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Joint Agencies Issue Final Flood Rule

On June 22, 2015 a press release was issued by the federal banking regulatory agencies announcing the approval of a joint final rule that modifies regulations that apply to loans secured by properties located in special flood hazard areas. The final rule implements provisions of the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA) relating to the escrowing of flood insurance payments and the exemption of certain detached structures from the mandatory flood insurance purchase requirement. The final rule also implements provisions in the Biggert-Waters Flood Insurance Reform Act of 2012 (the Biggert-Waters Act) relating to the force placement of flood insurance.

The final rule is very similar to the proposed rules that were issued in October 2013 and October 2014, respectively. One major difference is that the final rule does not address the private flood insurance provisions in the Biggert-Waters Act that were addressed in the October 2013 proposal. However, the agencies have announced that they plan to address the private flood insurance provisions in a separate rulemaking. The following is an overview of the key requirements under this final rule.

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CFPB Delays TRID Implementation

On July 21, 2015, the CFPB issued the final rule moving the effective date of TILA-RESPA Integrated Disclosures to October 3rd, 2015. The change was prompted by an administrative error as the CFPB failed to submit the necessary form to Congress and the Congressional Accountability Office at least 60 days prior to the original August 1st effective date. As with the original date, October 3rd is a Saturday which the CFPB believes will assist implementation by giving institutions time over the weekend to launch new systems, configurations and to test systems.

A few technical amendments were also made and can be viewed at:

http://www.consumerfinance.gov/newsroom/cfpb-finalizes-two-month-extension-of-know-before-you-owe-effective-date/

CRCM Training Credits for SHPCO TRID Training

For those of you who participated in the TILA/RESPA Integrated Disclosures Rule seminars that Steve H. Powell & Company has recently presented, continuing education credit hours have been approved as follows: Half Day/condensed seminar-4.75 CRCM credits and Full Day seminar-7.25 CRCM credits.

Regulation D, Excessive Activity, and Transaction Fees

Financial institutions are required to monitor savings and money market accounts for Regulation D transaction limitations and many institutions implement an excessive withdrawal fee to encourage customers not to exceed the federal limits. As a reminder, money market and savings accounts are limited to not more than six transfers or withdrawals made by preauthorized, automatic, telephonic agreement, order or instruction, or by check, debit card, or similar order made by the depositor and payable to third parties per statement cycle of at least four weeks. However, if the fee is based specifically on exceeding the Regulation D limitations, institutions should closely review how the fee is assessed on checks written to cash and processed at the teller line.

As many deposit operations employees know, checks written to cash and processed at the teller line are not always properly coded as a teller transaction. Incorrect coding of the transaction as a third party check causes the system to recognize the transaction as restricted by Regulation D which may incorrectly count towards the excessive withdrawal fee. Teller training should focus on the importance of correctly coding transactions. Institutions may also want to consider either adjusting the fee to charge for a certain number of all withdrawals per monthly statement cycle or have the fee manually adjusted when the statement is reviewed monthly for Regulation D transaction monitoring. If the bank was to change the fee structure to charging for a certain number of all withdrawals per monthly statement cycle, a thirty day advance notice would be required by Regulation DD.

The FTC Updates Its Website to Include Identity Theft Tools

Identity theft continues to rank as the top consumer complaint reported to the Federal Trade Commission ("FTC"), at 13% of total complaints, as evidenced in the *Stats & Data 2014* summary report published by the FTC. This preponderance of identity theft related complaints is corroborated in the *2014 Consumer Sentinel Network Data Book* ("CSN Data Book") which incorporates data from not only the FTC but also the Consumer Financial Protection Bureau, Better Business Bureau, and other state law enforcement organizations and federal agencies.

According to the CSN Data Book, the southeastern region of the United States represented eight of the top fifteen metropolitan statistical areas reporting identity theft related complaints (seven out of these eight are located in the state of Florida). Accompanying this data is the recent trend of massive data breaches such as the ones experienced by Target, Home Depot, and most recently the Office of Personnel Management.

To combat the prevalent threat of identity theft the FTC has prepared a checklist to help consumers protect themselves in the event information may be compromised. The checklist includes step-by-step instructions from placing initial fraud alerts on credit reports to contacting federal agencies and local law enforcement.

As swift action by the potential victim is paramount to preventing losses, the checklist categorizes the steps into immediate actions followed by subsequent actions that culminate into the creation of an Identity Theft Report. This Identity Theft Report is a combination of an Identity Theft Affidavit received from the FTC and the police report which will protect the potential victim from fraudulent information resulting from identity theft, debt collectors pursuing an account related to identity theft, as well as allow the potential victim to place an extended fraud alert on his or her credit report.

The FTC's identity theft checklist can be found at: https://www.identitytheft.gov/. Frontline staff can direct customers who have been victims of ID Theft to the FTC's website to get mitigation processes started as soon as possible.

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The entire final rule can be viewed at:
https://www.fdic.gov/news/board/2015/2015-06-16_notice_sum_c_fr.pdf

Escrow Requirement
The final rule will require regulated lending institutions to escrow flood insurance premiums and fees for certain loans secured by residential improved real estate or mobile homes that are made, increased, extended or renewed on or after January 1, 2016.

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Statutory exemptions to the mandatory escrow requirement include loans that are in a subordinate position to a senior lien secured by the same property for which flood insurance is being provided; loans secured by residential improved real estate or a mobile home that is part of a condominium, cooperative, or other project development, provided certain conditions are met; loans that are extensions of credit primarily for a business, commercial, or agricultural purpose; home equity lines of credit; nonperforming loans; and loans with terms not longer than 12 months. If a regulated lending institution later determines that an exception no longer applies, it must require the escrow of flood insurance premiums and fees as soon as reasonably possible. Further, the final rule requires non-exempt institutions to provide borrowers of covered residential loans outstanding as of January 1, 2016, a notice of the option to escrow flood insurance premiums and fees. The final rule includes new and revised sample notice forms and clauses concerning the escrow requirement and the option to escrow.

The final rule provides a small lender exemption where certain regulated lending institutions are exempt from the mandatory escrow requirements. This requirement is different from the exemption for escrow provided for small creditors under Regulation Z higher priced mortgage escrow requirements; therefore, a lender must be exempt under both criteria to continue to avoid the escrow requirements.

In order to meet the small lender exemption under the final flood rule a regulated lending institution must meet specific criteria in a three pronged test. The regulated lending institution must have had total assets of less than $1 billion as of December 31 of either of the two prior calendar years, and met the following criteria:

- On or before July 6, 2012 was not required under Federal or State law to deposit taxes, insurance premiums, fees, or any other charges in an escrow account for the entire term of any loan secured by residential improved real estate or a mobile home and,
- On or before July 6, 2012 did not have had a policy of consistently and uniformly requiring the deposit of taxes, insurance premiums, fees, or any other charges in an escrow account for any loans secured by residential improved real estate or a mobile home.

Many stakeholders have had questions about whether a lender who began a policy of consistently and uniformly requiring the deposit of taxes, insurance premiums, fees, or any other charges in an escrow account after July 6, 2012 could still qualify for the small lender exception. Based on the final rules, which reference a lender's policy on or before July 6, 2012, an institution could qualify for the exception if the policy of requiring escrow began after July 6, 2012, provided the lender meets the size threshold. Transitional rules also are included that provide guidance on timing of compliance with the various escrow rules where there has been a change in the regulated lending institution's status in qualifying from the small lender exemption from one year to the next.

Questions have arisen for some small lender institutions that began escrowing for HPML loans on or before July 6, 2012 and have subsequently stopped to receive the small creditor exemption under Truth in Lending for HPML loans. The questions have merit as the small lender flood escrow exemption date of July 6, 2012 occurred before the small creditor exemption was provided for escrow under Truth in Lending; and the flood exemption is vague in specifying and defining "the term of the loan" for the first part of the exemption test and "consistently and uniformly" requiring escrow in the second. Some small creditors were escrowing on or before July 6, 2012 for HPMLs and only required it on HPMLs.

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The question to be answered is whether or not these institutions were required by Federal law to escrow for "the term of the loan" and whether or not institutions that only required escrow on HPMLs required escrow "consistently and uniformly." Further clarification is needed to answer these questions from the regulatory agencies. If the agencies deem that "yes" is the required answer to either of the exemption questions, then the institution would likely be required to reinstitute an escrow program for covered loans under the final flood rules and would ultimately lose the HPML escrow exemption under Truth in Lending. Due to the risk involved, a financial institution that falls into this category would be best served to seek specific guidance from its primary federal regulator based upon its attendant circumstances before claiming the small lender exemption for the flood insurance rules.

Exemption for Certain Detached Structures

The final rule also includes a statutory exemption from the requirement to purchase flood insurance for a structure that is a part of a residential property if that structure is detached from the primary residence and does not also serve as a residence. For these purposes, "a structure that is a part of a residential property" is a structure used primarily for personal, family, or household purposes, and not used primarily for agricultural, commercial, industrial, or other business purposes. A structure is considered "detached" from the primary residential structure if it is not joined by any structural connection to that structure. Whether or not a structure will "serve as a residence" will be based upon the good faith determination of the regulated lending institution that the structure is intended for use or actually used as a residence, which generally includes sleeping, bathroom, or kitchen facilities. However, under HFIAA, lenders may nevertheless require flood insurance on the detached structures to protect the collateral securing the mortgage for safety and soundness purposes.

Force-placement of Flood Insurance

Lastly, the final rule includes the Biggert-Waters Act provisions on force placement. These provisions clarify that regulated lending institutions have the authority to charge a borrower for the cost of force-placed flood insurance coverage beginning on the date on which the borrower's coverage lapses or becomes insufficient. The final rule also stipulates the circumstances under which a lender must terminate force-placed flood insurance coverage and refund payments to a borrower. Within 30 days of receiving a confirmation of a borrower's existing flood insurance coverage, the regulated lending institution or its servicer is required to notify the insurance provider to terminate any force-placed flood insurance purchased. The institution is required to refund all premiums and fees paid by the borrower for any force-placed insurance purchased during any period where the borrower's flood insurance coverage and the force-placed coverage were each in effect. For purposes of confirming a borrower's existing flood insurance coverage, a regulated lending institution or its servicer must accept from the borrower an insurance policy declarations page that includes the existing flood insurance policy number and the identity of, and contact information for, the insurance company or agent.

Flood Insurance Webinar

We are offering a webinar covering this final flood insurance rule to help institutions prepare for the changes and avoid costly pit falls. Additional information will follow with details about the webinar and how to register.

SFHD Form Expired

The existing Standard Flood Hazard Determination Form (FEMA form 086-0-32) used by financial institutions to document their flood certifications expired on May 30, 2015. FEMA has provided instructions to use the current form until the new form becomes available. Once the new form is published, FEMA's webpage https://www.fema.gov/media-library/assets/documents/225 will be updated with the new form and with additional information on transitioning to the new form. When the form is updated banks should contact their third party flood determination providers to verify that the provider will update their flood determination form in a timely manner.

CFPB Continues Enforcement of Lender Compensation Rules

The CFPB is being aggressive with enforcement actions on large lenders that are violating lender compensation rules within Truth in Lending. A financial institution should be cautious in its methodology for paying compensation to lenders that may be found to be based on transaction terms or a proxy for transaction terms. Several entities have been overly aggressive in compensation perks primarily related to loan originator reimbursements and expense accounts. The following companies recently were assessed large civil money penalties:

- November 13, 2014: CFPB files a suit against Franklin Loan Corporation, to pay $730,000 for giving its employees illegal bonuses for steering consumers into loans with higher interest rates.
- June 3, 2015: Guarantee Mortgage Corporation - a civil penalty of $228,000 for paying its branch managers based, in part, on the interest rates of the loans they closed.
- June 6, 2015: RMP Mortgage, Inc. and its CEO, Erwin Robert Hirt – a proposed CMP for illegally paying bonuses and higher commissions to loan originators to encourage them to steer consumers into costlier mortgages. The proposed order that, if entered by the court, would require RPM to pay $18 million in redress to consumers and a $1 million civil penalty, and would require Hirt to pay an additional $1 million civil penalty.

This is just the tip of the iceberg. Many more CMPs and lawsuits will follow as the CFPB continues its enforcement actions. Financial institutions should expect more scrutiny from their primary regulator such as the FDIC and OCC as they are increasingly reviewing lender compensation plans. It is recommended that financial institutions document compensation practices in the form of lender compensation agreements and take special care to ensure that compensation incentive is not based on loan terms. Recordkeeping should also be maintained for bonuses paid to individual loan originators to ensure compliance with the record retention requirements of Truth in Lending.

Common compensation pitfalls for paying loan originators include bonuses that are based on year-end net income as year-end net income contains fees that are based on consumer mortgage transaction terms. The CFPB has stated that net income is a proxy for loan terms when paying bonuses if the financial institution's net income contains fees from mortgage transactions and interest earned on consumer mortgage transactions. There are exceptions for paying individual loan originators bonuses based on net income including a 10% of total compensation rule and a de minimis exception. An explanation of the exceptions and other rules can be found in the following links for the CFPB's compliance guide for loan originator compensation rules and FDIC's director training.

http://files.consumerfinance.gov/f/201401_cfpb_complaince-guide_loan-originator.pdf

https://www.fdic.gov/regulations/resources/director/technical/lo.html

Email us at compliancenewsletter@shpco.net with any questions or comments.

Visit our website at www.shpco.net to register your email for the Compliance Pipeline!