (Residential Mortgage Loan Origination Standards), B (Minimum Standards for Mortgages), C (High-Cost Mortgages), and E (Mortgage Servicing), and §§ 1471 (property appraisal requirements), 1472 (appraiser independence requirements), 1475 (Real Estate Settlement Procedures Act of 1974 ("RESPA") provisions relating to appraisal fees), and 1476 (Government Accountability Office ("GAO") study regarding effectiveness of various appraisal methods) are designated as enumerated consumer laws that come under the jurisdiction of the new Bureau. This means that the Bureau will issue the implementing regulations for these provisions and will have enforcement authority with respect to these provisions for depository institutions with more than $10 billion of assets, mortgage-related businesses, and certain larger participants in financial services.

- Regulations; Effective Date. Regulations to implement Title XIV must be issued in final form within 18 months following the designated transfer date. The regulations must take effect within 12 months after they are issued. However, if final regulations have not been issued within 18 months following the designated transfer date, the corresponding statutory provisions will become effective at that time. Given the lack of details in many of the statutory provisions, this would result in havoc. As a result, the Bureau and other federal banking agencies should be well motivated to issue the implementing regulations prior to the 18-month deadline.

  The "designated transfer date" is defined in § 1062 of the Dodd-Frank Act. The designated transfer date will be established by the Treasury Secretary, following consultation with other federal officials, within 60 days following enactment of the Dodd-Frank Act on July 21, 2010. The designated transfer date will be no earlier than 180 days, and no later than 12 months, following enactment. The Treasury Secretary can establish a designated transfer date beyond the 12-month period by following certain procedures, but the designated transfer date may not be more than 18 months following enactment. These rather lengthy timeframes reflect Congress'

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recognition that it will take considerable time to organize the Bureau, which will be responsible for issuing a large number of regulations.

Subtitle E – Mortgage Servicing

Section 1461. Escrow and Impound Accounts Relating to Certain Consumer Credit Transactions

(a) In General- Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129C (as added by section 1411) the following new section:

`Sec. 129D. Escrow or impound accounts relating to certain consumer credit transactions

`(a) In General- Except as provided in subsection (b), (c), (d), or (e), a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, shall establish, before the consummation of such transaction, an escrow or impound account for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms, as provided in, and in accordance with, this section.

`(b) When Required- No impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property may be required as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, except when--

`(1) any such impound, trust, or other type of escrow or impound account for such purposes is required by Federal or State law;

`(2) a loan is made, guaranteed, or insured by a State or Federal governmental lending or insuring agency;

`(3) the transaction is secured by a first mortgage or lien on the consumer's principal dwelling having an original principal obligation amount that--

`(A) does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)), and the annual percentage rate will exceed the average prime offer rate as defined in section 129C by 1.5 or more percentage points; or

`(B) exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)), and the annual percentage rate will exceed the average prime offer rate as defined in section 129C by 2.5 or more percentage points; or

`(4) so required pursuant to regulation.

`(c) Exemptions- The Board may, by regulation, exempt from the requirements of subsection (a) a creditor that--

`(1) operates predominantly in rural or underserved areas;

`(2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Board;

`(3) retains its mortgage loan originations in portfolio; and

`(4) meets any asset size threshold and any other criteria the Board may establish, consistent with the purposes of this subtitle.

`(d) Duration of Mandatory Escrow or Impound Account- An escrow or impound account established pursuant to subsection (b) shall remain in existence for a minimum period of 5 years, beginning with the date of the consummation of the loan, unless and until--

`(1) such borrower has sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required to maintain private mortgage insurance;

`(2) such borrower is delinquent;

`(3) such borrower otherwise has not complied with the legal obligation, as established by rule; or

`(4) the underlying mortgage establishing the account is terminated.

`(e) Limited Exemptions for Loans Secured by Shares in a Cooperative or in Which an Association Must Maintain a Master Insurance Policy- Escrow accounts need not be established for loans secured by shares in a cooperative. Insurance premiums need not be included in escrow accounts for loans secured by dwellings or units, where the borrower must join an association as a condition of ownership, and that association has an obligation to the dwelling or unit owners to maintain a master policy insuring the dwellings or units.

`(f) Clarification on Escrow Accounts for Loans Not Meeting Statutory Test- For mortgages not covered by the requirements of subsection (b), no provision of this section shall be construed as precluding the establishment of an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property--

`(1) on terms mutually agreeable to the parties to the loan;

`(2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower; or

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`(3) pursuant to the requirements for the escrowing of flood insurance payments for regulated lending institutions in section 102(d) of the Flood Disaster Protection Act of 1973.

`(g) Administration of Mandatory Escrow or Impound Accounts-

`(1) IN GENERAL- Except as may otherwise be provided for in this title or in regulations prescribed by the Board, escrow or impound accounts established pursuant to subsection (b) shall be established in a federally insured depository institution or credit union.

`(2) ADMINISTRATION- Except as provided in this section or regulations prescribed under this section, an escrow or impound account subject to this section shall be administered in accordance with--

`(A) the Real Estate Settlement Procedures Act of 1974 and regulations prescribed under such Act;

`(B) the Flood Disaster Protection Act of 1973 and regulations prescribed under such Act; and

`(C) the law of the State, if applicable, where the real property securing the consumer credit transaction is located.

`(3) APPLICABILITY OF PAYMENT OF INTEREST- If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law.

`(4) PENALTY COORDINATION WITH RESPA- Any action or omission on the part of any person which constitutes a violation of the Real Estate Settlement Procedures Act of 1974 or any regulation prescribed under such Act for which the person has paid any fine, civil money penalty, or other damages shall not give rise to any additional fine, civil money penalty, or other damages under this section, unless the action or omission also constitutes a direct violation of this section.

`(h) Disclosures Relating to Mandatory Escrow or Impound Account- In the case of any impound, trust, or escrow account that is required under subsection (b), the creditor shall disclose by written notice to the consumer at least 3 business days before the consummation of the consumer credit transaction giving rise to such account or in accordance with timeframes established in prescribed regulations the following information:

`(1) The fact that an escrow or impound account will be established at consummation of the transaction.

`(2) The amount required at closing to initially fund the escrow or impound account.

`(3) The amount, in the initial year after the consummation of the transaction, of the estimated taxes and hazard insurance, including flood insurance, if applicable, and any other required periodic payments or premiums that reflects, as appropriate, either the taxable assessed value of the real property securing the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction) or the replacement costs of the property.

`(4) The estimated monthly amount payable to be escrowed for taxes, hazard insurance (including flood insurance, if applicable) and any other required periodic payments or premiums.

`(5) The fact that, if the consumer chooses to terminate the account in the future, the consumer will become responsible for the payment of all taxes, hazard insurance, and flood insurance, if applicable, as well as any other required periodic payments or premiums on the property unless a new escrow or impound account is established.

`(6) Such other information as the Board determines necessary for the protection of the consumer.

`(i) Definitions- For purposes of this section, the following definitions shall apply:

`(1) FLOOD INSURANCE- The term `flood insurance' means flood insurance coverage provided under the national flood insurance program pursuant to the National Flood Insurance Act of 1968.

`(2) HAZARD INSURANCE- The term `hazard insurance' shall have the same meaning as provided for `hazard insurance', `casualty insurance', `homeowner's insurance', or other similar term under the law of the State where the real property securing the consumer credit transaction is located.'.

(b) Exemptions and Modifications- The Board may prescribe rules that revise, add to, or subtract from the criteria of section 129D(b) of the Truth in Lending Act if the Board determines that such rules are in the interest of consumers and in the public interest.

(c) Clerical Amendment- The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 129C (as added by section 1411) the following new item:

`129D. Escrow or impound accounts relating to certain consumer credit transactions.'.

Analysis. Section 1461 adds a new § 129D to the federal Truth in Lending Act ("TILA"), and requires escrow or impound accounts for certain consumer credit transactions.

- In General. A creditor in a consumer credit transaction that is secured by a first lien on the consumer's principal dwelling is required to establish, before the consummation of the transaction, an escrow or impound account for the payment of taxes, hazard insurance, flood insurance, mortgage insurance, ground rents, and any other periodic payment relating to the property or the loan ("escrow account"). The escrow account requirement does

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not apply to reverse mortgages or to open-end credit plans. There are various other exceptions discussed below.

This is very similar to an existing Federal Reserve Board ("Board") regulation at 12 C.F.R. § 226.35(b)(3). However, while § 129D applies to all consumer credit transactions secured by first liens on principal dwellings, the Board's existing regulation applies only to a higher-priced mortgage loan that is a first lien on a consumer's principal dwelling.

- Consumer Credit. "Consumer credit" means credit that is offered or extended to a consumer primarily for personal, family or household purposes. See 12 C.F.R. § 226.2(a)(12) and Paragraph 226.2(a)(12)-1 of the Regulation Z Commentary. An extension of credit primarily for business, commercial or agricultural purposes, and an extension of credit to a corporation or other borrower that is not a natural person, are exempt. See 12 C.F.R. § 226.3(a) and Paragraphs 226.3-1-8 of the Regulation Z Commentary.

- Principal Dwelling. A "dwelling" means a residential structure that contains 1-4 units, whether or not the structure is attached to real property. Examples include condominium units, cooperative units, mobile homes, and trailers or boats used as residences. See 12 C.F.R. § 226.2(a)(19) and Paragraphs 226.2(a)(19)-1-3 of the Regulation Z Commentary. For this purpose, Paragraph 226.35(b)(3)(i)-1 of the Regulation Z Commentary indicates that "principal dwelling" will be defined by reference to the definitions in Paragraphs 226.2(a)(19), 226.2(a)(24)-3, 226.15(a)(1)-5, 6 and 226.23(a)(1)-3, 4 of the Regulation Z Commentary. The basic rule is that a person can have only one principal dwelling at a time, thereby excluding vacation or second homes. If a consumer buys or builds a new dwelling that will become his/her principal dwelling within one year or upon the completion of construction, the new dwelling is considered the "principal dwelling" for purposes of applying the definition to a particular transaction. However, if the consumer acquires or constructs a new principal dwelling, any loan secured by the current principal dwelling is subject to the TILA/Regulation Z right of rescission.

- When Required. Section 129D(b) identifies the exclusive circumstances under which an escrow account may be required for a real property sale contract or loan secured by a first lien on the consumer's principal dwelling, as follows:

  - When the escrow account is required by federal or state law.

    Some state laws permit, but do not require, escrow accounts for certain loans. See, e.g., California Civil Code § 2954, which allows, but does not require, the imposition of escrow accounts under seven defined circumstances. This type of state law would not be covered by this mandatory escrow account requirement. However, even when an escrow account is not mandatory under § 129D, § 129D allows the lender or servicer to require an escrow account in its discretion, as provided in a contract between the parties. See § 129D(f), discussed below. Thus, whenever this California statute allows the lender to impose an escrow account, the lender may do so, assuming that this is provided for in its contract with the borrower.

  - When the loan is made, guaranteed, or insured by a state or federal governmental lending or insuring agency.

    An example would be certain FHA loan programs.

  - When the original principal amount of the transaction is less than or equal to the applicable Freddie Mac conforming loan limit, and the Annual Percentage Rate ("APR") will exceed the Average Prime Offer Rate by 1.5 or more percentage points.

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The “Average Prime Offer Rate” is defined in §129C of TILA, as amended by the Dodd-Frank Act, to mean the average prime offer rate for a comparable transaction as of the date on which the interest rate is set, as published by the Board. The Board’s existing regulation for higher-priced mortgage loans defines “Average Prime Offer Rate” in more detail at 12 C.F.R. § 226.35(a)(2) and Paragraph 226.35(a)(2) of the Regulation Z Commentary. (There is a similar definition in Regulation C at 12 C.F.R. § 203.4(a)(12)(ii) and Comment 203.4(a)(12)(ii)-1 of the Regulation C Commentary.)

  - Information regarding the Board’s publication of the Average Prime Offer Rate is set forth at Paragraph 226.35(a)(2)-4 of the Regulation Z Commentary.
  - There is no explanation of how a creditor determines when the interest rate is “set” for this purpose. There are analogous concepts detailed in Paragraph 226.35(a)(2)-3 of the Regulation Z Commentary for higher-priced mortgage loans and in Regulation C, Appendix A, at I.G.2., and these generally refer to the last date that the interest rate is locked or set before consummation. The Board may employ the same principles here.

- When the original principal amount of the transaction is greater than the applicable Freddie Mac conforming loan limit, and the APR will exceed the Average Prime Offer Rate by 2.5 or more percentage points.

  See above for a discussion of the “Average Prime Offer Rate.”

  The tests based on the comparison of the APR and the Average Prime Offer Rate are different than the Board’s current test for a “higher-priced mortgage loan.” The current test treats a loan as a “higher-priced mortgage loan” if the APR will exceed the Average Prime Offer Rate by 1.5 or more percentage points for a first lien, or by 3.5 or more percentage points for a subordinate lien. See 12 C.F.R. § 226.35(a)(1). However, on August 16, 2010, the Board issued a proposal to amend its mandatory escrow account requirement set forth at § 226.35(b)(3) of Regulation Z. Under the proposed amendment, a first lien loan that is a “jumbo” loan—that is, a loan with a principal balance at consummation that exceeds the maximum principal obligation in effect as of the date that the interest rate is set for the loan to be eligible for purchase by Freddie Mac—will be subject to the mandatory escrow account rule only if the APR exceeds the Average Prime Offer Rate for a comparable transaction as of the date that the interest rate is set by 2.5% or more. If put into final form, the Board’s proposal will conform the mandatory escrow account rule for first lien higher-priced mortgage loans in Regulation Z to the rule mandated by § 1461 of the Dodd-Frank Act. For a more detailed discussion relating to the Board’s proposal, see http://www.mofo.com/files/Uploads/Images/100818Escrow.pdf.

- When required by regulation.

  This presumably refers to a regulation of the Board.

- Exemptions. Section 129D(c) authorizes the Board to exempt a creditor from the mandatory escrow account requirement if the creditor: (i) operates predominantly in rural or underserved areas; (ii) together with its affiliates, does not have annual mortgage loan originations that exceed a threshold to be set by the Board; (iii) retains its mortgage loans in portfolio; and (iv) meets any asset size or other criteria that the Board sets.

  This exception is so narrow that it was likely designed to fit a particular creditor or small group of creditors. This exception may be designed for the same creditor(s) that are given the benefits of the special balloon payment exemption from the definition of a “qualified mortgage” in § 1412 of the Dodd-Frank Act. This is discussed in more detail in our separate mortgage origination user guide that was previously issued.

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- Duration of Mandatory Escrow or Impound Account. If the escrow account is required by the new statute, then it must be kept in place for a minimum of five years. See § 129D(d). There are four exceptions:

  - The borrower has sufficient equity in the property so that he/she is no longer required to maintain private mortgage insurance.

    Presumably, this is a reference to the provisions in the Homeowners Protection Act of 1998 ("HPA") that govern when private mortgage insurance may be terminated or cancelled (or, if applicable, when private mortgage insurance may be terminated under a "protected state law" that allows earlier termination or termination when a higher principal balance is achieved). See 12 U.S.C. §§ 4902, 4908. In general, the HPA allows a mortgagor to request cancellation of private mortgage insurance when the "cancellation date" is reached (*e.g.*, when the loan is scheduled to reach, or does reach, a loan-to-value ratio ("LTV") of 80%, based on the original value), and requires termination of private mortgage insurance when the "termination date" is reached (*e.g.*, when the loan is first scheduled to reach a LTV of 78%, based on the original value). If the private mortgage insurance is not sooner cancelled or terminated, it must not be permitted to continue beyond the first day of the month immediately following the date that is the "midpoint of the amortization period" of the loan (*i.e.*, the point in time that is halfway through the period that begins on the first day of the amortization period established when the loan is consummated and ending upon the completion of the entire period when the mortgage is scheduled to be amortized). There are various conditions and exceptions. See 12 U.S.C. § 4902.

  - The borrower is delinquent.

  - The borrower otherwise has not complied with the terms of the loan or real property sale contract, as established in the Board's rules.

    Presumably, the Board's rules will identify the type of defaults that are sufficient so as to relieve the loan from its escrow account maintenance obligation. Compare: § 129 of TILA, as amended by the Dodd-Frank Act, which allows accelerations of high-cost mortgages when there has been a "material violation of a provision of the loan documents other than the payment schedule."

  - The mortgage has been terminated.

The five-year period for mandatory escrows is characterized as a "minimum period," suggesting that the Board may required a longer period by regulation or that a creditor may require a longer period under the terms of the loan contract. In contrast, the Board's existing mandatory escrow account rule for higher-priced mortgage loans authorizes the creditor or servicer to cancel the escrow account if the consumer requests cancellation in a dated written request that is received no earlier than 365 days after "consummation" of the loan. See 12 C.F.R. § 226.35(b)(3)(iii).

- Limited Exemptions for Loans Secured by Shares in a Cooperative or in Which an Association Must Maintain a Master Insurance Policy. Section 129D(e) provides two limited exemptions from the mandatory escrow account requirement.

  - First, an escrow account need not be established for loans secured by shares in a cooperative.

    This is the same as the exemption found in the Board's existing rule for higher-priced mortgage loans. See 12 C.F.R. § 226.35(b)(ii)(A).

    The wording of this exemption—"need not be established"—indicates that the creditor can nevertheless require escrow accounts for loans secured by shares in a cooperative.

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- Second, insurance premiums need not be included in an escrow account for a loan secured by dwellings or units where the borrower must join an association as a condition of ownership, and the association has an obligation to the owners to maintain a master insurance policy for the dwellings or units.

  This is broader than the exemption found in the Board's existing rule for higher-priced mortgage loans, which is limited to condominium units. See 12 C.F.R. § 226.35(b)(ii)(B). The new provision in § 129D(e) would also apply to other types of ownership, such as certain planned unit developments.

  Note that this exemption is limited to property insurance. If an escrow account is otherwise required, it will still be required for property taxes, mortgage insurance, and other assessments. This is consistent with the Board's existing rule for higher-priced mortgage loans. See Paragraph 226.35(b)(3)(ii)(B)-1 of the Regulation Z Commentary.

  If the insurance exemption is utilized, the creditor or servicer should determine that the master insurance policy meets its requirements and provides sufficient coverage. The wording of this exemption—"need not be included"—indicates that the creditor has the discretion to require that insurance be included in the escrow accounts for these loans.

- Clarification on Escrow Accounts for Loans Not Meeting Statutory Test. If an escrow account is not mandatory as set forth above, § 129D(f) clarifies that § 129D does not prohibit the imposition of an escrow account in any of the following circumstances:

  - On terms mutually agreeable to the parties to the loan.

    This indicates that the parties to the loan can voluntarily agree to establish an escrow account. The reference to the "parties to the loan" presumably includes the original creditor, any assignee of the loan, and any loan servicer.

    Prior to the establishment of a voluntary escrow account, it would be prudent to provide a disclosure to the borrower explaining that the escrow account is not required, and to obtain (i) the borrower's written acknowledgment of that fact, and (ii) the borrower's written consent to the establishment of the voluntary escrow account.

    The Board's existing regulation for higher-priced mortgage loans is silent regarding the establishment of voluntary escrow accounts, but nothing in that regulation would preclude voluntary escrow accounts.

    Many state laws that limit the circumstances under which a creditor may impose an escrow account contain a similar exception for voluntary escrow accounts, although these often require certain disclosures to the borrower. See, e.g., California Civil Code § 2954.

  - When the creditor or servicer, in its discretion, requires the establishment of an escrow account. The contract between the lender or servicer and the borrower must provide for the escrow account.

    However, if state or other applicable law prohibits the establishment of the escrow account (and the escrow account is not required by § 129D), then the escrow account may not be established. For example, California Civil Code § 2954 allows, but does not require, the establishment of an escrow account in seven situations. The California statute does not allow escrow accounts in any other situations. If the escrow account is not required by § 129D, a creditor subject to the California statute may require an escrow account in these seven situations (assuming that the contract between the parties so provides), but no others.

    As noted, the contract between the lender or servicer and the borrower must provide for the escrow account. The standard Fannie Mae/Freddie Mac mortgage instrument contains a provision that requires

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the borrower to make payments into an escrow account, unless this is waived by the lender. Even if the mortgage instrument does not contain escrow account provisions, a stand-alone escrow account agreement should be sufficient.

- Under the escrow rules for flood insurance that apply to regulated lending institutions.

  For example, the flood insurance regulation of the Office of the Comptroller of the Currency ("OCC") states that if a bank requires that any taxes, insurance premiums, or other items be escrowed for a loan secured by residential improved real estate or a mobile home, and the loan was made, increased, extended or renewed on or after October 1, 1996, then flood insurance premiums also must be escrowed. See 12 C.F.R. § 22.5.

- Administration of Mandatory Escrow or Impound Accounts. Section 129D(g) governs the administration of mandatory escrow accounts. These provisions do not apply to voluntary escrow accounts, but state law may impose other administrative requirements. See, e.g., California Civil Code § 2955, which governs the investment of escrow funds.

  - In General. Escrow accounts must be maintained in a federally insured depository institution, unless Title XIV or the Board's regulations provide otherwise. Title XIV does not provide otherwise, and the Board's regulations are unlikely to provide otherwise. See § 129D(g)(1).

    If a loan servicer maintains tax and insurance escrow funds in an omnibus account at a depository institution whose accounts are insured by the Federal Deposit Insurance Corporation ("FDIC"), the deposit insurance is governed by 12 C.F.R. §§ 330.7(a), (d). This section states that, for accounts maintained by a mortgage servicer in a custodial or other fiduciary capacity, which are comprised of payments by mortgagors of taxes and insurance premiums, the funds of each individual mortgagor are added together with other funds held by or for the benefit of the same mortgagor at the same depository institution, and the total amount is insured to the standard maximum deposit insurance amount (currently, $250,000).

  - Administration. Under § 129D(g)(2), a mandatory escrow account must be administered in accordance with:

    - RESPA (12 U.S.C. §§ 2605(g), 2609, 2610) and the U.S. Department of Housing and Urban Development's ("HUD") Regulation X (24 C.F.R. §§ 3500.12, 3500.17, 3500.21(g)). This provides a broad framework for the administration of escrow accounts, including limitations on the amount of escrow payments; timely disbursements; escrow analyses; transfers of servicing; shortages, surpluses, and deficiency requirements; escrow account statements; requirements for timely payments; recordkeeping; penalties; and discretionary payments. In addition, it is impermissible to charge a fee for the preparation or distribution of escrow account statements.

    - The Flood Disaster Protection Act of 1973 (42 U.S.C. § 4012a(d)) and the regulations prescribed under that Act. This governs the mandatory escrowing of flood insurance premiums if any other items are required to be escrowed. See, e.g., the OCC regulation at 12 C.F.R. § 22.5, discussed in more detail above.

    - The applicable laws of the state in which the real property securing the transaction is located. See, e.g., California Civil Code § 2955(c), which requires a lender that deposits escrow funds in an out-of-state depository institution to make available in California the books, records, and files pertaining to the accounts to the appropriate state regulatory department or agency, or pay the reasonable expenses for travel and lodging incurred by the regulatory department or agency in order to conduct an examination at an out-of-state location. However, to the extent that the state law is inconsistent with § 129D, it would be preempted.

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For example, California Civil Code § 2955(a) authorizes a lender to place escrow funds in non-depository institution investments in California, which would be preempted given its inconsistency with § 129D(g)(1), discussed above.

- Applicability of Payment of Interest. The creditor is required to pay interest on the escrow account funds if this is required by applicable state or federal law. Interest is to be paid in the manner prescribed by applicable state or federal law. See § 129D(g)(3).

  Many states have laws that require the payment of interest on escrow account funds. See, e.g., California Civil Code § 2954.8(a), which requires the payment of "at least 2 percent simple interest per annum."

  Section 129D(g)(3) also requires that the interest be paid "in the manner as prescribed" by applicable state or federal law. For example, California Civil Code § 2954.8(a) states that "[s]uch interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier." Further, California Civil Code § 2954.8(b) prohibits the imposition of "any fee or charge in connection with the maintenance or disbursement of [escrow] money . . . that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received."

  For many years, state laws requiring the payment of interest on escrow account funds have been preempted by the regulations of the Office of Thrift Supervision ("OTS") and OCC with respect to federal savings banks and national banks, respectively. See 12 C.F.R. § 560.2(b)(6) (OTS) and 12 C.F.R. § 34.4(a)(6) (OCC). See also, e.g., OTS Chief Counsel Opinion P-2003-7 (October 6, 2003). Given the new federal preemption rules relating to OCC and OTS regulations set forth in §§ 1044 and 1046 of the Dodd-Frank Act, it is no longer prudent to rely upon the preemptive effects of these regulations. The preemption issues are discussed in more detail in the federal preemption user guide that we have issued.

  The requirement to pay interest on escrow account funds as required by applicable state and federal law is, by the terms of § 129D(g)(3), limited to escrow accounts that are "subject to this section." This clearly covers escrow accounts that are mandatory under § 129D. However, § 129D(f) clarifies that § 129D does not preclude the establishment of non-mandatory escrow accounts, raising the question of whether this reference is sufficient to cause non-mandatory escrow accounts to also be treated as "subject to this section." Because § 129D(f) does not actually regulate non-mandatory escrow accounts, the better reading is that non-mandatory escrow accounts are not "subject to this section," and that § 129D(g)(3) is limited to escrow accounts that must be established in accordance with § 129D. However, other state and federal laws may still directly require the payment of interest on any non-mandatory escrow accounts.

- Penalty Coordination with RESPA. Section 129D(g)(4) is designed to preclude the payment of duplicative penalties for violations of § 129D and RESPA. Specifically, § 129D(g)(4) states that if a person has violated RESPA or HUD Regulation X and has paid "any fine, civil money penalties, or other damages" as a result, the same action or omission that gave rise to the RESPA/Regulation X violation shall not give rise to any additional fine, civil money penalties, or other damages under § 129D, unless the action or omission also constitutes a "direct violation" of § 129D.

  A violation of the RESPA/Regulation X escrow account rules subjects a servicer to penalties. See 12 U.S.C. § 2609(d) and 24 C.F.R. §§ 3500.17(m), (n). The actions or omissions that constitute a violation of the RESPA/Regulation X escrow account rules would also violate § 129D(g)(2), which states that an escrow account must be administered in accordance with RESPA and Regulation X. Section 129D(g)(4) precludes the recovery of any additional fine, civil money penalties, or other damages under § 129D for that violation. However, § 129D(g)(4) does not preclude the recovery of any additional fine, civil money penalties, or other damages for an action or omission that also constitutes a "direct violation" of § 129D.

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This would include, for example, a failure to maintain an escrow account for at least five years, as required by § 129D(d).

- Disclosures Relating to Mandatory Escrow or Impound Account. If an escrow account is mandatory under § 129D(b), then the creditor is required to provide a written disclosure to the consumer. The disclosure must be provided at least three business days before the consummation of the transaction. However, the Board may establish a different timeframe in its implementing regulations. See § 129D(h).

  "Consummation" occurs at "the time that that a consumer becomes contractually obligated on a credit transaction." See 12 C.F.R. § 226.2(a)(13). This typically occurs when the consumer signs his/her loan documents.

  For purposes of § 129D(h), a "business day" means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions." See 12 C.F.R. § 226.2(a)(6). In this regard, Paragraph 226.2(a)(6)-1 of the Regulation Z Commentary provides as follows: "Activities that indicate that the creditor is open for substantially all of its business functions include the availability of personnel to make loan disbursements, to open new accounts, and to handle credit transaction inquiries. Activities that indicate that the creditor is not open for substantially all of its business functions include a retailer's merely accepting credit cards for purchases or a bank's having its customer-service windows open only for limited purposes such as deposits and withdrawals, bill paying, and related services."

  Note that this disclosure is required only for mandatory escrows under § 129D(b). The disclosure is not required for non-mandatory escrow accounts, although other laws may require certain disclosures for those accounts.

  While the statute states that the disclosure must be written, any written disclosure required by TILA can be provided electronically in accordance with the Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), 15 U.S.C. § 7001 *et seq.* Also see 12 C.F.R. §§ 226.5(a)(1)(iii) and 226.17(a)(1). If a disclosure (for purposes of the E-SIGN Act, a "record") normally must be provided in writing, it can instead be provided electronically if the consumer has affirmatively consented to electronic delivery and has not withdrawn that consent. Prior to consenting, the consumer must be provided with a clear and conspicuous statement: (i) informing the consumer of (A) any right or option to receive the record in a paper or non-electronic form, and (B) the right to withdraw his/her consent to electronic delivery, plus any related conditions, consequences or fees; (ii) informing the consumer whether the consent applies only to a particular transaction or to identified categories of records; (iii) describing the procedures the consumer must use to withdraw his/her consent and to update information needed to contact the consumer electronically; and (iv) informing the consumer how, after the consent, he/she can obtain a paper copy of the electronic record upon request, and whether any fee will be charged for the paper copy. Also, prior to consenting, the consumer must receive a statement of the hardware and software requirements for access to and retention of the electronic records, and the consumer must consent, or confirm his/her consent, electronically in a manner that reasonably demonstrates that he/she can access information in the electronic form in which the records in question will be provided. If, after consent is given, a change in the hardware or software requirements creates a material risk that the consumer will not be able to access or retain the records, it is necessary to provide the consumer with a statement of the revised requirements, and a statement of the right to withdraw the consent without fees and without any imposition of conditions or consequences not disclosed as set forth above. At that point, an electronic consent must be obtained once again as described above. See 15 U.S.C. § 7001(c).

  The information that must be disclosed includes the following:

  - The fact that an escrow account will be established at consummation of the transaction.

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For this purpose, "consummation" is likely to be interpreted to mean the closing of the transaction rather than the technical Regulation Z definition discussed above.

- The amount that must be provided at closing for the initial funding of the escrow account.

- The estimated amount of the various escrow items that will be required for the first year of the transaction. These are to be based, as appropriate, upon the taxable assessed value of the real property (including any improvements to be constructed, whether or not financed by the transaction) or the replacement costs of the property.

  This disclosure is in addition to the initial escrow account statement that must be provided to the borrower at settlement or within 45 days of settlement. See 24 C.F.R. § 3500.17(g). The initial escrow account statement is to reflect the initial escrow account analysis required by 24 C.F.R. § 3500.17(c)(2). The calculation of estimates of disbursements is governed by 24 C.F.R. § 3500.17(c)(7). In general, this subsection requires the servicer to use actual disbursement numbers if these are known to the servicer. If the actual disbursement numbers are unknown, the servicer is to base the estimated disbursement on the preceding year's charge, or the preceding year's charge as modified by an amount not exceeding the most recent year's change in the national Consumer Price Index for all urban consumers. In the case of unassessed new construction, the servicer is to base the estimated disbursements on the assessment of comparable residential property in the market area. There would be an obvious risk of consumer confusion if the numbers in the § 129D(h) disclosure did not square up with the numbers in the initial escrow account statement. Hopefully, the Board's regulations for § 129D(h) will require calculations that are consistent with those mandated by the initial escrow account analysis required by 24 C.F.R. § 3500.17(c)(2).

- The estimated monthly amount to be escrowed.

  See comments immediately above regarding consistency with the initial escrow account analysis required by 24 C.F.R. § 3500.17(c)(2).

- The fact that if the consumer subsequently terminates the escrow account, he/she will be required to pay the various escrow items directly (unless a new escrow account is established).

  The initial escrow account must be established for a minimum of five years. See § 129D(d), discussed above.

- Any other information required by the Board to protect the consumer.

o Definitions. Two definitions are provided by § 129D(i), as follows.

- Flood Insurance. This term is defined by reference to the flood insurance coverage provided under the National Flood Insurance Act of 1968.

- Hazard Insurance. This term means "hazard insurance," "casualty insurance," "homeowners insurance," or similar term, as defined under state law in the state where the real property securing the transaction is located.

  Since § 129D also applies to dwellings that are not real property (*e.g.*, mobile homes), this definition creates some ambiguity regarding the definition of "hazard insurance" for non-real property loans. The Board's regulations should resolve this ambiguity, most likely by referencing the definition under applicable state law for these loans as well.

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Does “hazard insurance” include insurance that is not required by the lender as a condition of obtaining credit (*e.g.*, earthquake insurance or debt-protection insurance)? The statute does not answer this question. Under the Board’s existing regulation for higher-priced mortgage loans, escrow accounts are not required for such optional insurance coverages. See Paragraph 226.35(b)(3)(i)-3 of the Regulation Z Commentary. The Board is likely to follow the same approach in its regulations under § 129D.

- Exemptions and Modifications. Section 1461(b) authorizes the Board to issue rules that revise, add to, or subtract from the criteria for requiring escrow accounts under § 129D(b). To do so, the Board must determine that this is in the interests of consumers and in the public interest.

Section 1462. Disclosure Notice Required for Consumers Who Waive Escrow Services

Section 129D of the Truth in Lending Act (as added by section 1461) is amended by adding at the end the following new subsection:

`(j) Disclosure Notice Required for Consumers Who Waive Escrow Services-

`(1) IN GENERAL- If--

`(A) an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to real property securing a consumer credit transaction is not established in connection with the transaction; or

`(B) a consumer chooses, and provides written notice to the creditor or servicer of such choice, at any time after such an account is established in connection with any such transaction and in accordance with any statute, regulation, or contractual agreement, to close such account,

the creditor or servicer shall provide a timely and clearly written disclosure to the consumer that advises the consumer of the responsibilities of the consumer and implications for the consumer in the absence of any such account.

`(2) DISCLOSURE REQUIREMENTS- Any disclosure provided to a consumer under paragraph (1) shall include the following:

`(A) Information concerning any applicable fees or costs associated with either the non-establishment of any such account at the time of the transaction, or any subsequent closure of any such account.

`(B) A clear and prominent statement that the consumer is responsible for personally and directly paying the non-escrowed items, in addition to paying the mortgage loan payment, in the absence of any such account, and the fact that the costs for taxes, insurance, and related fees can be substantial.

`(C) A clear explanation of the consequences of any failure to pay non-escrowed items, including the possible requirement for the forced placement of insurance by the creditor or servicer and the potentially higher cost (including any potential commission payments to the servicer) or reduced coverage for the consumer in the event of any such creditor-placed insurance.

`(D) Such other information as the Board determines necessary for the protection of the consumer.'.

Analysis. Section 1462 adds a new subjection (j) to § 129D for consumers who waive an escrow account.

- In General. § 129D(j) applies in two situations. First, where an escrow account is not established for a consumer credit transaction secured by real property. Second, where an escrow account was established for a consumer credit transaction secured by real property, but the consumer is choosing to cancel that account in accordance with applicable law or a contract (and gives written notice of the cancellation). In either instance, the creditor or servicer is required to provide a timely and clearly written disclosure that tells the consumer his/her responsibilities and the implications of not having an escrow account.

  This new section reflects Congress’ belief that escrow accounts are good. Where an escrow account is not required in accordance with § 129D(b) of TILA (discussed above), Congress wishes the consumer to have sufficient information regarding the ramifications of waiving or terminating an escrow account.

  The scope of § 129D(j) is different than the scope of § 129D(b). While § 129D(j) covers a consumer credit transaction secured by any lien on real property, § 129D(b) covers a consumer credit transaction secured by a first lien on a principal dwelling. (Dwellings can include both real property and other property, such as mobile homes.) In addition, § 129D(j) applies to both closed-end and open-end credit, as well as reverse mortgages.

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In contrast, § 129D(b) excludes both open-end credit and reverse mortgages. Thus, depending upon the transaction, either § 129D(b) or § 129D(j), or both, will apply. In other instances, neither section will apply.

The Board's implementing regulations are likely to provide more detail regarding the timing of this new disclosure.

- Disclosure Requirements. The new disclosure must include the following:
  - Information regarding any fees or costs involved in the non-establishment of an escrow account or the closing of the escrow account.

    Some lenders charge an "escrow account waiver fee" to borrowers who do not establish escrow accounts. Unless (i) the lender has the right under applicable state or federal law to require an escrow account in the first instance, and (ii) applicable state or federal law does not mandate the establishment of an escrow account, it would not appear that the lender has a legal basis for imposing such a fee (unless applicable state or federal law provides otherwise).

  - A clear and prominent statement that the consumer must personally and directly pay the various non-escrowed items if an escrow account is not established, and that this is in addition to his/her regular mortgage loan payment. In addition, there must be a disclosure that the cost for the various items can be substantial.

    Regulation Z disclosures generally must meet a "clear and conspicuous" standard. See, e.g., 12 C.F.R. §§ 226.5(a)(1)(i) and 226.17(a)(1). The Board will need to clarify what, if anything, more is required to meet the "clear and prominent" standard mandated by this subsection.

  - A clear explanation of the consequences of failing to pay the non-escrowed items. This includes the possible force placement of insurance and the potentially higher costs (including servicer commissions) and/or reduced coverage of the force-placed insurance.

    The consequences of failing to pay the non-escrowed items will depend upon the nature of those items. For example, the consequences of failing to pay assessments may be a lien on the property while the consequences of failing to pay mortgage insurance may be a foreclosure of the loan. In some instances, the consequences of failing to pay a non-escrowed item will differ from one jurisdiction to the next. For example, while the failure to pay property taxes ordinarily results in a tax lien on the property, in many jurisdictions it may also result in the assessment of interest and penalties.

  - Any other information that the Board deems necessary to protect the consumer.

Section 1463. Real Estate Settlement Procedures Act of 1974 Amendments

(a) Servicer Prohibitions- Section 6 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605) is amended by adding at the end the following new subsections:

`(k) Servicer Prohibitions-

`(1) IN GENERAL- A servicer of a federally related mortgage shall not--

`(A) obtain force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance;

`(B) charge fees for responding to valid qualified written requests (as defined in regulations which the Bureau of Consumer Financial Protection shall prescribe) under this section;

`(C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties;

`(D) fail to respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan; or

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`(E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this Act.

`(2) FORCE-PLACED INSURANCE DEFINED- For purposes of this subsection and subsections (l) and (m), the term `force-placed insurance' means hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage.

`(l) Requirements for Force-placed Insurance- A servicer of a federally related mortgage shall not be construed as having a reasonable basis for obtaining force-placed insurance unless the requirements of this subsection have been met.

`(1) WRITTEN NOTICES TO BORROWER- A servicer may not impose any charge on any borrower for force-placed insurance with respect to any property securing a federally related mortgage unless--

`(A) the servicer has sent, by first-class mail, a written notice to the borrower containing--

`(i) a reminder of the borrower's obligation to maintain hazard insurance on the property securing the federally related mortgage;

`(ii) a statement that the servicer does not have evidence of insurance coverage of such property;

`(iii) a clear and conspicuous statement of the procedures by which the borrower may demonstrate that the borrower already has insurance coverage; and

`(iv) a statement that the servicer may obtain such coverage at the borrower's expense if the borrower does not provide such demonstration of the borrower's existing coverage in a timely manner;

`(B) the servicer has sent, by first-class mail, a second written notice, at least 30 days after the mailing of the notice under subparagraph (A) that contains all the information described in each clause of such subparagraph; and

`(C) the servicer has not received from the borrower any demonstration of hazard insurance coverage for the property securing the mortgage by the end of the 15-day period beginning on the date the notice under subparagraph (B) was sent by the servicer.

`(2) SUFFICIENCY OF DEMONSTRATION- A servicer of a federally related mortgage shall accept any reasonable form of written confirmation from a borrower of existing insurance coverage, which shall include the existing insurance policy number along with the identity of, and contact information for, the insurance company or agent, or as otherwise required by the Bureau of Consumer Financial Protection.

`(3) TERMINATION OF FORCE-PLACED INSURANCE- Within 15 days of the receipt by a servicer of confirmation of a borrower's existing insurance coverage, the servicer shall--

`(A) terminate the force-placed insurance; and

`(B) refund to the consumer all force-placed insurance premiums paid by the borrower during any period during which the borrower's insurance coverage and the force-placed insurance coverage were each in effect, and any related fees charged to the consumer's account with respect to the force-placed insurance during such period.

`(4) CLARIFICATION WITH RESPECT TO FLOOD DISASTER PROTECTION ACT- No provision of this section shall be construed as prohibiting a servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act of 1973.

`(m) Limitations on Force-placed Insurance Charges- All charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable.'.

(b) Increase in Penalty Amounts- Section 6(f) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(f)) is amended--

(1) in paragraphs (1)(B) and (2)(B), by striking `$1,000' each place such term appears and inserting `$2,000'; and

(2) in paragraph (2)(B)(i), by striking `$500,000' and inserting `$1,000,000'.

(c) Decrease in Response Times- Section 6(e) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(e)) is amended--

(1) in paragraph (1)(A), by striking `20 days' and inserting `5 days';

(2) in paragraph (2), by striking `60 days' and inserting `30 days'; and

(3) by adding at the end the following new paragraph:

`(4) LIMITED EXTENSION OF RESPONSE TIME- The 30-day period described in paragraph (2) may be extended for not more than 15 days if, before the end of such 30-day period, the servicer notifies the borrower of the extension and the reasons for the delay in responding.'.

(d) Prompt Refund of Escrow Accounts Upon Payoff- Section 6(g) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2605(g)) is amended by adding at the end the following new sentence: `Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.'.

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Analysis. Section 1463 modifies § 6 of RESPA to impose new responsibilities on loan servicers relating to force-placed insurance, qualified written requests, responses to borrowers, and refunds of escrow funds upon loan payoff. The penalties under § 6 have also been increased.

- Servicer Prohibitions. Section 1463(a) adds a new § 6(k) of RESPA, which establishes a list of prohibited actions for servicers of federally related mortgage loans.

  Section 6(k) applies to servicers of "federally related mortgage loans," a term that includes first lien loans, subordinate lien loans, closed-end loans, and open-end loans. See 24 C.F.R. § 3500.2. The term excludes loans for a business, commercial, or agricultural purpose (as defined in Regulation Z at 12 C.F.R. § 226.3(a)(1)); temporary financing, such as a construction loan of less than two years (but the exemption does not apply if the loan is used for, or may be converted to, permanent financing by the same lender or is used to finance a transfer of title to the first user) or bridge loan; loan on vacant land, unless a structure or manufactured home will be constructed or placed on the property within two years, or a loan on a structure or manufactured home to be placed on the property will be secured by a lien on the property; any assumption in which the lender does not have the right to expressly approve a subsequent person as the borrower on the loan; a loan conversion to different terms that are consistent with the original mortgage, so long as a new note is not required; and certain bona fide secondary market transactions (but excluding table-funded transactions). See 24 C.F.R. § 3500.5.

  - In General. The prohibited actions are as follows:

    - Force-Placed Insurance. A servicer may not force-place hazard insurance unless there is a reasonable basis to believe that the borrower has failed to maintain hazard insurance as required by the loan contract.

      Whether there is a "reasonable basis" is governed by new § 6(l) of RESPA, discussed below.

      See discussion under "Force-Placed Insurance Defined," below, regarding what is included in the "terms of the contract." This is undoubtedly the same as the "loan contract" referenced above.

    - Fees for Qualified Written Requests ("QWRs"). A servicer may not charge fees for responding to valid QWRs. The Bureau's regulations will define a "qualified written request."

      The duty of loan servicers to respond to QWRs is already governed by § 6(e) of RESPA and HUD Regulation X at 24 C.F.R. § 3500.21(e). Collectively, the statute and regulation provide a detailed set of obligations relating to the servicer's receipt of QWRs, response to QWRs, and protection of the borrower's credit rating. Section 6(e) is silent regarding the imposition of fees for responding to QWRs.

      Some borrowers (or their lawyers) have routinely deluged servicers with voluminous and burdensome information requests styled as QWRs to thwart the collection process or in an effort to generate liability for non-compliance with the QWR rules under § 6(f) of RESPA and 24 C.F.R. § 3500.21(f). Some servicers have responded by imposing fees for responding to QWRs. New § 6(k) will prohibit those fees.

      While the term "qualified written request" is already defined in § 6(e)(1)(B) of RESPA and 24 C.F.R. § 3500.21(e)(2), new § 6(k) states that the Bureau will define the term in its regulations. Currently, the QWR process is limited by 24 C.F.R. § 3500.21(e)(1) to "mortgage servicing loans," which means a federally related mortgage loan that is secured by a first lien. See 24 C.F.R. § 3500.21(a). A "mortgage servicing loan" also excludes open-end lines of credit (*e.g.*, home equity line plans) covered by TILA and Regulation Z, presumably because those open-end lines are already subject to a detailed body of error resolution procedures (see

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15 U.S.C. § 1666 and 12 C.F.R. § 226.13). Given that § 6(k) is, by its terms, applicable to the more broadly defined "federally related mortgage loans" (see discussion above), it is possible that the Bureau will define the term "qualified written request" in a manner that expands the QWR process to all federally related mortgage loans. Expansion of the QWR process to open-end lines would be particularly burdensome, because this would require servicers to comply with both the QWR process and Regulation Z's error resolution procedures.

- Correction of Error Requests. A servicer may not fail to take timely action to respond to a borrower's request to correct errors relating to: (i) allocation of payments; (ii) final balances for purposes of loan payoffs; (iii) final balances for purposes of avoiding foreclosure; or (iv) other standard servicer's duties.

  A borrower's request to correct any of the foregoing errors would, if properly submitted in writing, constitute a "qualified written request" under the existing QWR process set forth at § 6(e) of RESPA and HUD Regulation X at 24 C.F.R. § 3500.21(e). This subsection establishes a parallel obligation to respond to borrower inquiries relating to the servicing of the loan. The most significant differences are (i) the existing QWR process is currently limited to "mortgage servicing loans" (described above), whereas this new process applies to any federally related mortgage loan (*e.g.*, including subordinate lien loans and open-end home equity lines) and (ii) the new process is not limited to *written* requests, suggesting that the servicer will be required to respond to oral requests. This will be very burdensome for servicers.

  It is possible that the implementing regulations will establish a streamlined mechanism for compliance with both the QWR process and this new process.

  The implementing regulations will likely establish specific timeframes for responses to borrower requests under the new process. These timeframes are unlikely to be more generous than the parallel timeframes contained in § 6(e) of RESPA for responding to QWRs. The QWR timeframes have been dramatically shortened by § 1463(c) of the Dodd-Frank Act, as discussed below.

- Contact Information Requests. A servicer may not fail to respond within 10 business days to a borrower request for the identity, address, and other relevant contact information about the owner or assignee of the loan.

  A request for contact information under this new provision is unlikely to constitute a QWR under 24 C.F.R. § 3500.21(e)(2)(i) because the request does not relate to an alleged error in the borrower's account or "information relating to the servicing of the loan." Accordingly, this new provision does not overlap with the QWR process.

  This new requirement has some loose parallel in § 131(g) of TILA, which requires the "new creditor" holding a mortgage loan to provide a notice to the consumer that contains, among other things, the "identity, address, and telephone number of the covered person who owns the mortgage loan." See 74 Fed. Reg. 60,143, 60,152 (November 20, 2009) and 12 C.F.R. § 226.39(d)(1).[1] However, while the § 131(g) notice must be provided by the *new owner* of the loan, the new process contemplated by § 6(k) of RESPA will require the *servicer* to provide up-to-date contact information about the current owner or assignee of the loan. This may be extremely burdensome for some servicers, which will not have this information readily at hand. Servicers will need to make appropriate arrangements so that they will have access to this information.

[1] On August 16, 2010, the Board issued a final rule that requires a disclosure relating to the acquisition of legal title to a mortgage loan. See discussion at http://www.mofo.com/files/Uploads/Images/100823FinalRule.pdf.

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This new process is not limited to *written* requests for contact information, suggesting that the servicer will be required to respond to oral requests. This will be very burdensome for servicers.

Under HUD Regulation X, a "business day" is defined to mean "a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity's business functions." See 24 C.F.R. § 3500.2(b).

- Other Obligations. A servicer also will be required to comply with any other obligations found by the Bureau to be "appropriate to carry out the consumer protection purposes" of RESPA. The Bureau will prescribe these obligations by regulation.

  The "consumer protection purposes" of RESPA are to change the real estate settlement process for residential real estate in a manner that will result in: (i) more effective advance disclosure to home buyers and sellers of settlement costs; (ii) the elimination of kickbacks or referral fees that tend to unnecessarily increase settlement costs; (iii) a reduction of the amounts that home buyers must pay to fund escrow accounts; and (iv) a significant reform and modernization of local recordkeeping of land title information. See 12 U.S.C. § 2601. While these purposes are not as far-reaching as those contained in some other consumer protection statutes, they are sufficiently broad to provide cover for extensive rulemaking by the Bureau.

- Force-Placed Insurance Defined. Section 6(k)(2) of RESPA defines "force-placed insurance" for purposes of §§ 6(k), (l) and (m) to mean hazard insurance that a servicer of a federally related mortgage loan obtains when the borrower fails to maintain or renew that insurance as required by the terms of the mortgage.

  The term "hazard insurance" is not defined for purposes of § 6(k)(2). HUD Regulation X also does not define the term, but its definition of "settlement service" in 24 C.F.R. § 3500.2 references the providing of "hazard, flood, or other casualty insurance or homeowner's warranties." The separate reference to "hazard" and "flood" insurance suggests that "force-placed insurance" does not include the force-placement of flood insurance. This result would make sense given the fact that the Flood Disaster Protection Act of 1973 already contains a detailed procedure for the force-placement of flood insurance if the borrower fails to maintain it as required by law. See 42 U.S.C. § 4012a(e). There are implementing regulations for this requirement. See, e.g., 12 C.F.R. § 22.7 (OCC regulation). Section 6(l)(4) of RESPA, discussed below, further supports the conclusion that the force-placement provisions of § 6(k)(2) do not apply to flood insurance.

  The "terms of the mortgage" is also an undefined term. While this undoubtedly includes the mortgage instrument (which typically contains detailed provisions relating to the maintenance of hazard insurance), the term should be sufficiently broad to include the separate hazard insurance requirements documentation that mortgage lenders often enter into with their borrowers.

- Requirements for Force-Placed Insurance. Section 1463(a) adds a new § 6(l) to RESPA, which identifies the steps that a servicer must take to demonstrate a "reasonable basis" for force-placing hazard insurance.

  As discussed above, § 6(k) of RESPA states that a servicer may not force-place hazard insurance unless there is a "reasonable basis to believe the borrower has failed" to maintain hazard insurance as required by the loan contract. Although the wording in the two subsections is somewhat different, the standard is undoubtedly the same.

  - Written Notices to Borrower. The servicer must do the following before it imposes "any charge" on a borrower for force-placed insurance.

The term "any charge" will be read broadly. It will include the premium for the insurance itself as well as any related fees.

- First Written Notice. The servicer must send two written notices to the borrower. The first written notice must be sent by first-class mail and must contain: (i) a reminder of the borrower's obligation to maintain hazard insurance on the property; (ii) a statement that the servicer does not have evidence of the insurance coverage; (iii) a clear and conspicuous statement of the procedures that the borrower must follow to demonstrate that he/she already has insurance coverage; and (iv) a statement that the servicer may obtain insurance coverage, at the borrower's expense, if the borrower does not demonstrate, in a timely manner, that he/she does have insurance coverage.

  Nothing in the statute precludes the servicer from providing additional information. For example, the notice could tell the borrower the cost of the force-placed insurance, the amount of any fees that will be imposed, and the time at which the force-placed insurance will be imposed. The notice could also explain the consequences if the borrower provides his/her own policy of insurance after the servicer force-places, as more fully described under "Termination of Force-Placed Insurance," below.

  The description of the procedures that the borrower must follow to demonstrate that he/she already has insurance coverage must be "clear and conspicuous," a disclosure standard that is not defined. This disclosure standard is also used in existing HUD Regulation X at 24 C.F.R. § 3500.7(f)(6), but is not defined there either. The "clear and conspicuous" disclosure standard is used in TILA and Regulation Z, where it is defined to mean "a reasonably understandable form." See Paragraphs 226.5(a)(1)-1 and 226.17(a)(1)-1 of the Regulation Z Commentary. It is possible that the Bureau will employ a similar definition here.

  While the statute states that the notice must be written, any written disclosure or notice required by RESPA can be provided electronically in accordance with the E-SIGN Act. See also 24 C.F.R. § 3500.23. The E-SIGN Act is briefly discussed at § 1461, above.

- Second Written Notice. The second written notice must be sent by first-class mail and must contain all of the same information that is required by the first written notice. The second written notice must be sent at least 30 days after the mailing of the first written notice.

- No Demonstration of Hazard Insurance Coverage. The servicer must not have received any demonstration of hazard insurance coverage (as discussed below) by the end of 15 days after the date that the second written notice was mailed.

  If the servicer has received any demonstration of hazard insurance coverage within that time period, then it cannot force-place the insurance.

- Example of Force-Placement Time Line. If the first written notice is mailed on March 1, the soonest that the second written notice can be mailed is March 31 (*i.e.*, 30 days after the first written notice was mailed on March 1). Assume that the second written notice is mailed on April 1. If so, the borrower would have until the end of April 16 to demonstrate that he/she has hazard insurance (*i.e.*, 15 days following April 1). As a practical matter, this means that the servicer would not be able to force-place the insurance until the next day, April 17.

  The process for force-placing hazard insurance is similar to, but more detailed than, the process for force-placing flood insurance. If a lender or servicer of a designated loan determines that the building or mobile home and any personal property securing the loan are not covered by flood insurance, or the amount of flood insurance is insufficient, the lender or its servicer must notify

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the borrower that he/she must obtain sufficient flood insurance. If the borrower fails to do so within 45 days after notification, then the lender or servicer must force-place the flood insurance. The borrower may be charged for the insurance premium plus the fees incurred in purchasing the insurance. See, e.g., 12 C.F.R. § 22.7 (OCC regulation).

In practice, most servicers already follow a process of advance borrower notification before they force-place hazard insurance. This usually involves notice to the borrower, giving the borrower 60 days to obtain the insurance on his/her own, and refunding any force-placed insurance premiums for any period of time after the effective date of the borrower's obtaining of insurance coverage. See, e.g., the Fannie Mae Single Family Servicing Guide, Part II, Chapter 6.

- Sufficiency of Demonstration. As discussed above, the servicer cannot force-place the hazard insurance if the borrower makes a demonstration of hazard insurance coverage during the requisite time period. Section 6(l)(2) of RESPA now states that the servicer must accept "any reasonable form of written confirmation" from a borrower of existing insurance coverage. The statute states that this includes the existing insurance policy number together with the identity and contact information for either the insurance company or the insurance agent. The statute states that this also includes any other reasonable form of written confirmation required by the Bureau.

  Historically, most servicers have used strict requirements for determining whether there was sufficient evidence of renewed hazard insurance coverage, such as receipt of an insurance certificate. Under the new standard set forth in § 6(l)(2) of RESPA, the borrower need only provide the servicer with the existing policy number and minimal contact information for either the insurance issuer or agent. Once the borrower has done so, the implication is that the burden shifts to the servicer. That is, the servicer must contact the insurance company or agent, as applicable, and determine whether the hazard insurance policy has been renewed and whether its terms remain sufficient. If the Bureau identifies other methods for confirming the renewal of the hazard insurance policy, the servicer will be required to follow those as well.

  Note that the demonstration of hazard insurance coverage must be written. The servicer is not required to accept an oral communication of the necessary information. However, it would be prudent for the servicer to instruct a borrower who seeks to provide this information orally on how to provide the information in an acceptable written form. Ideally, the servicer will develop a script for its customer servicer representatives to use in these situations.

- Termination of Force-Placed Insurance. If a servicer force-places hazard insurance, the borrower can at any time provide confirmation to the servicer that he/she has existing hazard insurance coverage. Within 15 days of the servicer's receipt of this confirmation, the servicer must (i) terminate the force-placed insurance and (ii) refund all force-placed insurance premiums and related fees paid by the borrower for any period when both the force-placed insurance and the borrower-provided insurance were in effect. See § 6(l)(3) of RESPA.

  This termination and refund obligation is consistent with standard industry practice. The duty to refund, rather than credit, may require a change in some servicers' operations. The duty to refund "related fees" would include any late charges for non-payment of the force-placed insurance premiums once the borrower-provided insurance was in place.

- Clarification with Respect to Flood Disaster Protection Act. Section 6(l)(4) of RESPA states what might otherwise be obvious—that nothing in § 6(l) is to be interpreted to prohibit the servicer from providing a simultaneous or concurrent notice to the borrower if the borrower has failed to obtain required flood insurance under the Flood Disaster Protection Act of 1973, or if the amount of the flood insurance is insufficient.

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A summary of the force-placement provisions required by the OCC regulation implementing the Flood Disaster Protection Act of 1973 is set forth above at § 1461.

The reference to a "simultaneous or concurrent notice" indicates that the flood insurance notice and the hazard insurance notice may each be mailed when required, even if this means that they are going out to the borrower at the same time. This wording also suggests the possibility of placing the flood insurance notice in the same envelope as the hazard insurance notice. In practice, it would be difficult—and potentially very confusing—to combine the two notices into a single notice, because there are different timing requirements under the flood insurance and hazard insurance rules.

- Limitations on Force-Placed Insurance Charges. Section 6(m) of RESPA states that all charges related to force-placed hazard insurance must be bona fide and reasonable. Excluded from this rule are any charges that are subject to state regulation as the business of insurance.

  This language indicates that § 6 of RESPA does not prohibit the imposition of charges to cover certain costs incurred by the servicer in force-placing the hazard insurance. There are limitations on these charges. First, § 6(m) itself states that these charges must be bona fide and reasonable, a standard for which the statute provides no further guidance. A similar standard—"bona fide and reasonable in amount"—is used by Regulation Z in determining whether certain real estate related fees may be excluded from the finance charge. See 12 C.F.R. § 226.4(c)(7). This standard indicates that the charges must be lawful, actually incurred for the services rendered, and market-based. Second, state law may restrict or prohibit these charges. In this regard, state laws that are more protective of consumer rights are not inconsistent with RESPA and are not preempted. See 12 U.S.C. § 2616. Third, the mortgage contract should be reviewed to determine whether it restricts or prohibits these charges. Servicers should remain cognizant of the fact that charges imposed with respect to force-placed insurance have been a fertile source of litigation in the past.

  The exclusion of charges that are subject to state regulation as the business of insurance includes, for example, an insurance company's premium rates for force-placed insurance that are filed with, and approved by, a state insurance commissioner in accordance with the state's insurance law.

- Increase in Penalty Amounts. The statutory penalties imposed for any violation of § 6 of RESPA have been doubled. The statutory damages for an individual action have been increased from $1,000 to $2,000. The statutory damages for a class action have been increased from $1,000 to $2,000 per class member, with the maximum statutory damages increasing from $500,000 to $1,000,000 (but not more than 1% of the servicer's net worth). In both individual and class actions, statutory damages are imposed in the case of a pattern or practice of noncompliance with § 6. See §§ 6(f)(1)(B) and 6(f)(2)(B) of RESPA.

  Section 6 of RESPA governs the servicing disclosure statement, notice of transfer of servicing and related procedures, QWRs, the new servicer prohibitions discussed above, the new requirements and limitations for force-placed insurance discussed above, and the administration of escrow accounts.

  The doubling of the statutory damages under § 6 of RESPA is consistent with the increase in certain statutory damages under § 130 of TILA. See § 1416 of the Dodd-Frank Act, which is discussed in more detail in our mortgage origination user guide.

- Decrease in Response Times. Section 1463(c) modifies the response times for responding to QWRs under § 6(e) of RESPA. Specifically, the time period for providing a written acknowledgment of receipt of a QWR has been decreased from 20 days to 5 days. The time period for responding to a QWR has been decreased from 60 days to 30 days. The 30-day period can be extended by not more than 15 days if the servicer notifies the borrower of the extension and the reasons for the delay in response. The extension notice must be sent before the end of the 30-day period.

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The reduction in QWR response times is a significant "sleeper" provision in the Dodd-Frank Act. As noted above, some borrowers (or their lawyers) have routinely deluged servicers with voluminous and burdensome information requests styled as QWRs to thwart the collection process or in an effort to generate liability for non-compliance with the QWR rules under § 6(f) of RESPA and 24 C.F.R. § 3500.21(f). The reduction in QWR response times will impose further pressure on servicers who are responding to these requests. Servicers will need to consider the adequacy of their staffing in light of the new QWR response times.

The ability to exercise the 15-day extension for responding to a QWR will depend on the existence of one or more valid reasons for doing so. Those reasons must be stated in the extension notice to the borrower, and should be memorialized in the servicer's records. Examples of valid reasons would likely include delays caused by one or more of the following: (i) the servicer is experiencing an unusually high volume of QWRs; (ii) information necessary to respond to the QWR is located in a remote location; or (iii) information necessary to respond to the QWR resides with an unaffiliated person. A chronically understaffed servicing department that routinely requires 15-day extensions may be at risk of challenge.

Prompt Refund of Escrow Accounts Upon Payoff. Section 1463(d) modifies § 6(g) of RESPA, which generally governs the administration of escrow accounts. The amended provision states that, within 20 business days of loan payoff, the servicer must return to the borrower any balance in the escrow account that is within the servicer's control, or credit those funds to a new escrow account being established with a new mortgage loan to the same borrower from the same lender.

The servicer is obligated to refund or credit the escrow balance within 20 business days of loan payoff. This time frame contrasts with the current 30-day period for refunding or crediting escrow funds after an escrow account analysis discloses a surplus. See 24 C.F.R. § 3500.17(f)(2).

The statute does not provide guidance regarding when the new lender will be regarded as the "same lender." The "same lender" is an easy concept to apply in the case of a portfolio lender that refinances its own loan, but what about a lender that sells a loan and then continues to service that loan? An analogous situation arises under 12 C.F.R. § 226.23(f)(2), which exempts a loan from the TILA right of rescission if it consists of a refinancing by the "same creditor." In that context, the same creditor means "the creditor to whom the [loan] was initially made payable." This would cover a creditor that sells a loan but continues to service that loan. The same creditor is also construed to include any successor to the original creditor by merger, consolidation or acquisition. See Paragraph 226.23(f)-4 of the Regulation Z Commentary.

For information regarding the definition of a "business day," see discussion of § 1463, above.

Historical Note: In 1995, HUD stated that where there is a refundable surplus for an escrow account, it is not permissible to give the borrower the option of crediting the surplus to principal. See 60 Fed. Reg. 8812, 8814 (Q&A "m") (Feb. 15, 1995).

Section 1464. Truth in Lending Act Amendments

(a) Requirements for Prompt Crediting of Home Loan Payments- Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by inserting after section 129E (as added by section 1472) the following new section:

`Sec. 129F. Requirements for prompt crediting of home loan payments

`(a) In General- In connection with a consumer credit transaction secured by a consumer's principal dwelling, no servicer shall fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, except as required in subsection (b).

`(b) Exception- If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.'.

(b) Requests for Payoff Amounts- Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.), as amended by this title, is amended by inserting after section 129F (as added by subsection (a)) the following new section:

`Sec. 129G. Requests for payoff amounts of home loan

`A creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower.'.

Analysis. Section 1464 adds new provisions to TILA that require prompt crediting of home loan payments and prompt responses to requests for loan payoff amounts.

- Requirements for Prompt Crediting of Home Loan Payments. Section 1464 adds a new § 129F to TILA.

  - In General. Section 129F requires a servicer to credit a payment to a loan as of the date of receipt. There is an exception where a delay in crediting does not result in any charge to the consumer or in a negative report to a consumer reporting agency. Section 129F applies to any consumer credit transaction that is secured by the consumer's principal dwelling.

    The new statute is the same as the Board's existing regulation. See 12 C.F.R. § 226.36(c)(1)(i) and Paragraph 226.36(c)(1)(i)-1, 2 and 3 of the Regulation Z Commentary.

    Most details relating to the prompt crediting of payments are not addressed by § 129F. The Regulation Z Commentary provisions for the Board's existing regulation are likely to apply, as follows:

    - The servicer need not post the payment on a particular date. The servicer is only required to credit the payment as of the date of receipt. See Paragraph 226.36(c)(1)(i)-1 of the Regulation Z Commentary.

    - The new statute states that a delay in crediting the payment is not impermissible if the delay in crediting does not result in any charge to the consumer or in a negative report to a consumer reporting agency. For this purpose, a "charge" to the consumer would include items such as late charges, additional interest, or similar penalties. See Paragraph 226.36(c)(1)(i)-1 of the Regulation Z Commentary.

    - Payments are to be credited in accordance with the legal obligation between the creditor and consumer. The legal obligation is determined by applicable state or other law. See Paragraph 226.36(c)(1)(i)-2 of the Regulation Z Commentary.

      For high-cost mortgage loans, see also § 129 of TILA, as amended by § 1433 of the Dodd-Frank Act. This provision clarifies the late charge imposition rules when the note provides that payments are first applied to any past due principal balances. If the consumer fails to make a payment, and then subsequently resumes making payments, but has not paid all past due installments, the creditor may impose a separate late payment charge for any principal due (without deduction due to late fees or related fees) until the default is cured. Section 1433 of the Dodd-Frank Act is discussed in more detail in our mortgage origination user guide.

    - The "date of receipt" is the date that the check, other payment instrument, electronic fund transfer, or other means of payment reaches the servicer. When the funds are actually received by the servicer is not relevant in this regard. See Paragraph 226.36(c)(1)(i)-3 of the Regulation Z Commentary.

    The Regulation Z Commentary provisions for the Board's existing regulation are similar to the prompt crediting rule for open-end credit set forth in 12 C.F.R. § 226.10. That regulation was amended by the Board earlier in 2010, and the new regulation and related Commentary provisions are somewhat more detailed. See 75 Fed. Reg. 7658 (Feb. 22, 2010). It is possible that the regulations to implement § 129F will pick up some of these more detailed provisions.

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- Exception. If a servicer specifies in writing its requirements for the making of payments, but the consumer pays in some other manner, and the servicer accepts the non-conforming payment, the servicer "shall credit the payment as of 5 days after receipt."

  Once again, the new statute is the same as the Board's existing regulation. See 12 C.F.R. § 226.36(c)(2) and Paragraphs 226.36(c)(2)-1, 2 and 3 of the Regulation Z Commentary.

  Most details relating to the crediting of non-conforming payments are not addressed by § 129F. The Regulation Z Commentary provisions for the Board's existing regulation are likely to apply as follows:

  - Examples of reasonable requirements for the crediting of payments include: (i) requiring that payments be accompanied by the account number or payment coupon; (ii) setting a cut-off hour for payments to be received; (iii) setting different cut-off hours for payments by mail or payments in person; (iv) stating that only checks or money orders should be sent by mail; (v) stating that payments must be made in U.S. dollars; and (vi) identifying a particular post office box or other address for payments. See Paragraph 226.36(c)(2)-1 of the Regulation Z Commentary.

    Note that it is unlawful to require that payments be made via preauthorized electronic transfers as a condition of credit. See 15 U.S.C. § 1693k and 12 C.F.R. § 205.10(e). However, "a creditor may offer a program with a reduced annual percentage rate or other cost-related incentive for an automatic repayment feature, provided the program with the automatic repayment feature is not the only loan program offered by the creditor for the type of credit involved." See Paragraph 205.10(e)(1)-1 of the Regulation E Commentary.

  - Payment requirements must be reasonable, and it should not be difficult for most consumers to make conforming payments. A 5:00 p.m. cut-off hour for payments by mail at the designated address would be reasonable. See Paragraph 226.36(c)(2)-2 of the Regulation Z Commentary.

  - If the servicer has not specified requirements for making payments, payments may be made at any location where the servicer conducts business; at any time during the servicer's normal business hours; and by cash, money order, draft, or similar instrument in properly negotiable form (or by electronic fund transfer, if the servicer and consumer have so agreed). See Paragraph 226.36(c)(2)-3 of the Regulation Z Commentary.

  The Regulation Z Commentary provisions for the Board's existing regulation are similar to the crediting of non-conforming payments rule for open-end credit set forth in 12 C.F.R. § 226.10. That regulation was amended by the Board earlier in 2010, and the new regulation and related Commentary provisions are somewhat more detailed. See 75 Fed. Reg. 7658 (Feb. 22, 2010). It is possible that the regulations to implement § 129F will pick up some of these more detailed provisions. Note, however, that there is one significant difference between the existing Commentary and § 129F versus 12 C.F.R. § 226.10—the existing Commentary and § 129F(b) state that servicer "shall credit the [non-conforming payment] *as of* 5 days after receipt," while § 226.10(b)(4) states that the creditor "shall credit the [non-conforming payment] *within* five days of receipt" (emphasis added). It remains to be seen whether the existing Commentary and § 129F(b) will be interpreted in accordance with their literal terms.

Requests for Payoff Amounts of Home Loans. Section 1464 adds a new § 129G to TILA. It states that an accurate payoff balance ("payoff statement") for a home loan must be provided within a reasonable time, but in no case more than seven business days after receiving a written request from or on behalf of the consumer.

Section 129G is somewhat similar to the Board's existing regulation at 12 C.F.R. § 226.36(c)(1)(iii). However, while the Board's existing regulation applies to the payoff balances for consumer credit transactions secured by principal

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dwellings, § 129G applies to all home loans. The term "home loan" is not defined, but will likely be interpreted to mean any loan secured by a dwelling, whether or not it is the principal dwelling.

Both § 129G and the Board's existing regulation state that the payoff statement must be provided within a "reasonable time." Section 129G establishes an absolute cut-off of seven business days for sending the statement. The Regulation Z Commentary takes a somewhat more flexible approach and does not set an absolute cut-off. It states that a reasonable time under most circumstances would be five business days, but that a longer time frame may be reasonable when, for example, the servicer is experiencing an unusually high volume of refinancing requests. See Paragraph 226.36(c)(1)(iii)-1 of the Regulation Z Commentary. Hopefully, the Board will find a way to provide some additional flexibility in its implementing regulations notwithstanding the wording of the new statute.

The new payoff statement rule in § 129G applies when a payoff statement request is from "or on behalf of" the consumer. This is substantively the same as the Board's existing rule, which applies when the request is "from the consumer or any person acting on behalf of the consumer." The existing Regulation Z Commentary gives examples of a person who is authorized by the consumer to obtain the payoff statement, such as an attorney representing the consumer, a non-profit counseling center, or a creditor that is refinancing the consumer's loan. The Commentary also states that the servicer may take reasonable measures to verify the requestor's identity and to obtain the consumer's authorization before the "reasonable time" period begins to run. See Paragraph 226.36(c)(1)(iii)-2 of the Regulation Z Commentary.

The existing Regulation Z Commentary allows the servicer to specify reasonable requirements for making payoff requests, including the following examples (i) that the request be in writing (this requirement is set forth in § 129G itself) and (ii) that the request be directed to a particular mailing address, e-mail address, or fax number specified by the servicer, or orally to a telephone number specified by the servicer. If the consumer does not follow the servicer's reasonable requirements, a longer time frame for responding to the request "would be reasonable." See Paragraph 226.36(c)(1)(iii)-3 of the Regulation Z Commentary. It is expected that the Board will continue to follow this approach with the new statute.

Both § 129G and the existing Board regulation provide that the payoff statement must be accurate. The existing Regulation Z Commentary clarifies this by stating that the payoff statement must be accurate "when issued." See Paragraph 226.36(c)(1)(iii)-4 of the Regulation Z Commentary. It is expected that the Board will continue to follow this approach with the new statute.

The maximum seven-day delivery requirement for home loans in § 129G contrasts with the more stringent five-day delivery requirement for high-cost mortgages in § 129(t)(2) of TILA, which was added by § 1433 of the Dodd-Frank Act. Section 1433 is discussed in more detail in our mortgage origination user guide.

Section 1465. Escrow Included in Repayment Analysis

Section 128(b) of the Truth in Lending Act (15 U.S.C. 1638(b)) is amended by adding at the end the following new paragraph:

`(4) REPAYMENT ANALYSIS REQUIRED TO INCLUDE ESCROW PAYMENTS-

`(A) IN GENERAL- In the case of any consumer credit transaction secured by a first mortgage or lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, for which an impound, trust, or other type of account has been or will be established in connection with the transaction for the payment of property taxes, hazard and flood (if any) insurance premiums, or other periodic payments or premiums with respect to the property, the information required to be provided under subsection (a) with respect to the number, amount, and due dates or period of payments scheduled to repay the total of payments shall take into account the amount of any monthly payment to such account for each such repayment in accordance with section 10(a)(2) of the Real Estate Settlement Procedures Act of 1974.

`(B) ASSESSMENT VALUE- The amount taken into account under subparagraph (A) for the payment of property taxes, hazard and flood (if any) insurance premiums, or other periodic payments or premiums with respect to the property shall reflect the taxable assessed value of the real property securing the transaction after the consummation of the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction), if known, and the replacement costs of the property for hazard insurance, in the initial year after the transaction.'.

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Analysis. Section 1465 adds a new subsection to § 128(b) of TILA. Section 128(b) generally prescribes standards relating to the form and timing of disclosures.

- In General. Section 128(b)(4) states that when disclosing the payment schedule required by § 128(a) of TILA for any consumer credit transaction secured by a first lien on a principal dwelling (excluding open-end credit plans and reverse mortgages) for which an escrow account is required, that payment schedule shall take into account the amount of the periodic escrow payments for the loan. The escrow payments are to be calculated in accordance with § 10(a)(2) of RESPA.

  Section 10(a)(2) of RESPA generally limits the maximum amount that a borrower can be required to pay into the escrow account each month plus the amount of the allowable cushion. More detailed requirements are imposed by HUD Regulation X, including the duty to use aggregate accounting in conducting escrow account analyses. See 24 C.F.R. § 3500.17(c).

  The requirements of § 128(b)(4), which is added by § 1465, appear to be inconsistent with the requirements of § 128(a) as added by § 1419 of the Dodd-Frank Act. As discussed above, § 128(b)(4) as added by § 1465 states that when disclosing the payment schedule required by § 128(a) for any consumer credit transaction secured by a first lien on a principal dwelling (excluding open-end credit plans and reverse mortgages) for which an escrow account is required, that payment schedule shall take into account the amount of the periodic escrow payments for the loan. In contrast, § 128(a), as added by § 1419, which applies to ARMs with escrow accounts, requires the disclosure of both initial and fully-indexed payment schedules *with, and without,* the escrow. Further, § 128(b)(4), as added by § 1465, states that the escrow payments are to be calculated in accordance with § 10(a)(2) of RESPA. In contrast, § 128(a), as added by § 1419, is silent regarding the calculation of the escrow payments, although it would certainly be logical to calculate those payments in accordance with § 10(a)(2) of RESPA and 24 C.F.R. § 3500.17(c). The Board's implementing regulations will need to sort out these differences.

  On August 16, 2010, the Board issued an interim rule under the Mortgage Disclosure Improvement Act of 2008 governing loans that are secured by real property or a dwelling. For these loans, a new § 226.18(s) of Regulation Z will govern. Section 226.18(s) requires an interest rate and payment summary for these mortgage transactions, rather than an exact payment schedule reflecting every payment due for every phase of the loan (as required under current § 226.18(g) of Regulation Z). The payment summary must include payments with tax and insurance escrows. Compliance with the new rule is optional until January 30, 2011. Compliance is mandatory for applications received on or after that date. For more details relating to the interim rule, see http://www.mofo.com/files/Uploads/Images/100820InterimRule.pdf. The Board will need to resolve any differences between its interim rule and the requirements of §§ 1419 and 1465 of the Dodd-Frank Act.

Assessment Value. In determining the dollar amount of the escrow payments to be included in the TILA disclosure statement's payment schedule, those payments are to be based on the taxable assessed value of the real property security, including the value of any improvements on the property or to be constructed (and whether or not the improvements are to be financed by the loan in question) and the replacement costs of the property for hazard insurance in the initial year after the transaction.

This is largely the same standard required for the calculation of escrow payments in the new disclosure under § 129D(h) of TILA, discussed above under § 1461, except that § 129D(h) uses the term "*or* the replacement costs of the property" while § 128(b)(4) of TILA uses the term "*and* the replacement costs of the property for hazard insurance, *in the initial year after the transaction*" (emphasis added). The Board's regulations will almost undoubtedly construe the two provisions in the same way.

There is a glitch in the wording of § 128(b)(4)(B). Section 128(b)(4)(A) applies to any consumer credit transaction secured by a first lien on a principal dwelling (excluding open-end credit plans and reverse mortgages), which necessarily includes non-real property dwellings such as mobile homes. However, when defining how to calculate the escrow payments, § 128(b)(4)(B) refers to the "taxable assessed value of the *real property*" (emphasis added).

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The basis for valuing a principal dwelling that is not real property will be left to the Board's implementing regulations.

See discussion regarding § 1461 above regarding the escrow payment calculations under § 129D(h) versus the escrow payment calculations under 24 C.F.R. § 3500.17(c)(7).

Once again, § 128(b)(4), as added by § 1465, is not consistent with § 128(a), as added by § 1419. As discussed above, § 128(b)(4), as added by § 1465, defines the basis for valuing the property when calculating escrow payments while § 128(a), as added by § 1419, is silent regarding this issue. It is likely that the Board's regulations will use the valuation directions established by § 128(b)(4) for all purposes relating to the calculation of escrow payments to be disclosed in the TILA disclosure statement.

Subtitle G – Mortgage Resolution and Modification

Section 1481. Multifamily Mortgage Resolution Program

(a) Establishment- The Secretary of Housing and Urban Development shall develop a program under this subsection to ensure the protection of current and future tenants and at-risk multifamily properties, where feasible, based on criteria that may include--

(1) creating sustainable financing of such properties, that may take into consideration such factors as--

(A) the rental income generated by such properties; and

(B) the preservation of adequate operating reserves;

(2) maintaining the level of Federal, State, and city subsidies in effect as of the date of the enactment of this Act;

(3) providing funds for rehabilitation; and

(4) facilitating the transfer of such properties, when appropriate and with the agreement of owners, to responsible new owners and ensuring affordability of such properties.

(b) Coordination- The Secretary of Housing and Urban Development may, in carrying out the program developed under this section, coordinate with the Secretary of the Treasury, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Federal Housing Finance Agency, and any other Federal Government agency that the Secretary considers appropriate.

(c) Definition- For purposes of this section, the term `multifamily properties' means a residential structure that consists of 5 or more dwelling units.

(d) Prevention of Qualification for Criminal Applicants-

(1) IN GENERAL- No person shall be eligible to begin receiving assistance from the Making Home Affordable Program authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 et seq.), or any other mortgage assistance program authorized or funded by that Act, on or after 60 days after the date of the enactment of this Act, if such person, in connection with a mortgage or real estate transaction, has been convicted, within the last 10 years, of any one of the following:

(A) Felony larceny, theft, fraud, or forgery.

(B) Money laundering.

(C) Tax evasion.

(2) PROCEDURES- The Secretary shall establish procedures to ensure compliance with this subsection.

(3) REPORT- The Secretary shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate regarding the implementation of this provision. The report shall also describe the steps taken to implement this subsection.

Analysis. Section 1481 does two unrelated things. First, it requires HUD to establish a program for troubled multifamily properties. Second, it excludes persons with certain criminal records from participating in the U.S. Treasury Department's Making Home Affordable Program ("HAMP").

- Establishment. HUD is directed to develop a program to ensure the protection of current and future tenants and at-risk multifamily properties, where feasible. Sample criteria to be considered by HUD are set forth in the statute. See § 1481(a).

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While this language is vague, it is apparently directed at multifamily mortgages that are at risk of foreclosure.

- Coordination. HUD may coordinate its efforts with the Treasury Department, FDIC, Board, the Federal Housing Finance Agency, and other appropriate federal agencies. See § 1481(b).

- Definition. A "multifamily property" is defined as a residential structure of five or more dwelling units. This definition is consistent with industry practice. See § 1481(c).

- Prevention of Qualification for Criminal Applicants. Section 1481(d) prevents persons with certain criminal records from participating in the HAMP.

  - In General. A person is not eligible to begin receiving assistance from the HAMP, or any other mortgage assistance program authorized or funded by that Act, on or after 60 days after enactment of the Dodd-Frank Act if he/she has been convicted within the last 10 years of any of the following in connection with a mortgage or real estate transaction: (i) felony larceny, theft, fraud, or forgery; (ii) money laundering; or (iii) tax evasion.

    This prohibition is effective on September 19, 2010, which is 60 days after July 21, 2010, the date that the Dodd-Frank Act was signed by the President.

  - Procedures. The Secretary is required to establish procedures to ensure compliance with this prohibition.

    The "Secretary" is not defined. That being the case, the "Secretary" means the Secretary of the Treasury. See § 2(14) of the Dodd-Frank Act.

    The new statute does not explain the steps that a servicer will be required to take to ensure compliance with the prohibition. For example, is it sufficient to ask a HAMP applicant if he/she has been convicted of such crimes, or is it necessary to use a third party search company to make this determination? Presumably, the Treasury will issue a supplemental directive under the HAMP to tell servicers what they are expected to do.

    If a servicer obtains criminal conviction information for the purpose of determining whether the borrower is eligible to participate in the HAMP, then, depending on the particular source of the criminal conviction information and the circumstances of the borrower's loan, it may be necessary to provide a FCRA adverse action notice in accordance with 15 U.S.C. § 1681m or under the Equal Credit Opportunity Act and Regulation B in accordance with 12 C.F.R. § 202.9. The two adverse action notices can be combined into a single notice.

    Once § 1481(d) becomes effective, the wording of that section suggests that it should not affect the HAMP permanent modifications that were already in place before the effective date, because the prohibition states that the convicted person shall not "be eligible to *begin* receiving assistance from the [HAMP]" (emphasis added). A case can be made for applying this same analysis even where the borrower was in a trial modification on the effective date of § 1481(d), on the theory that a borrower in a trial modification is already receiving a form of assistance from the HAMP.

    Report. The Secretary is required to report on the implementation of § 1481(d) to the House Financial Services Committee and the Senate Banking Committee.

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Section 1482. Home Affordable Modification Program Guidelines

(a) Net Present Value Input Data- The Secretary of the Treasury (in this section referred to as the `Secretary') shall revise the supplemental directives and other guidelines for the Home Affordable Modification Program of the Making Home Affordable initiative of the Secretary of the Treasury, authorized under the Emergency Economic Stabilization Act of 2008 (Public Law 110-343), to require each mortgage servicer participating in such program to provide each borrower under a mortgage whose request for a mortgage modification under the Program is denied with all borrower-related and mortgage-related input data used in any net present value (NPV) analyses performed in connection with the subject mortgage. Such input data shall be provided to the borrower at the time of such denial.

(b) Web-based Site for NPV Calculator and Application-

(1) NPV CALCULATOR- In carrying out the Home Affordable Modification Program, the Secretary shall establish and maintain a site on the World Wide Web that provides a calculator for net present value analyses of a mortgage, based on the Secretary's methodology for calculating such value, that mortgagors can use to enter information regarding their own mortgages and that provides a determination after entering such information regarding a mortgage of whether such mortgage would be accepted or rejected for modification under the Program, using such methodology.

(2) DISCLOSURE- Such Web site shall also prominently disclose that each mortgage servicer participating in such Program may use a method for calculating net present value of a mortgage that is different than the method used by such calculator.

(3) APPLICATION- The Secretary shall make a reasonable effort to include on such World Wide Web site a method for homeowners to apply for a mortgage modification under the Home Affordable Modification Program.

(c) Public Availability of NPV Methodology, Computer Model, and Variables- The Secretary shall make publicly available, including by posting on a World Wide Web site of the Secretary--

(1) the Secretary's methodology and computer model, including all formulae used in such computer model, used for calculating net present value of a mortgage that is used by the calculator established pursuant to subsection (b); and

(2) all non-proprietary variables used in such net present value analysis.

Analysis. Section 1482 requires the Secretary of the Treasury to take a series of steps to establish basic levels of transparency for the Net Present Value (“NPV”) model used for the HAMP.

- Net Present Value Input Data. The Treasury Secretary is directed to revise the supplemental directives and other guidance for the HAMP to require a servicer to provide each borrower whose modification request is denied with all borrower-related and mortgage-related data that is inputted into any NPV analysis that is performed. The data is to be provided to the borrower at the time of the denial. See § 1482(a).

  This is the first of several steps that Treasury must take to remove some of the mystery from the NPV “black box.” The NPV test compares the net present value of cash flows expected from a modification to the net present value of cash flows expected in the absence of a modification. If the net present value of the modification scenario is greater, the NPV result is positive and the servicer is required to offer a HAMP modification.

  As written, § 1482 is not self-executing. Thus, HAMP servicers will not be required to comply until Treasury issues the necessary supplemental directive. Presumably, the directive will identify precisely what information must be provided to the borrower and the form of that information.

  The statute states that the required information is to be provided to the borrower “at the time of [the] denial.” It is likely that the Treasury’s supplemental directive will provide some flexibility in the transmittal of the required information.

  In some instances, a borrower will be rejected for a HAMP modification before an NPV test is performed (*e.g.*, because the borrower refuses to submit necessary information). Section 1482 requires the servicer to provide “all . . . input data *used in any net present value (NPV) analysis performed*” (emphasis added). In these situations, because no NPV analysis is performed, it should not be necessary to provide NPV input data to the borrower under § 1482.

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When borrowers receive the NPV input data as required by § 1482, some of them will likely come back to their servicers and contest the accuracy of that data. As a result, § 1482 will likely prove to be burdensome for servicers.

- Web-Based Site for NPV Calculator and Application.

  - NPV Calculator. The Treasury Secretary is directed to establish and maintain a web site that provides an NPV calculator that is based on Treasury's NPV methodology. Borrowers must be able to enter information into the calculator and be advised whether they would be approved for a modification under the HAMP using that methodology.

    Because the NPV calculator on the web site is only required to be "based on the Secretary's methodology for calculating such [NPV] value," the results produced by this calculator may be different than the results produced when the servicer runs the NPV test. Note that large servicers of non-GSE loans are permitted to customize their NPV models based on the unique performance of their own portfolios. In addition, data inputted into the online NPV calculator may change by the time that the servicer runs the NPV test, again creating the possibility of differing results. A borrower who achieves a positive NPV test using the on-line NPV calculator will likely be disappointed by a negative NPV result from the servicer, and may be inclined to challenge that result. For this reason as well, § 1482 will likely prove to be burdensome for servicers.

  - Disclosure. The Treasury's web site must disclose that the servicer may use an NPV methodology that is different than the one used by the Treasury.

    Notwithstanding this disclosure, borrowers who pass the Treasury's NPV test but fail the servicer's NPV test will likely be dissatisfied and may be inclined to question the servicer's results.

  - Application. The Treasury Secretary is required to make a reasonable effort to include on the same web site a method for borrowers to apply for a modification under the HAMP.

    This may be difficult because various servicers have different requirements for HAMP applications.

- Public Availability of NPV Methodology, Computer Model, and Variables. The Treasury Secretary is required to make publicly available, including by publishing on a web site, the methodology, and the computer model (including all formulas) used for the online calculator, as well as all nonproprietary variables used in the NPV analysis. See § 1482(c).

  Once again, variances between the Treasury's published methodology and the servicer's actual methodology may lead to different results, increasing the likelihood of borrower complaints.

  Nothing in § 1482(c) requires, or prohibits, the publication of this information on the same web site as the web site that is used for the NPV calculator. Presumably, Treasury will be inclined to use a single web site.

Section 1483. Public Availability of Information about the Making Home Affordable Program

(a) Revisions to Program Guidelines- The Secretary of the Treasury (in this section referred to as the `Secretary') shall revise the guidelines for the Home Affordable Modification Program of the Making Home Affordable initiative of the Secretary of the Treasury, authorized under the Emergency Economic Stabilization Act of 2008 (Public Law 110-343), to provide that the data being collected by the Secretary from each mortgage servicer and lender participating in the Program is made public in accordance with subsection (b).

(b) Public Availability- Data shall be made available according to the following guidelines:

(1) Not more than 14 days after each monthly deadline for submission of data by mortgage servicers and lenders participating in the Program, reports shall be made publicly available by means of a World Wide Web site of the Secretary, and by submitting a report to the Congress, that shall include the following information:

(A) The number of requests for mortgage modifications under the Program that the servicer or lender has received.

(B) The number of requests for mortgage modifications under the Program that the servicer or lender has processed.

(C) The number of requests for mortgage modifications under the Program that the servicer or lender has approved.

(D) The number of requests for mortgage modifications under the Program that the servicer or lender has denied.

(2) Not more than 60 days after each monthly deadline for submission of data by mortgage servicers and lenders participating in the Program, the Secretary shall make data tables available to the public at the individual record level. The Secretary shall issue regulations prescribing--

(A) the procedures for disclosing such data to the public; and

(B) such deletions as the Secretary may determine to be appropriate to protect any privacy interest of any mortgage modification applicant, including the deletion or alteration of the applicant's name and identification number.

Analysis. Section 1483 is intended to provide additional transparency to the HAMP.

- Revisions to Program Guidelines. The Treasury Secretary is directed to revise the HAMP guidelines so that the data collected from participating servicers and lenders is made public. See § 1483(a).

- Public Availability. Within 14 days after each monthly deadline for submission of data by participating servicers and lenders, a report will be put onto a Treasury web site. A copy of the report will be submitted to Congress. The report will include, for each servicer or lender, the number of modification requests received, processed, approved, and denied. Within 60 days after each monthly deadline for submission of data by participating servicers and lenders, the Treasury Secretary is required to make data tables available to the public at the individual loan level. The Treasury Secretary is directed to issue regulations prescribing (i) the procedures for disclosure of loan level data, and (ii) the redactions of data that are necessary to protect the privacy of individuals, including names and identification numbers. See § 1483(b).

  The aggregate reports and loan level data published in accordance with § 1483 will result in considerable scrutiny and analysis by government agencies and interest groups. The data of individual servicers will be compared, and those providing fewer modifications will likely be subject to further scrutiny and questions. There have been a number of lawsuits filed against servicers for their alleged failure to approve HAMP modifications but these have, to date, proven largely unsuccessful.

Section 1484. Protecting Tenants at Foreclosure Extension and Clarification

The Protecting Tenants at Foreclosure Act is amended--

(1) in section 702 (12 U.S.C. 5220 note)--

(A) in subsection (a)(2), by striking `, as of the date of such notice of foreclosure'; and

(B) in subsection (c), by inserting after the period the following: `For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.'; and

(2) in section 704 (12 U.S.C. 5201 note), by striking `2012' and inserting `2014'.

Analysis. Section 1484 amends three provisions of the Protecting Tenants at Foreclosure Act of 2009 ("Protecting Tenants Act"). All three amendments are designed to benefit tenants at the expense of successors in interest to foreclosed properties.

The Protecting Tenants Act is Title VII of the Helping Families Save Their Homes Act of 2009 (Division A of Pub. L. No. 111-22). The Protecting Tenants Act is designed to give certain protections to bona fide tenants residing in dwellings that are foreclosed upon.

- Tenants Who are Protected. Prior to enactment of the Dodd-Frank Act, the Protecting Tenants Act stated that the successor in interest to a foreclosed property assumes its interest subject to certain rights of any bona fide tenant "as of the date of such notice of foreclosure." See § 702(a)(2) of the Protecting Tenants Act. Section

1484(1)(A) deletes the language in quotes. As a result, the successor in interest to a foreclosed property assumes its interest subject to certain rights of any bona fide tenant, *regardless of the time* that the tenant becomes a bona fide tenant. For example, if Tenant #1 signs a bona fide lease before the notice of foreclosure, and Tenant #2 is a bona fide tenant who assumes that lease after the notice of foreclosure, this amendment now gives Tenant #2 the protections of § 702(a)(2).

- Date of a Notice of Foreclosure. As discussed above, the successor in interest to a foreclosed property assumes its interest subject to certain rights of any bona fide tenant. The rights in question are the rights to occupy the property (with one exception) until the end of the remaining term of any bona fide lease that was entered into "before the notice of foreclosure." See § 702(a)(2)(A) of the Protecting Tenants Act. Prior to enactment of the Dodd-Frank Act, a reasonable interpretation of the quoted language meant that the bona fide lease had to have been entered into before the initial notice that commenced the foreclosure process. Section 1484(1)(B) has now defined the "date of a notice of foreclosure" to be the date on which "complete title" is transferred to the successor person or entity as a result of the foreclosure process. This means that the relevant date is at the *end* of the foreclosure process (*e.g.*, the recording of a foreclosure deed to the successor in interest) rather than the *beginning* of the foreclosure process. If the foreclosure process involves a subsequent right of redemption, the "date of a notice of foreclosure" may well be the date that the right of redemption finally expires without being exercised, since that may be the date on which "complete title" is transferred to the successor in interest.

  As a result of this amendment, a bona fide lease that is entered into one day before "complete title" is transferred to the successor in interest will receive the protections of § 702(a)(2)(A).

- Extension of Sunset. Prior to enactment of the Dodd-Frank Act, the Protecting Tenants Act had a sunset date of December 31, 2012. Section 1484(2) has extended the sunset date by two years, until December 31, 2014.

Contacts

Joseph Gabai
(213) 892-5284
jgabai@mofo.com

Sean Ruff
(202) 778-1665
sruff@mofo.com

Andrew Smith
(202) 887-1558
andrewsmith@mofo.com

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