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MORTGAGE SERVICING RULES AMENDED

On August 4, 2016, the CFPB issued final rules amending the mortgage servicing provisions of RESPA Regulation X and TILA Regulation Z. At the same time, the Bureau issued an interpretive rule under the Fair Debt Collection Practices Act (FDCPA) relating to compliance with certain provisions by mortgage servicers who are also debt collectors under the FDCPA. Like the original mortgage servicing rules, the amendments are lengthy and complex. The CFPB issuance is 901 pages. Some changes will become effective 12 months after publication of the rule in the Federal Register, and others will take effect 18 months after publication. As of October 18, 2016, publication in the Federal Register had not yet occurred. In this article, we will summarize some of the key provisions in the amendments. But first, it might help to briefly review the basics of the current servicing rules.

<u>The Current Mortgage Servicing Rules.</u>
Issued in 2013 pursuant to Dodd-Frank and effective January 10, 2014, the CFPB rules generally apply to mortgage loan servicers including creditors and assignees servicing their own loans. The rules are split between Reg. Z and Reg. X. The Reg. Z mortgage servicing provisions apply to any closed-end, dwelling secured consumer credit transaction, first or subordinate lien, and whether or not the dwelling is the borrower's principal dwelling. The Reg. X servicing provisions apply to any "mortgage loan" which is defined as a "federally related mortgage loan" covered by RESPA, subject to the usual RESPA exemptions for business purpose loans, loans secured by 25 acres or more, and construction or other temporary financing, and excluding in this case, HELOCs. The Reg. X servicing amendments apply to first and subordinate lien loans except that the initial servicing disclosure and the servicing transfer disclosures apply only to first lien loans. Some of the Reg. X requirements apply only to loans secured by the borrower's principal residence.

The current Reg. Z servicing rules include:

- <u>Prompt payment crediting and payoff statements</u>. Servicers must promptly credit periodic payments as of the date of receipt. Pyramiding of late fees is prohibited. Servicers are responsible for providing an accurate payoff to a consumer within a reasonable time, no later than seven business days, after receiving a written request. Prompt payment crediting and payoff statement requirements also apply to open-end consumer HELOCs.

- ARM adjustment notices. On ARM loans, servicers must provide the first rate/payment adjustment notice at least 210 but no more than 240 days before the first payment at the adjusted level comes due. For subsequent rate adjustments, notice must be provided between 60 and 120 days before a payment at a new level becomes due. The rule sets forth detailed requirements for the contents and format of both notices.

- Periodic billing statements. A periodic statement must be provided for each billing cycle. The rule sets forth detailed requirements for timing, form, and content of the billing statements and includes model forms. On fixed rate loans, a coupon or payment book may be used in lieu of sending billing statements, and the rule specifies the content of the payment book.

The current Reg. X servicing provisions include:

- Servicing transfer disclosures. When loan servicing is transferred, each transferor servicer and transferee servicer must provide the borrower with a notice of transfer that meets the timing, content and format requirements specified in the rule.

- Written servicing and information management policies and procedures. Servicers must establish and maintain comprehensive written policies and procedures for servicing loans, maintaining records, and managing information. Policies and procedures must be tailored to the size, scope, and nature of the servicer's operations and be reasonably designed to achieve the objectives and satisfy the requirements detailed in the rule.

- Error Resolution and Information Requests. Servicers must acknowledge receipt of consumer requests for information and notices of error and, either, provide the requested information or investigate and correct any errors and provide the borrower with written notice of the corrective action taken, within the time limits specified in the rule. Delinquent loan payments cannot be required to be made before responding. Fees for responding to error notices are prohibited, and if the alleged error relates to a loan payment, no adverse information regarding the payment may be reported to the credit bureau for at least 60 days.

- Force-placed insurance notices. No charge may be imposed for force-placed insurance unless the servicer has a reasonable basis to believe the borrower has failed to maintain required hazard insurance. The servicer must send two written notices to the borrower and not have received any verification that the borrower has insurance. Notices must meet the content, format and timing requirements in the rule, and the rule contains model forms. If a borrower provides proof of coverage, any overlapping force-placed insurance must be canceled and premiums refunded within 15 days. All charges must be bona fide and reasonable, and any costs other than regulated insurance premiums must be for services actually performed and bear a reasonable relationship to the servicer's costs of providing the service. If there is an escrow for insurance, the servicer must advance funds to the escrow account to pay insurance premiums even when the borrower is delinquent on the loan.

- Early intervention with delinquent borrowers. For a loan secured by the borrower’s principal dwelling, a servicer must make good faith efforts to establish live contact with the borrower by the time the account is 36 days delinquent and inform the borrower, where appropriate, that loss mitigation options may be available. In addition, the servicer must send written notice by the time the loan is 45 days delinquent. The rule specifies the content of the written notice and provides model forms.

- Continuity of contact with delinquent borrowers. For a loan secured by the borrower's principal dwelling, a servicer must have and maintain reasonable written policies and procedures for providing a delinquent borrower with access to personnel who can assist them with any available loss mitigation options. The policies and procedures must be reasonably designed to achieve certain objectives specified in the rule.

- Loss mitigation procedures. For a loan secured by the borrower's principal dwelling, a servicer is subject to limitations on initiating or continuing foreclosure and to procedural requirements when offering any loss mitigation option. Basically, a loss mitigation option is any alternative to foreclosure offered by the investor/owner of the mortgage available through the servicer. No specific loss mitigation options are required, but any that are offered must meet the procedural requirements of the rule.

The rule sets time limits for consideration of loss mitigation applications. Generally, servicers must acknowledge receipt within 5 days, inform the borrower of any additional information needed and the deadline for providing it, and evaluate the borrower for all available loss mitigation options within 30 days after receiving the completed application. A borrower must be given 7 to 14 days to accept or reject any mitigation offered, depending on how far in advance of a scheduled foreclosure the completed application was received. If the application is denied, written notice of the denial must be given to the borrower which must include a description of any appeal rights and, in some cases, a statement of the specific reasons for the denial. The borrower may appeal the denial, and any appeal must be reviewed by different personnel than those who decided the initial application. The borrower must be given notice of the determination on the appeal within 30 days, and if the appeal results in an offer of loss mitigation, the borrower must be given 14 days to accept or reject.

- Delinquency and foreclosure. Servicers are prohibited from starting foreclosure until the loan is at least 120 days delinquent. The rule prohibits "dual tracking", or proceeding with foreclosure while at the same time dealing with a borrower on a pending loss mitigation request. Also, a servicer may not seek a judgment of foreclosure, move for an order of sale, or conduct a foreclosure sale if the borrower is performing under the terms of any permanent or temporary loss mitigation agreement.

Small servicer exceptions under the current rule. A "small servicer" is one that, together with any affiliates, services 5,000 or fewer mortgage loans in a calendar year, and only services mortgage loans originated or owned by it or its affiliate. Loans serviced on a pro bono basis for an unaffiliated entity, such as Habitat for Humanity, do not count for the threshold determination. Small servicers are exempt from Reg. Z requirements for billing statements/payment books and are also exempt from Reg. X requirements for written loan servicing and information management policies and procedures, early intervention with delinquent borrowers, continuity of contact with delinquent borrowers, and loss mitigation procedures. Small servicers are still subject to the 120 day foreclosure rule and the other Reg. Z and Reg. X requirements listed, with one small twist on force-placed insurance. Small servicers may force place insurance when the borrower is in default rather than having to advance funds to an existing escrow account, but only if the force-placed insurance costs less than the amount the servicer would disburse from escrow to maintain the borrower's existing coverage.

Key Provisions of the 2016 Mortgage Servicing Rule Amendments.

The most significant changes contained in the 2016 amendments include the following:

- Successors in interest. Under the current rule, a servicer's written servicing policies and procedures must reasonably ensure that upon receiving notice of a borrower's death, the servicer can promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property securing the loan. The 2016 amendments make three sets of changes relating to successors in interest.

First, the Bureau defines the term "successor in interest" for purposes of Reg. X and Reg. Z in a fashion consistent with the types of transfers that are protected from enforcement of a due-on-sale clause under section 341(d) of the 1982 Garn-St.Germain Act. A successor in interest is a person to whom an ownership interest in a property securing a mortgage loan is transferred from a borrower in one or more of the following ways: (i) a transfer by inheritance or through a right of survivorship on the death of a joint tenant or tenant by the entirety; (ii) a transfer to a relative resulting from the death of a borrower; (iii) a transfer where the spouse or children of the borrower become an owner; (iv) a transfer resulting from a divorce, legal separation, or property settlement agreement by which the spouse of the borrower becomes an owner; or (v) a transfer into an *inter vivos*, or living, trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of occupancy rights. While small servicers are generally exempt from the requirement to maintain written servicing policies and procedures, the Bureau noted that small servicers must still respond in a timely manner to requests for information which might include providing a written description of the documents the servicer reasonably requires to confirm a successor's identity and ownership interest in the property.

Second, the 2016 amendments clarify how a mortgage servicer confirms a successor in interest's identity and ownership interest. Generally, a servicer must respond to a written request from a person who may be a successor in interest by providing that person with a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property. A servicer's policies and procedures must be reasonably designed to ensure the servicer can: (i) upon receipt of notice of the borrower's death or a transfer of the property, promptly facilitate communication with any potential or confirmed successors in interest, (ii) promptly determine what documents the servicer requires to confirm the person's identity and ownership interest, (iii) promptly provide to any potential successor in interest a description of those documents and how the person may submit them; (iv) upon receipt of those documents, promptly make a determination and notify the person that his or her status is confirmed, that additional documents are needed (and what those documents are), or that the servicer has determined the person is not a successor in interest.

Third, the 2016 amendments extend the protections of the Reg. X and Z mortgage servicing rules to successors in interest once their status has been confirmed. Essentially, a successor in interest is treated as a "borrower" under Reg. X and as a "consumer" under Reg. Z for purposes of the mortgage servicing requirements, including the right to receive periodic statements and other notices, prompt crediting of payments and payoff statements, responding to notices of error and information requests, communication with delinquent borrowers, and loss mitigation. A servicer may not condition its review of a loss mitigation application upon a confirmed successor in interest agreeing to assume liability on the loan, but may condition consummating a loan modification or other loss mitigation option on assumption by the successor.

While confirmed successors in interest are entitled to receive periodic statements and notices such as escrow statements, rate/payment adjustment notices, force-placed insurance notices, etc., duplicative notices are not required. If the servicer is already sending those notices to another borrower on the loan, it is not required to also send those notices to a successor, but the servicer may still have to provide that information to the successor in response to a written request for information. A servicer may also disclose non-public personal information relating to the mortgage loan to a confirmed successor in interest, but may redact financial, contact, or location information about other borrowers to protect their privacy.

- <u>Definition of delinquency</u>. The Bureau is finalizing a general definition of delinquency that applies to all of the servicing provisions of Reg. X and Reg. Z. Delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, until such time as no periodic payment is due and unpaid. When a servicer receives a payment and applies it to the oldest payment outstanding, that payment advances the delinquency date and shortens the delinquency period for purposes of the 120 day foreclosure rule. However, a borrower's failure to pay the entire loan balance following a servicer's acceleration of maturity and demand for payment in full would begin or continue a delinquency under the 2016 amendments.

- <u>Requests for information</u>. The 2016 amendments clarify how a servicer must respond to requests for information asking for ownership information for loans in a securitization trust for which Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held. Under the current rule, when the borrower asks for information on the owner of a mortgage which has been sold in the secondary market and securitized, the servicer must respond with information about the name of the trust, and the name, address, and appropriate contact information for the trustee. The amendment clarifies that when Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust containing the loan, the servicer may respond by simply providing the name and contact information for Fannie or Freddie, as applicable, without naming the trust, unless the borrower specifically requests that information.

- <u>Force-placed insurance</u>. The Bureau is finalizing amendments to the force-placed insurance disclosures and model forms to account for situations where a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance on the property. Additionally, servicers now will have the option to include a borrower's mortgage loan account number on the notices. The Bureau also is finalizing several technical edits to correct discrepancies between the model forms and the text of the rule contained in § 1024.37.

- Early intervention. The Bureau is clarifying the early intervention live contact obligations for servicers to establish, or make good faith efforts to establish, live contact so long as the borrower remains delinquent. A servicer is expected to make good faith efforts to establish live contact with a delinquent borrower no later than 36 days after each missed payment date/period of delinquency. But, good faith efforts may take into consideration the length of the delinquency and the borrower's responsiveness to previous attempts at contact.

The Bureau is also clarifying requirements regarding the frequency of the written early intervention notices. Under the current rule, a servicer must provide multiple early intervention written notices in some cases. The 2016 amendments clarify that a servicer is not required to send more than one written notice within a 180 day period. A servicer must send early intervention written notices at least once every 180 days to a borrower who is 45 days or more delinquent. If at the end of any 180 day period, the borrower is less than 45 days delinquent, a notice must be provided again no later than 45 days after the payment due date. The requirements and time frames continue to apply even when there is a servicing transfer during the delinquency period.

In addition, where the borrower is in bankruptcy or has invoked his or her cease communication rights under the FDCPA, the Bureau is finalizing exemptions for servicers from complying with the live contact obligations but requiring servicers to provide written early intervention notices under certain circumstances. A servicer is exempt from the live contact requirements if either: (i) any borrower on the loan is in bankruptcy, or (ii) the servicer is also a debt collector under the FDCPA with respect to the loan and the borrower has requested the servicer cease further communications with respect to the loan. If either of those situations apply, the servicer is also exempt from requirements for providing written early intervention notices if no loss mitigation option is available. If a loss mitigation option is available, then the notice requirements are modified. However, if both conditions are met (the borrower is in bankruptcy and the borrower has invoked his cease communications rights under the FDCPA with a servicer who is a debt collector), the servicer is exempt from the written notice requirements even if a loss mitigation option is available. Compliance with the early intervention requirements must resume again once the bankruptcy case is closed or dismissed or the borrower reaffirms the debt in bankruptcy.

- Loss mitigation. The Bureau is finalizing several amendments relating to the loss mitigation requirements. The final rule:

(1) requires servicers to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application;

(2) modifies an existing exception to the 120-day prohibition on foreclosure filing to allow a servicer to join the foreclosure action of a

superior or subordinate lienholder (the current rule says subordinate);

(3) clarifies how servicers select the reasonable date by which a borrower should return documents and information to complete an application;

(4) clarifies that, if a borrower timely submits a complete loss mitigation application more than 37 days before a foreclosure sale, and even where the servicer has already made the first notice or filing for foreclosure: (i) the servicer must not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, including where the sale proceeding is conducted by a third party, unless one of the specified circumstances is met (i.e., the borrower's loss mitigation application is properly denied, withdrawn, or the borrower fails to perform on a loss mitigation agreement); (ii) conduct of a foreclosure sale is a violation of the rule absent one of the specified circumstances; (iii) a servicer must instruct foreclosure counsel promptly not to make any further dispositive motion, to avoid obtaining a ruling or order on a pending dispositive motion, and to prevent conduct of a foreclosure sale, unless one of the specified circumstances is met; and (iv) a servicer is responsible for the actions or inactions of its legal counsel in that regard;

(5) requires servicers to provide written notice to a borrower within five business days after receiving a complete loss mitigation application which: (i) indicates the servicer has received a complete application; (ii) provides the date of completion, a statement that the servicer expects to complete its evaluation within 30 days of the completion date and explains that the borrower is entitled to certain specific foreclosure protections and may be entitled to additional protections under State or Federal law; and (iii) clarifies that the servicer might need additional information later, in which case the evaluation could take longer and the foreclosure protections could end if the servicer does not receive the information as requested;

(6) sets forth how servicers must attempt to obtain third-party documents or information not in the borrower's control and evaluate a loss mitigation application while waiting for third party information; requires servicers to exercise reasonable diligence to obtain the information and prohibits servicers from denying borrowers solely because a servicer lacks required information not in the borrower's control, except under certain circumstances such as where the servicer is unable to obtain the needed third party information for a significant period of time despite reasonable diligence; requires servicers in this circumstance to complete all possible steps in the evaluation process within the 30 days, notwithstanding the lack of the required third-party information; requires that servicers promptly provide a written notice to the borrower if the servicer lacks required third party information 30 days after receiving the borrower's complete application and cannot evaluate the application in accordance with applicable requirements established by the investor/owner of the mortgage loan; and requires servicers to notify borrowers of their determination on the application in writing promptly upon receipt of the third party information it previously lacked;

(7) clarifies that servicers may offer a short-term repayment or forbearance plan based upon an evaluation of an incomplete loss mitigation application and requires written notice of the specific payment terms and duration of the plan;

(8) clarifies that servicers may stop collecting documents and information from a borrower for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the investor/owner, the borrower is ineligible for that option (remember, that the current rule generally requires the servicer to evaluate the borrower for all potentially available loss mitigation options); and clarifies that servicers may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference for a particular option; and

(9) addresses and clarifies how loss mitigation procedures and timelines apply when a transferee servicer receives a mortgage loan for which there is a loss mitigation application pending at the time of a servicing transfer (essentially, the various timeframes, deadlines and responsibilities carry through unchanged to the transferee servicer).

- Prompt payment crediting. The 2016 amendments clarify how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Periodic payments made pursuant to temporary loss mitigation programs must continue to be credited according to the loan contract and could, if appropriate, be credited and treated as partial payments, while periodic payments made pursuant to a permanent loan modification must be credited under the terms of the permanent loan agreement.

- Periodic statements. The Bureau is finalizing several requirements relating to periodic statements. The 2016 rule:

(1) clarifies certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified, to, generally, conform the disclosure of the amount due with the Bureau's understanding of the legal obligation in each of those situations, including that the amount due may only be accurate for a specified period of time when a mortgage loan has been accelerated;

(2) requires servicers to send modified periodic statements, or coupon books when permissible, to consumers who have filed bankruptcy (the current rule exempts servicers from providing statements to borrowers in bankruptcy), subject to certain exceptions, with substantial modifications to the content of the statements which will vary depending on whether the consumer is a debtor in a chapter 7 or 11, or a chapter 12 or 13, bankruptcy case; and includes sample periodic statement forms that servicers may use;

(3) exempts servicers from the periodic statement requirement for borrowers in bankruptcy when: (i) the consumer requests the servicer to stop sending statements; (ii) the bankruptcy plan provides for avoidance of the lien, surrender of the home or otherwise does not provide for payment of pre-bankruptcy arrearage or maintenance of payments due under the loan; (iii) the court orders the lien avoided, lifts the automatic stay or requires the servicer to stop sending statements; or (iv) the consumer files a statement of intent to surrender the home and has made no payments on the loan since filing bankruptcy; and

(4) exempts servicers from the periodic statement requirement for charged-off mortgage loans provided the servicer does not charge any additional fees or interest on the account and sends a final statement which

includes additional disclosures related to the effects of charge-off (e.g., the loan has been charged off, no fees or additional interest will be imposed, the lien remains in place, and the borrower remains liable for the loan and related obligations such as taxes).

- Small servicer. The 2016 amendments finalize certain changes to the small servicer determination. The small servicer exemption generally applies to servicers who service 5,000 or fewer mortgage loans for all of which the servicer is the creditor or assignee. The final rule excludes mortgage loans voluntarily serviced without compensation for a non-affiliate, even if the non-affiliate is not a creditor or assignee, from being counted toward the 5,000 loan limit. The 2016 amendments also exclude from consideration seller-financed transactions where the seller-financer meets the requirements of §1026.36(a)(5) (generally, a natural person, trust or estate that, among other things, provides seller financing for the sale of only one property in any 12 month period). Servicers that would otherwise qualify for small servicer status may retain their exemption while servicing those transactions.

- Principal residence. The 2016 amendments clarify that if property securing the loan ceases to be the principal residence of the borrower, then those protections under Reg. X that only apply to the principal residence will no longer apply, but the Bureau notes that a vacant property may still be considered to be the borrower's principal residence.

In addition to the changes discussed above, the final rule also makes technical corrections and minor clarifications to wording throughout several provisions of Regulations X and Z that generally are not substantive in nature.

The requirements relating to successors in interest and periodic statements become effective 18 months after publication of the final rule in the Federal Register. The other changes will become effective 12 months after publication. We plan to discuss the changes in greater detail at a future quarterly meeting.

(Cliff Harrison)

HELOC's REVISITED

Home Equity Lines of Credit ("HELOC's") have been around for a long time. This credit product has proved to be very useful to consumers who wish to access some of the equity in their homes, in many cases a consumer's primary source of wealth.

Of late, HELOC's have gained the attention of lenders due to the special treatment HELOC's receive under recent regulatory changes.

As home values rise after the Great Recession and regulatory changes take effect, we are seeing an increase in the use of HELOC's as a means of meeting a homeowner's credit needs. With that increase have come a number of compliance issues, two of which will be the focus of this article: (1) regulatory requirements for advertising HELOC products; and (2) the substitution of a HELOC product for the more traditional closed-end credit products such as cash-out refinance transactions.

HELOC's, while easy to access, can be complicated to set up properly. A HELOC, like closed-end credit, is subject to a number of general disclosure requirements, as well as certain general open-end credit disclosure provisions of the Truth in Lending Act ("TILA"). In addition, there are specific disclosures unique to HELOC's secured by a consumer's principal dwelling.

Both ease of customer access and somewhat less cumbersome disclosure requirements have resulted in more HELOC offerings. An integral part of any such offering is the advertising of the HELOC to the public. Patsy Parkin and her team have seen a significant increase in such offerings and the consequent advertising – unfortunately not always done properly. Thus, the focus of this article.

Advertising of HELOC's

Advertising of HELOC plans must comply with all standard TILA provisions related to advertising of open-end credit. For instance, the advertisement must truthful. It must mention only those terms the creditor plans to offer. The disclosed advertising terms must be clear and concise. There is no type size or particular placement requirement (other than the "clear and concise" requirement), but there are special formatting requirements for introductory or promotional rate and deferred interest plans.

Trigger Terms

Generally, HELOC advertising requirements are triggered by reference to payment terms (*e.g.*, length of the plan, minimum payment required, etc.) and timing of payments. Reference to finance charges, APRs, or other charges are also trigger terms.

Once a trigger term is used, the advertisement must set forth the following:

- Any loan fee calculated as a percentage of the credit limit, as well as an estimate of other fees that may be imposed. Any such estimate may be stated as either a single dollar amount or a reasonable range;

- Any periodic rate used to calculate the finance charge stated as an APR; and

- The highest APR that can be imposed for a variable-rate plan.

Teaser/Promotional Rates

TILA imposes special advertising requirements in two cases: (1) where an initial rate is advertised that is not based on the index and margin used to make later adjustments; and (2) where a rate is offered that is lower than the rate that would result from the usual formula at any time during the life of a plan. The first is called a "teaser rate;" the second is referred to as a "promotional rate." Teaser rates differ from promotional rates in that they only apply at the beginning of a HELOC plan, while promotional rates may apply at any point in time.

The Initial Rate

An initial rate may be higher or lower than the rate that would be derived from the application of the index and margin used in a variable-rate plan. The use of such initial rate requires the following disclosures:

- The time period that the initial rate will be in effect; and

- A "reasonably current" APR that would have been in effect using the usual index and margin.

These disclosures must appear with equal prominence and in close proximity to the initial rate. A "reasonably current" index and margin is one that was:

- In effect within 60 days of the advertisement for direct mail advertising; or

- Within 30 days for printed, emailed, website or other generally available forms of advertising.

Promotional Rates or Payments

These features to a HELOC require special disclosure too. A promotional rate is a lower rate than would apply at any time during the life of a plan. A promotional payment is any minimum payment that is less than the payment that would normally be required under a variable-rate plan. For fixed-rate plans, it is any payment that is less than the payment that would be required under the plan given an assumed balance.

A HELOC advertisement that contains either a promotional rate or payment must disclose:

- The period of time during which the promotional rate or payment would apply;

- For promotional rates, any APR that would apply under the plan;

- For promotional payments, the amounts and time periods of any payments, using a reasonably current index and margin for variable-rate plans.

Promotional rate disclosures must appear with equal prominence and in close proximity to each listing of the promotional rate or payment. This means you must use the same type size as the promotional rate or payment. To be closely proximate, the disclosure must appear directly above or below the promotional rate or payment. It cannot appear as a footnote.

HELOCs in General.

Although mostly anecdotal, there is some indication that some lenders are shifting in a major way from traditional closed-in credit products to HELOC loans as a means of avoiding some of the more recently adopted regulations dealing with loans secured by a borrower's residence. The Ability to Repay Rule is perhaps the primary driver.

As you know, the Ability to Repay Rule does not apply to HELOCs. However, there is a general prohibition against structuring credit as open-end simply to avoid complying with requirements of TILA.

A creditor offering open-end high-cost (HOEPA) loans is presumed to have complied with the Ability to Repay Rule for open-end high-cost credit if they:

- verify income or assets relied upon;

- verify current obligations;

- use the largest minimum payment assuming the full amount of the credit, the maximum interest rate and only minimum payments; and

- assess repayment ability using either debt-to-income or residual income.

That is a lot to digest, but suffice it to say that structuring your loan portfolio by emphasizing HELOC products may cause problems. If a loan should have been classified as closed-end credit based on its other characteristics, you will not have provided the necessary closed-end disclosures required by TILA. Furthermore, you may find yourself facing a UDAAP allegation by the regulators based on the deceptive use of open-end credit.

In conclusion, HELOC products have a definite place in your business model. They need to be structured, advertised, disclosed and administered carefully. They are not an escape mechanism to avoid recent regulatory requirements. The Compliance Department needs to be involved from the outset in all aspects of offering HELOCs to customers.

(Ed Wilmesherr)

ADA AND WEBSITE ACCESSIBILITY

In meetings past, we have discussed the Americans with Disabilities Act ("ADA") requirement that public accommodations, including banks, provide "auxiliary aids and services" to "ensure effective communication" for consumers with speech, hearing or vision disabilities and how those requirements apply in the context of ATM accessibility. The requirement to provide auxiliary aids and services to disabled consumers also applies to other banking services including bank websites and mobile applications. Electronic banking has become increasingly popular, and now is a good time for banks to review website accessibility, particularly, in light of recent ADA litigation and in anticipation of new regulations.

In 2010, the Department of Justice (DOJ), through its Division of Disability Rights which enforces compliance with the ADA, issued an advanced notice of proposed rulemaking ("ANPR") seeking public comment on website accessibility. The initial proposal was that banks and other public entities could provide disabled consumers with an alternative to website accessibility such as telephone service available 24 hours per day, 7 days per week. It appears that DOJ's view has changed since 2010 as a result of the increased popularity of electronic banking. In recent lawsuits and settlement agreements with public entities, including banks, the DOJ has taken the position that providing an accessible website is required under the ADA as part of the requirement of public entities to provide "auxiliary aids and services" to "ensure effective communications" with those with speech, hearing or vision disabilities.

In April and May of 2016, the DOJ withdrew its 2010 ANPR and issued a Supplemental Advance Notice of Proposed Rulemaking ("SANPR"). Through the SANPR, the DOJ solicited comments on 123 questions, the key issues of which were: the scope of proposed rule; Web Content Accessibility Guidelines 2.0, level AA; the reasonableness of a compliance date two years from the date of publication of a final rule; availability of experts to assist banks and other entities with compliance with Web Content Accessibility Guidelines 2.0; the possibility of different standards for smaller entities; exemptions; the application of new regulations to mobile applications; and the costs and benefits of web accessibility.

The DOJ is also considering an exception for compliance if compliance would: (1) fundamentally alter the nature of the goods or services, or (ii) create an undue burden. It seems highly unlikely that website and/or mobile application accessibility accommodations will be deemed to cause an undue burden to a bank given the resources of most financial institutions. However, if such a determination is made, the bank will be required to provide an alternative method of receiving equal access to the services provided online.

The Web Content Accessibility Guidelines 2.0, level AA ("WCAG 2.0") mentioned by the DOJ is a technical standard used internationally and developed by the Worldwide Web Consortium. The WCAG 2.0 standard has twelve guidelines operating under the four basic principles that the standards must be perceivable, operable, understandable, and robust. If WCAG 2.0 is adopted as the standard under the new regulations, banks will be required to: (1) provide text alternatives for non-text content (such as text describing images); (2) provide alternatives for multi-media such as captions and audio descriptions; (3) present content in different ways without losing the meaning; (4) create content that is easier for users to hear and see; (5) make all website functions available from a keyboard; (6) avoid website content that could potentially cause seizures; (7) provide easier methods for reading and using the website; (8) provide means by which users are able to more easily navigate and find content; (9) provide readable and understandable text; (10) provide website content that is predictable throughout the site; (11) provide error messages and options for correction; and (12) provide tools for users.

While the DOJ has been working on setting appropriate standards for years now, this issue has taken on a new urgency. Plaintiff's law firms are now pursuing banks and other entities alleging ADA violations for failure to provide accessible websites. The Tennessee Bankers Association recently alerted its members to this issue and to suggestions made in September by the American Bankers Association ("ABA") to its members for bank compliance and risk management. The ABA recommended that banks: (1) implement a website accessibility policy (adoption of the WCAG 2.0 standard is recommended); (2) conduct a website audit to determine its level of accessibility according to the proposed regulations; (3) assign an employee with the responsibility of oversight of new and existing electronic information technology accessibility; (4) train appropriate personnel and management; (5) develop and implement a website accessibility plan; (6) develop a webpage dedicated to providing accessibility information including a means by which problems can be reported and consumers can get help; (7) review third party vendor contracts for accessibility requirements; and (8) perform audits, at least annually, for conformance with WCAG 2.0.

It may be tempting to wait for the DOJ to set definitive standards before starting on ADA compliance for websites and mobile banking apps. But, in light of lawsuits being filed by some plaintiff's firms against banks in different parts of the country, it may be wise to start now on developing and implementing a plan website accessibility.

(Memrie Fortenberry)

CFPB ADOPTS PREPAID RULE

On October 5, 2016, the CFPB issued a final rule (the "Prepaid Rule") amending Regulations E and Z to create new consumer protections for prepaid financial products. Effective October 1, 2017, the Prepaid Rule creates extensive new disclosure and consumer protection requirements for prepaid accounts that fall within the scope of the rule. In this article we will discuss the coverage of the rule and briefly summarize the new requirements to allow compliance officers to begin thinking about whether and how the rule may impact their institutions. We will plan on discussing the rule in greater detail at a future quarterly meeting.

Coverage. The Prepaid Rule amends Reg. E to add "prepaid account" as a type of "account" that is subject to the various requirements of Reg. E. Payroll card accounts and government benefit accounts are prepaid accounts under the rule. Also, a prepaid account is any product that meets either of the following descriptions, unless an exception applies:

- an account that is marketed or labeled as "prepaid" and is redeemable upon presentation at multiple, unaffiliated merchants for goods and services or is usable at ATMs;
- an account that meets all of the following:
  - issued on a prepaid basis in a specified amount or is capable of being loaded with funds after issuance;
  - its primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services, conduct transactions at ATMs, or make person-to-person transfers; and
  - is not a checking account, share draft account, or NOW account.

However, if an account meets one or both of those tests, it is not a prepaid account under the rule if any of the following exceptions apply:

- the account is loaded only with funds from a health savings account, flexible spending account, medical savings account, health reimbursement arrangement, dependent care assistance program, or transit or parking reimbursement arrangement;
- the account is established, directly or indirectly, through a third party and is loaded only with qualified disaster relief payments;
- a gift certificate;
- store gift card;
- a loyalty, award or promotional card;
- a general use prepaid card that is both marketed and labeled as a gift card or gift certificate; or
- an account established for distributing needs-tested benefits in a program established under state or local law or administered by a state or local agency.

Since Reg. E only covers accounts established for personal, family or household purposes, an account established for business or commercial purposes will not be a prepaid account under the Prepaid Rule. Note also, that the definition of prepaid account refers to a type of account and is not limited to a card or any other particular means of access.

If an account is a prepaid account covered by the rule, then the general requirements of the Reg. E apply, but with some different and additional requirements concerning disclosures, limited liability, error resolution, and periodic statements. In addition, beginning October 1, 2018, the Prepaid Rule requires certain institutions to post their prepaid account agreements on the Internet and submit them to the Bureau. The Reg. Z changes in the Prepaid Rule address overdraft credit features that may be offered in conjunction with prepaid accounts.

Disclosures. Required disclosures under the rule include "pre-acquisition" disclosures, disclosures which must appear on an access card or device, and initial account opening disclosures. The Prepaid Rule requires certain "pre-acquisition" disclosures be provided to a consumer before the consumer acquires the account. Those disclosures include a short form disclosure and a long form disclosure, both of which must comply with specific content and format requirements. Model forms are provided for both. The short form disclosure contains basic information about the identity of the issuer, the prepaid program, fees, linked overdraft features and other information. The short form disclosures are designed in table format so that they can appear on a card carrier or similar packaging. The long form disclosures include more comprehensive disclosures about all fees, FDIC/NCUA insurance, linked overdraft features, financial institution contact information and other information.

While the short and long form pre-acquisition disclosures must be provided before a consumer acquires a prepaid account, the Prepaid Rule allows the long form disclosure to be given after acquisition for prepaid accounts sold at retail locations other than an office of the issuing financial institution. In that case, the short form disclosure must contain information enabling the consumer to access the long form disclosure via telephone or a website. The pre-acquisition disclosures must be provided electronically for accounts that are opened online or via a mobile device, and in that instance, the rule allows those disclosures to be provided without advance E-Sign consent.

Certain specific disclosures must appear on the card or any access device for the account. If there is not a physical access device, those disclosures must appear on the website, mobile application, or other entry point the consumer uses to electronically access the account. Reg. E initial disclosures must also be provided for prepaid accounts which include all information contained in the long form pre-acquisition disclosure.

Liability Limits. Generally, prepaid accounts must comply with the limitations of liability and error resolution requirements of Reg. E, but with some modifications. The Prepaid Rule extends Reg. E's limited liability and error resolution requirements to all prepaid accounts, including newly established accounts and whether or not the financial institution has completed its customer identification and verification process for the account. Provisional crediting for unverified accounts is not required, but once the prepaid account has been verified, a financial institution must provisionally credit a consumer's account in the amount of any alleged error, minus a maximum of $50, if the institution will take longer than ten days to investigate and determine whether an error has occurred.

Periodic Statements. Generally, the Prepaid Rule requires financial institutions to provide periodic statements for prepaid accounts. However, an exception to this requirement exists if a financial institution makes certain information available to a consumer in other ways. To take advantage of the exception, a financial institution must make account balance information readily available by telephone, make available electronically an account transaction history covering at least 12 months, and make available upon request written account transaction histories covering at least 24 months.

Posting and Submitting Agreements. The Prepaid Rule generally requires issuers to submit to the Bureau any new or amended prepaid account agreement and to notify the Bureau of any withdrawn agreements no later than 30 days after the issuer offers, amends or ceases to offer the agreement. Issuers with fewer than 3,000 open prepaid accounts are exempt from this requirement. Any issuer who is required to submit agreements to the Bureau must also post the account agreement in a prominent and readily accessible location on its website. All issuers must either post prepaid account agreements on their website or provide a consumer with a copy of the agreement no later than five business days after receiving a request for a copy, and the consumer must be able to make the request by phone. The requirement to submit agreements to the Bureau does not become effective until October 1, 2018.

Linked Credit Features. The Prepaid Rule amends Regulations E and Z to regulate overdraft credit features that are offered in connection with prepaid accounts. The rule adds the term "hybrid prepaid credit card" to Reg. Z and sets out specific requirements that apply to those cards. A card that is a hybrid prepaid credit card is also a credit card under Reg. Z. The rule generally requires prepaid account issuers to structure any overdraft credit feature accessible by a hybrid prepaid credit card as a separate credit feature and not as a negative balance to the prepaid account. As a result, an overdraft credit feature may only be structured as a negative balance on a prepaid account if the issuer has a policy and practice of declining to authorize overdrafts and does not impose credit related fees on the asset feature of the prepaid account. Issuers must wait at least 30 days after a prepaid account is registered before soliciting the consumer to link the separate credit feature to the account and must obtain consumer consent to linking a credit feature to a prepaid account. The rule limits how often an issuer may automatically deduct the cardholder's debt under the credit feature from the prepaid account or other deposit balance held by the card issuer to once per month and only pursuant to a written authorization from the cardholder. Consumers must be given at least 21 days to repay debt incurred through the use of a separate credit feature that is an open-end consumer credit plan, and consumers may not be required to set up preauthorized electronic fund transfers to repay credit extended through a separate credit feature. Also, a financial institution that provides a prepaid account with a covered separate credit feature must also offer the same account terms, conditions, and features to prepaid accounts without a covered credit feature within the same prepaid account program. However, the institution may impose higher fees or charges on a prepaid account with a covered separate credit feature.

Like other CFPB regs, the Prepaid Rule is long, dense and full of specific requirements and exceptions. Step one for any institution will be to look at the rule and its products and determine whether it offers any products covered by the new rule. Fortunately, with an October 1, 2017 effective date, we have some time to get ready.

(Cliff Harrison)

IS THE CFPB UNCONSTITUTIONAL? (Don't Celebrate Yet)

In a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit (*PHH Corporation v. Consumer Financial Protection Bureau*), the structure of the CFPB has been called into question. That appellate court found that the Director of the CFPB had been awarded more authority under the Dodd-Frank Act than any other officer in any of the three branches of the U.S. Government, other than the President of the United States, supposedly an unconstitutional grant of authority.

But before the celebration begins, you need to remember several things. First, the Court did not abolish the CFPB; it simply allowed the CFPB to continue to operate as an agency within the Executive Branch of government in much the same fashion as the Justice Department or the Department of Treasury. As such, the Director of the CFPB would be removable by the President. With it seeming more and more likely that Hillary Clinton will be our next President, there would be little chance that substantial changes to the operation of the CFPB will take place. She has publicly stated her support for the CFPB and its consumer protection mission.

On a more technical note, the Court's opinion itself may be flawed. The CFPB has publicly stated that the decision involves a novel finding that has no basis either in constitutional interpretation or prior Supreme Court decisions. It is a fact that a majority of the judges involved in the decision are Republican appointees with conservative leanings. An appeal seems likely, and only time will tell.

Of some benefit may be the Court's ruling that the CFPB is subject to a three-year statute of limitations when it comes to pursuing enforcement actions. The CFPB had taken the position that there was no limit on the length of time it could go back when pursuing consumer protections.

Again, time will tell, but for now and the foreseeable future do not expect to see any significant change in the function of the CFPB. Any celebration is premature.

(Ed Wilmesherr)

MSRCG ANNUAL MEETING TO BE HELD ON NOVEMBER 15, 2016

The MSRCG will hold its November Annual Meeting on November 15, 2016, at The Racquet Club of Memphis in the Large Ballroom located at 5111 Sanderlin Avenue, Memphis, Tennessee. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

As has been our practice over the years, we will have speakers from the various regulatory agencies share with us their insights into a number of topics. A representative of the Federal Reserve Board will address the topics of CRA and Fair Lending compliance. Speakers from the FDIC will cover a variety of topics including common TRID errors and examination issues, UDAAP compliance problems, the use of social media and handling of consumer complaints, as well as a summary of the most common compliance examination findings. PLEASE SEND ANY QUESTIONS YOU WISH TO POSE TO OUR SPEAKERS NO LATER THAN NOVEMBER 8, 2016 ATTN: PATSY PARKIN AT patsy.parkin@butlersnow.com.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, November 10, 2016, so that arrangements for lunch can be finalized. We look forward to seeing you there.

(Ed Wilmesherr)

MRCG ANNUAL MEETING TO BE HELD ON NOVEMBER 17, 2016

The MRCG will hold its Annual Meeting on November 17, 2016, at the Mississippi Sports Hall of Fame & Museum Conference Center, 1152 Lakeland Drive, Jackson, Mississippi. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m..

As has been our practice over the years, we will have speakers from the various regulatory agencies share with us their insights into a number of topics. A representative of the Federal Reserve Board will address the topics of CRA and Fair Lending compliance. Speakers from the FDIC will cover a variety of topics including common TRID errors and examination issues, UDAAP compliance problems, the use of social media and handling of consumer complaints, as well as a summary of the most common compliance examination findings. PLEASE SEND ANY QUESTIONS YOU WISH TO POSE TO OUR SPEAKERS NO LATER THAN NOVEMBER 8, 2016 ATTN: PATSY PARKIN AT patsy.parkin@butlersnow.com.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Friday, November 11, 2016, so that arrangements for lunch can be finalized. We look forward to seeing you there.

(Ed Wilmesherr)

MRCG-MSRCG COMPLIANCE CALENDAR

10/03/2015 – TRID regulations effective	02/16/2017 – MRCG Quarterly Meeting
01/01/2016 – Flood insurance escrow rules effective	02/28/2017 – MSRCG Quarterly Meeting
01/01/2016 – Reg. Z changes to small creditor serving rural/underserved areas effective	04/20/2017 - MRCG-MSRCG Joint Steering Committee Meeting
03/31/2016 – Reg. Z exception for Small Creditor operating in rural or underserved area effective	05/23/2017 - MSRCG Quarterly Meeting
04/01/2016 – Small creditor temporary balloon QM exception expires	05/25/2017 - MRCG Quarterly Meeting
04/01/2016 – Deadline to update CRA public file	07/20/2017 - MRCG-MSRCG Joint Steering Committee Meeting
05/02/2016 – Deadline to submit credit card agreements to be posted on CFPB's website. *For issuers not 10,000 or more accounts	08/17/2017 - MRCG Quarterly Meeting
06/30/2016 – Deadline for notices re: option to escrow flood premiums for existing loans	08/22/2017 - MSRCG Quarterly Meeting
08/10/2016 – Comments due on CFPB proposed rule on annual privacy notices.	09/21/2017 - MRCG-MSRCG Joint Steering Committee Meeting
08/22/2016 – Comments due on CFPB proposed rule on arbitration agreements	10/03/2017 – MLA coverage expands to include credit cards
09/14/2016 – Comments due on CFPB proposed rule on payday, title and high cost installment loans	11/14/2017 - MSRCG Annual Meeting
10/03/2016 – DoD MLA consumer credit rules effective	11/16/2017 - MRCG Annual Meeting
11/15/2016 – MSRCG Annual Meeting	01/01/2018 – Revised HMDA data collection begins
11/17/2016 – MRCG Annual Meeting	05/11/2018 – FinCEN BSA enhanced customer due diligence rules effective
01/01/2017 – HMDA exception for low volume depository institutions effective	01/01/2019 – Revised HMDA data reporting begins
01/19/2017 – MRCG-MSRCG Joint Steering Committee Meeting	