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Quarterly Report

Mid-South Regulatory Compliance Group

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PEERING INTO MURKY WATER

Over fifty years ago, the Kingston Trio was the hottest recording group in America. Some of their album sales numbers surpassed The Beatles and stand today.

A line from a Kingston Trio song came to mind as I tried to follow some of the early developments of the Trump administration. That line goes: “don't muddy the waters around you; you may have to drink it soon.”

In my experience, never before has so much regulatory relief been promised, anticipated, and feared (by some), and yet so little relief been actually accomplished. It is difficult to say at this point just where things stand.

Everyone is aware that a panel of the D.C. Circuit Court of Appeals has ruled that Richard Cordray was subject to “at will” removal from his position as Director of the CFPB by the President. That decision is currently stayed, and the CFPB will surely ask the full D.C. Circuit to reconsider. That can take months to resolve if reconsideration is granted.

Further muddying the water, President Trump has issued a Memorandum to all regulatory agencies directing the following:

- <u>No New Regulations</u>. Send no new regulations to the Office of the Federal Register (a necessary step to any regulation’s implementation) until the new agency head reviews and approves the regulation. (At this point there is no new head of the CFPB, making this provision perhaps moot.)

- <u>Withdraw Final but Unpublished Regulations</u>. (Speaks for itself.); and

- <u>Delay the Effective Date of Published but not yet Effective Regulations</u>.

While this Memorandum could make it difficult for the CFPB to finalize pending measures such as payday lending, debt collection, overdraft and small business data collection regulations due to the need for input from other agencies (e.g., the Office of Management and Budget), it will probably not impede the implementation of final rules announced and published last year dealing with prepaid card accounts, mortgage loan servicing rules, and, most importantly, changes to the HMDA data collection requirements. Arguably, the measures possibly affected are much less significant to banks and compliance officers than are the new rules that will likely go into effect with no delay.

Much of this could change if Richard Cordray should decide to resign, as some are requesting. And there is always the possibility that our Reality TV President could echo his favorite line: “you’re fired!” It seems clear that Cordray has no inclination to resign, and it seems unlikely that President Trump could “trump up” (pun intended) the reasons he would need in order to fire Cordray “for cause”, which is the standard that the Dodd-Frank Act requires. In any event, Cordray would litigate any attempt to fire him. (That never happened on “The Apprentice”.)

So where do we stand? Republicans, especially conservative “R’s”, will claim to have significantly reduced regulatory burden. Democrats will be up in arms over any attempt to limit the effectiveness of the CFPB as a watchdog for consumer protection. Vendors for the platforms that you rely upon in your daily work will sit and wait for clarity. Compliance officers will worry about the steps they should be taking now to prepare for the day when the waters begin to clear.

For now, the only thing that seems safe to say is that we have muddy waters all around us. What else can you expect when politicians take steps to “drain the swamp”?

Stay tuned….

(Ed Wilmesherr)

MORTGAGE SERVICING RULE AMENDMENTS AND PREPAID PRODUCTS RULE IN FEBRUARY

In August of last year, the CFPB issued final rules that amended the mortgage servicing requirements contained in RESPA (Regulation X) and TILA (Regulation Z). The CFPB also issued interpretive rulings under the Fair Debt Collection Practices Act (FDCPA) that related to mortgage servicers that are also debt collectors under the FDCPA.

Shortly thereafter, the CFPB issued the “Prepaid Rule” in final form, amending Regulations E and Z and creating new disclosure and consumer protection requirements for prepaid accounts covered by this rule.

Both of these final rules have been published now in the Federal Register and await implementation. Articles in the November Newsletter addressed both of these topics, but time did not allow us to cover these measures at the Annual Meeting. As we promised, both of these topics will be covered in the February Meeting. Copies of the two articles from the November Newsletter are appended hereto.

Although it is not completely clear what effect President Trump’s Regulatory Freeze Order could have on these two measures (see related article), it seems as if both measures have reached the stage where they will not be impacted. For the present, it is wisest to assume that both amended rules will go into effect later this year.

More to come at the February Meeting.

(Ed Wilmesherr)

ADA WEBSITE COMPLIANCE UPDATE

In the November 2016 newsletter, we addressed the issue of ADA website compliance. Although definitive standards for compliance have yet to be set by the Department of Justice ("DOJ"), this remains a hot issue. Plaintiff law firms are continuing to actively target banks and other entities alleging ADA violations for failing to provide appropriately accessible websites.

In response, the Independent Community Bankers Association ("ICBA") recently issued guidelines for banks to follow before and upon receipt of a demand letter asserting alleged violations of the Americans with Disabilities Act ("ADA"). If your bank has not received a letter claiming violations of website accessibility under the ADA, these guidelines should not be ignored. The DOJ has set forth that website compliance is an "already existing obligation." Therefore, you should conduct a website review and take steps toward compliance now.

If the bank has already received a demand letter, the ICBA advises that bank should contact its legal counsel for an assessment of the claim(s). Next, a review of the bank's website should be conducted and any updates necessary to bring the bank's website into compliance should be made. A review of third party service provider contracts should also be conducted to ensure that each of the bank's vendors is in compliance with the ADA, as applicable. The ICBA also warns that if a bank hires an outside company to update its website for compliance with the ADA, an independent review should be conducted thereafter to ensure full compliance.

We will discuss these requirements and recent developments in further detail at the February meeting.

(Memrie Fortenberry)

SCRA/MLA EXAMINATIONS

As you are aware, there have been recent changes to the Military Lending Act (MLA) and an increased focus on the protection of service members. New rules greatly expanding the scope of the MLA regulations became effective just a few months ago on October 3, 2016. It has been brought to our attention that banks will be subjected to increased scrutiny for compliance with the Service Members Civil Relief Act (SCRA) and MLA. In fact, one of our member banks was told by an OCC examiner to expect to have a separate SCRA/MLA examination in the near future.

The FDIC issued FIL-65-2016 addressing its plans related to examining banks' compliance with the SCRA and MLA. There, the FDIC noted that during early examinations, its focus will be on the Bank's overall efforts to come into compliance with the expanded regulations. Specifically, examinations will focus on the following areas: the bank's actions taken to update policies, procedures and processes; training; and how any implementation challenges were addressed.

Updated interagency examination procedures have been issued to reflect the expanded MLA regulations. We have included updated audit procedures in the SCRA/MLA section of the MRCG/MSRCG Compliance Manual and will also be including this in as part of our loan compliance reviews. If you haven't done so already, now is the time to conduct your own SCRA/MLA review.

(Memrie Fortenberry)

ADJUSTMENTS TO CIVIL MONEY PENALTY AMOUNTS

Every leap year, the world's attention turns back to the Summer Olympics, America holds a presidential election, and the banking regulators dutifully adjust the amounts of civil money penalties for inflation. 2016 was different. Golf returned to the Summer Olympics for the first time since 1904, Donald Trump's victory turned politics upside down, and the banking regulators implemented the verbosely titled Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (sarcastically abbreviated in this article as the "FCPIAAIA").

Beginning with the Federal Civil Penalties Inflation Adjustment Act in 1990, regulators adjusted civil money penalties every four years, in leap years, to keep up with inflation. The quadrennial inflationary adjustments sought to maintain a sufficient deterrent and penalty for bad conduct. 2015's FCPIAAIA required regulators (1) to make a onetime catch-up adjustment for certain civil money penalties (capped at 150% of the prior amount) and (2) going forward, to adjust for inflation every year instead of every four years. The catch-up adjustments became effective August 1, 2016, and each agency has published tables of the new amounts.

Expect new inflationary adjustments every year, beginning this year. Alas, the opening ceremonies in Tokyo are still three years away.

(Jeff Stancill)

NEW GUIDANCE FOR CONSUMER COMPLIANCE RATING SYSTEM

The FFIEC has issued guidance regarding the Consumer Compliance Rating System to be effective on March 31, 2017. The guidance carefully states that it does not "set new or higher supervisory expectations" or create "additional regulatory burden." Instead, the revisions seek to align the rating system more closely with examination processes by following four foundational principals:

- Be "risk-based" to recognize that compliance management systems vary by institution based on their size, complexity, and risk profile;
- Provide transparent distinctions among the rating categories to promote consistent application;
- Identify strengths and weaknesses to direct attention appropriately and to assess the overall compliance management system; and
- Create incentives for establishing and implementing an effective consumer compliance system.

The system maintains the familiar one through five rating. In general, a one rating is exemplary, two is satisfactory, three is deficient, four is seriously deficient, and five is critically deficient. Performance under the Community Reinvestment Act is ***not*** taken into account in assigning a rating because CRA is evaluated separately.

Because the single rating system applies to institutions of all sizes, it purposefully avoids a rigid and formulaic approach. Instead, the system employs a more qualitative approach to allow more tailored application to each institution. Balancing goals of consistency and transparency on one hand with flexibility on the other, the guidance blends objectivity and subjectivity into 12 assessment factors to be applied by examiners. Those 12 factors are evenly divided among three broader categories: (1) Board and Management Oversight, (2) Compliance Program, and (3) Violations of Law and Consumer Harm. Familiar calls to be proactive, to self-identify and correct problems, and to manage third party relationships remain important themes throughout the rating system.

Board and Management Oversight. An examiner's assessment of board and management should be appropriate for their roles and responsibilities as well as the institution's size, complexity, and risk profile and should be based on the following:

- Oversight of and commitment to the institution's CMS;
- Effectiveness of change management processes, both in timeliness and in substance;
- Comprehension, identification, and management of risks; and
- Self-identification and corrective action for consumer compliance issues.

Compliance Program. The effectiveness of a CMS will be assessed according to the following:

- Whether internal policies and procedures are appropriate for the risks associated with that institution;
- The degree to which training is current and tailored;
- The sufficiency of monitoring; and
- The responsiveness and effectiveness of the consumer complaint resolution process.

Violations of Law and Consumer Harm. Violations will be analyzed according to the following:

- "Root-cause" of the violation, with particular supervisory concern for violations stemming from a deficient CMS;
- Severity of the consumer harm;
- Duration of time, with particular supervisory concern for violations that continue after management is alerted; and
- Pervasiveness of the violation, including whether a violation exists in multiple products and services.

(Jeff Stancill)

ICE ONCE AGAIN IN FEBRUARY

Special Agent Stephen Cole, the IMAGE Coordinator for the Immigration and Customs Enforcement Agency (ICE), has kindly offered to speak again this year at both the Jackson and Memphis meetings in February.

Matters related to Bank Secrecy Act enforcement, Customer Identification procedures and Enhanced Due Diligence requirements will almost surely not be the subject of regulatory deemphasis under the Trump Administration.

We plan on giving Steve ample time to present his topic and entertain questions from you. If you have specific questions you would like to see addressed, forward those to Patsy Parkin at patsy.parkin@butlersnow.com.

(Ed Wilmesherr)

MRCG MEETING TO BE HELD ON FEBRUARY 16, 2017

The MRCG will hold its February Meeting on February 16, 2017, at the Mississippi Sports Hall of Fame & Museum Conference Center, 1152 Lakeland Drive, Jackson, Mississippi. Registration for will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m..

We have a busy agenda for the February Meeting. Special Agent Stephen Cole will speak on issues related to CIP and Enhanced Due Diligence from his experience with Immigration and Customs Enforcement. We will cover the new final rules dealing with amendments to the mortgage loan serving rules and the prepaid accounts rule. Patsy Parkin will offer advice regarding common TRID errors she has encountered. And Jeff Stancill, Virginia Wilson and Memrie Fortenberry will cover recent changes to exam procedures from the FFIEC and the various bank regulatory agencies.

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, February 10, 2017, so that arrangements for lunch can be finalized. We look forward to seeing you there.

(Ed Wilmesherr)

MSRCG MEETING TO BE HELD ON FEBRUARY 28, 2017

The MSRCG will hold its February Meeting on February 28, 2017, 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.

We have a busy agenda for the February Meeting. Special Agent Stephen Cole will speak on issues related to CIP and Enhanced Due Diligence from his experience with Immigration and Customs Enforcement. We will cover the new final rules dealing with amendments to the mortgage loan serving rules and the prepaid accounts rule. Patsy Parkin will offer advice regarding common TRID errors she has encountered. And Jeff Stancill, Virginia Wilson and Memrie Fortenberry will cover recent changes to exam procedures from the FFIEC and the various bank regulatory agencies.
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, February 23, 2017, 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
01/06/2017 – Comments due onproposed rule on private flood insurance	05/23/2017 - MSRCG Quarterly Meeting
01/15/2017 – CMP Inflation adjustments effective	05/25/2017 - MRCG Quarterly Meeting
03/31/2016 – Reg. Z exception for Small Creditor operating in rural or underserved area effective	07/20/2017 - MRCG-MSRCG Joint Steering Committee Meeting
04/01/2016 – Small creditor temporary balloon QM exception expires	08/17/2017 - MRCG Quarterly Meeting
04/01/2016 – Deadline to update CRA public file	08/22/2017 - MSRCG Quarterly 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	09/21/2017 - MRCG-MSRCG Joint Steering Committee Meeting
06/30/2016 – Deadline for notices re: option to escrow flood premiums for existing loans	10/01/2017 – Reg. E and Reg. Z Prepaid Accounts rule effective
08/10/2016 – Comments due on CFPB proposed rule on annual privacy notices.	10/03/2017 – MLA coverage expands to include credit cards
08/22/2016 – Comments due on CFPB proposed rule on arbitration agreements	10/19/2017 – Reg. Z and Reg. X Mortgage Servicing Amendments effective
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	04/19/2018 – Reg. Z and Reg. X Mortgage Servicing Amendments to bankruptcy periodic statements and successors in interest effective
01/01/2017 – HMDA exception for low volume depository institutions effective	05/11/2018 – FinCEN BSA enhanced customer due diligence rules effective
01/19/2017 – MRCG-MSRCG Joint Steering Committee Meeting	01/01/2019 – Revised HMDA data reporting begins

ATTACHMENT TO FEBRUARY 2017 NEWSLETTER

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.

The Current Mortgage Servicing Rules.
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:

- Prompt payment crediting and payoff statements. 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.

- Definition of delinquency. 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.

- Requests for information. 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.

- Force-placed insurance. 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 <u>not</u> 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).

- <u>Prompt payment crediting</u>. 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.

- <u>Periodic statements</u>. 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)

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)