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# Mortgage Banking in the Time of Coronavirus

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**Weiner Brodsky Kider**
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# The Panel

- Mitch Kider, Managing Partner
- Jack Konyk, Executive Director of Government Relations
- Ken Markison, Of Counsel

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# Mitch Kider

**Mitchel H. Kider** is the Chairman and Managing Partner of Weiner Brodsky Kider PC, a national law firm specializing in the representation of financial institutions, residential homebuilders, and real estate settlement service providers. Mitch represents banks, mortgage companies, homebuilders, credit card issuers, and other financial service companies in a broad range of litigation and regulatory and compliance matters. He defends clients in investigative and enforcement actions before the Consumer Financial Protection Bureau, Department of Housing and Urban Development, Department of Veterans Affairs, Department of Justice, Federal Trade Commission, Ginnie Mae, Fannie Mae, Freddie Mac, and various state and local regulatory authorities and Attorneys General offices.

Mitch speaks frequently on regulatory and litigation matters before trade associations and other industry groups. He is a Fellow of the American College of Consumer Financial Services Lawyers, and a Faculty Fellow of the Mortgage Bankers Association. Mitch is the author of six books pertaining to residential mortgage finance and also has written numerous law review and real estate journal articles on the subject. His most recent books are Consumer Protection and Mortgage Regulation Under Dodd-Frank (West/Thomson Reuters 2018) and Real Estate and Mortgage Banking: A New Era of Regulatory Reform (West/Thomson Reuters 2017-2018).

# Jack Konyk

**Jack Konyk** has over four decades of financial services experience, having held a wide array of front-line and back-office positions in consumer banking and lending disciplines with a concentration in all aspects of mortgage finance. Prior to joining Weiner Brodsky Kider, he spent 14 years at National City Bank, now merged into PNC, where he held a variety of senior level managerial positions in regulatory compliance, enterprise risk management, and public and government affairs management, for a number of National City's consumer lending entities, most notably National City Mortgage. His prior experience included similar positions at other significant financial institutions, including the likes of Integra Bank and Mellon Bank.

Jack is an active participant in industry trade associations as well, a frequent speaker at conferences and seminars across the country, and a prominent voice for the industry with legislators and regulators at all levels of government. He is a past member of the Mortgage Bankers Association's Board of Directors, is past Chair of its State and Local Legislative and Regulatory committee, past Regulatory Compliance Vice-Chair of its Legal Issues, Quality Assurance and Regulatory Compliance committee, a past member of its Residential Board of Governors, and remains an active member of a number of MBA committees. Jack is also Past Chairman of the American Association of Residential Mortgage Regulators' Industry Advisory Council, and has had significant involvement with the Financial Services Roundtable's Housing Policy Council and the American Bankers Association's Mortgage Markets committee.

# Ken Markison

**Ken Markison** joined Weiner Brodsky Kider PC as Of Counsel following decades as a leader in the housing and financial services legal community. Before coming to the firm, Ken's career in industry and government included service as Vice President and Regulatory Counsel of the Mortgage Bankers Association, Assistant General Counsel for GSEs and RESPA at the U.S. Department of Housing and Urban Development and HUD liaison to the Oversight Board for the Resolution Trust Corporation. At WBK, Ken advises lender and vendor companies, trade associations and other organizations that draw on his deep experience and expertise regarding the Dodd-Frank Wall Street Reform and Consumer Protection Act, Real Estate Settlement Procedures Act, Truth in Lending Act, Fair Housing Act, Home Mortgage Disclosure Act and virtually every other law regulating the primary and secondary mortgage market. Ken is a prominent voice with legislators and regulators at all levels of government on financial regulatory issues. He graduated George Washington University Law with honors, is a member of the Maryland and DC Bars, a fellow of the American College of Consumer Financial Services Lawyers, and a frequent speaker at conferences across the country.

# INTRODUCTION AND AGENDA

# Introduction

- Coronavirus or COVID-19 is having unparalleled and unprecedented effects on the nation and its housing finance system
- It may prove a greater shock to the system than has ever occurred in our lifetimes
- The situation is rapidly changing as events are occurring nearly hourly

# Introduction (cont'd)

- Turning to our industry in particular –
  - Pronouncements by federal, state and sometimes local governmental units and related entities affecting the industry in particularly are coming almost hourly
  - The amount of information, often contradictory and uncoordinated, contributes to confusion
  - Governmental pronouncements and orders must be read and interpreted very carefully, as many are very detail-dependent and are often over-generalized in press announcements

# Purpose of Webinar and Firm Efforts

- The purpose of our webinar, the web page and future COVID informational efforts is to sort through the enormous amount of information to get you what you need to assist planning and decision making on the many issues before you and your company
- This webinar and other widely circulated materials are intended to be general guidance and are informational only, and not intended to substitute for specific legal or other advice, which we would be happy to provide by direct engagement
- The information in this webinar is accurate through yesterday March 24, 2020, BUT
  - The situation is rapidly changing
  - Numerous proposals are actively being considered
  - Federal, state and local authorities are all very active

# Agenda

- This webinar will address five primary areas of interest:
  - Origination issues
  - Servicing issues
  - Business operations issues
  - Potential future issues
  - WBK client services
- Time permitting, audience questions and comments will be invited

# ORIGINATION ISSUES

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# Loan Originators at Home

- Issues surrounding LOs working from home during times of social distancing are prevalent
- At least 33 states have given temporary permission for LO work at home, but the associated requirements vary
- For those states that have allowed LOs to work at home, some or all have:
  - additional data security requirements
  - prohibition on meeting with consumers at the unlicensed location
  - prohibition on advertisements that include the unlicensed location's address

# Loan Originators at Home (cont'd)

- Some or all states also have:
  - prohibitions on storing physical business records at the unlicensed location
  - requirements for prior notice to the regulator of the unlicensed locations from which business will be conducted
  - requirements for additional disclosures to consumers
- Regardless of the presence or lack of specific state directives, care still must be given to both physical and virtual data protection and privacy constraints; all other requirements such as Fair Housing requirements apply as well
- Whether or not LO work at home is permissible, LOs and applicants may still insist on social distancing, possibly requiring new protocols for obtaining, exchanging, securing and shipping docs

# Loan Originators at Home (cont'd)

- Notably, document and records possession, storage and disposal concerns still must be addressed when company employees work from home
  - Some borrower exhibits and other materials will likely be paper-based and must be imaged and/or physically exchanged with other people in the processing chain
  - All hard-copy materials must be securely stored and/or appropriately destroyed at its point of possession
  - Some firms/rules may have prohibited having certain materials at non-licensed locations (such as LO homes) at all

# What About Current Location?

- There are also challenges to maintaining the company's current locations for employees under current circumstances
- At least 12 states and the federal government have issued restrictions and recommendations against gatherings of more than 10-50 individuals, which may impact call centers and other large employee locations
  - Legal exceptions to restrictions may be available for lending functions but unsatisfactory to employees as inconsistent with CDC and other recommendations, requiring operational changes
- Orders for non-essential employees to remain at home, which have been put in place by several jurisdictions including California, Connecticut, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, New York, New Jersey, Ohio and Oregon and several cities and counties can also cause significant disruption in normal activities
  - We note again, though, that the definition of non-essential, critical infrastructure and a host of exemptions, vary widely

# And What About Third Party Services?

- Stay at home and other restrictions present unique challenges regarding the service of third-party service providers and others
- Ancillary service providers to the mortgage industry such as appraisers and closing agents to be discussed shortly may not be treated as essential and excepted from work at home orders
- In-person appraisals, for example, may also present social distancing concerns for appraisers themselves and customers; AVMs should be workable for some loans

# The GSEs on Appraisals

- Fannie Mae's Lender Letter, LL-2020-04 (March 23, 2020)
- During period of the COVID-19 national emergency, Fannie Mae is allowing temporary flexibility in appraisal requirements that include:
  - Allowing exterior-only inspection appraisals or desktop appraisals
  - Desktop appraisals: allowed for purchase transactions when an interior and exterior appraisal is not available
  - Exterior-only inspection appraisals: allowed for purchase and limited cash-out refinances of Fannie Mae-owned loans
  - Traditional appraisals are still required for limited cash-out refinances that are not Fannie Mae-owned and all cash-out refinances, regardless of whether they are owned by Fannie Mae
  - Purchase of a second home when the LTV ratio exceeds 85% also requires a traditional appraisal
  - New construction and construction to permanent loans still requires interior inspection for purchases
- Action by others permitting appraisal flexibility is hoped for

# Closing Services

- Closing transactions also present challenges
- Closing agents may be unable/unwilling to conduct in-person closings
- County Recorders' offices may be closed, accepting eRecording and mail only, or only eRecording
- eClosing, Remote Online Notary and other pertinent technologies that might be useful have not gained widespread acceptance; 23 states have enacted laws permitting some or all of these technologies, but not all states
- Federal legislation has been introduced to approve RON's and some believe it may pass

# Closing Services (cont'd)

- Title insurers have different approaches to recording gaps, creating potential issues with loan sales

- And their approaches do not yet appear consistent

# The GSEs on Closing

- Fortunately Fannie Mae issued Lender Letter, LL-2020-3, (March 23, 2020)
- In addition to Verification of Employment flexibility, the letter reminds lenders that Fannie will accept GAP Title Coverage
- The letter also reminds lenders of original policy regarding possession of promissory note and electronic signature requirements
- Freddie Mac has taken the same view
- FHA and VA are working on these issues and guidance is hoped for soon

# And Other Third Parties?

- VOEs may be difficult to obtain from companies working with limited staff and estimates of the probability of continued employment may present additional challenges
- Fannie Mae and Freddie Mac’s March 23 Guidance, while still urging lenders to seek VOEs, also offers flexibility
  - Written VOE: The Fannie Mae Selling Guide permits the lender to obtain a written VOE confirming the borrower’s current employment status within the same timeframe as the verbal VOE requirements
  - An email directly from the employer’s work email address that identifies the name and title of the verifier and the borrower’s name and current employment status may be used in lieu of a verbal VOE
  - In addition, the lender may obtain the VOE after loan closing, up to the time of loan delivery (though we strongly encourage getting the verbal VOE before the note date)

# Clarifications Needed

- ATR
  - Under TILA, as amended by Dodd-Frank, the lender must make a reasonable determination borrower has a reasonable Ability to Repay
  - CFPB may have to weigh in on whether, under the current circumstances, lenders can determine based on ATR that the economy will return and borrowers will get back from temporary hiatus
- Other Issues
  - Concerns have been raised about operational requirements under other rules in light of the pandemic's effects
  - For example, TRID 3-day waiting period after CD
  - Clarifications concerning waiver merit CFPB direction

# Thinking About Origination

- Pipeline management and associated concerns are crucial when thinking about originations
  - Pipeline protection and rate lock policies should be carefully reviewed to address potential impacts from the disruption of normal business activities combined with the record low rates spurring abnormally high refinance volumes

# SERVICING ISSUES

# Servicing Also Has Changed Rapidly

- Several new requirements and non-mandatory directives suspend or alter existing well-established servicing activities and payment processes
- These requirements have emanated from national, state and even local authorities
- The requirements vary widely here, too, and should be examined carefully

# Servicing Directives

- Fannie Mae and Freddie Mac, consistent with an FHFA directive, issued several new policies on March 18, 2020; primary provisions include:
  - foreclosures suspended for 60 days
  - forbearance up to 12 months for borrowers affected by COVID-19
  - credit reporting of late payments by affected borrowers also suspended
  - servicers are to maintain or reduce payments after forbearance through loan modification if needed

# Servicing Directives (cont’d)

- FHA, by a Mortgagee Letter dated March 18, 2020, established a 60-day moratorium on foreclosures and evictions applying to all FHA insured properties
- VA Circular 26-20-7, dated March 16, 2020, encouraged holders of VA loans to forbear, waive late charges and suspend reporting to credit agencies regarding affected borrowers
- CFPB on March 18, 2020 commended actions taken by FHFA and HUD, and said, “CFPB is ready to help consumers resolve issues with their financial services providers who submit a complaint through our consumer complaint system.”
- OCC Bulletin 2020, dated March 13, 2020, emphasizes that prudent efforts to modify the terms of existing loans for affected customers should not be subject to examiner criticism. For example, when appropriate, a bank may restructure a borrower’s debt obligations due to temporary hardships resulting from COVID-19-related issues

# Servicing Directives (cont'd)

- Several states including New York, California, Maryland, Virginia and the District of Columbia have moved to suspend foreclosures and evictions, but the terms differ state-to-state
- Numerous federal and state entities have also proposed broader measures, requiring or urging, as their authorities permit, deferring normal monthly payments, with no interest or late charges, for extended periods of time
- In fact, federal legislation may include a national standard covering all loans. This is even though the federal government has already enacted two pieces of legislation addressing COVID-19 remediation that do include mortgage-related measures
- A number of these proposals, although not all, do contain provisions to address the needs of lenders who would have otherwise received these funds to remit payments for securities holders, etc., which is encouraging

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# Consequences of Servicing Changes

- As noted, many of these provisions include a requirement to prohibit reporting of negative information to credit bureaus resulting from such deferrals or moratoriums
  - There have been no efforts to interfere with unaffected elements of credit reporting; this will therefore require servicers to be stop reporting ONLY for those accounts affected by the proposed requirements
- Third-Party / Vendor Impacts
  - Similar to the appraisal issues affecting origination activities, property inspectors may be reticent to visit properties
  - Likewise, property maintenance companies could have similar concerns around exposure from on-property activities
- Finally, we are hopeful that government actions will help, not harm, servicing

# BUSINESS OPERATIONS ISSUES

# Business Operations Issues

- Importance of establishing Continuity of Operations Plan (COOP)
- FFIEC Interagency Statement on Pandemic Planning, Revised March 2020, updates:
  - 2007 Interagency Statement on Pandemic Planning
  - Interagency Advisory on Influenza Pandemic Preparedness
  - Letter to Credit Union 06-CU-06 – Influenza Pandemic Preparedness
- NY State already requires licensees to have a preparedness plan, as does Massachusetts

# Business Operations Issues

- Requirements for Paid Sick Time and Family Leave must be closely considered
- Effect on required timelines and deadlines could be problematic
  - Not all time-sensitive activities have had deadlines delayed or suspended
  - Some states have taken action to delay deadlines for certain required reporting, and other matters
- IRS had delayed federal tax payment and filing deadline

# Business Operations Issues

- Fiscal, Financial, and Capital Markets related issues include:
  - Pipeline management and hedging activities could be severely impacted
  - Impacts to financial strength, net worth, liquidity and reserves could be similarly significant
  - Impacts on operations resulting from counterparty issues should also be considered
  - The Fed buying unlimited amounts of MBS should help stabilize the origination side, but Treasury and interested stakeholders are still discussing what might be possible to support the servicing side

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# Business Operations Issues

- Unique issues might arise from large scale remote-work arrangements:
  - Technical considerations
    - Sufficient supply of technically capable equipment
    - Adequacy of computer environment at home locations
  - Management and control considerations
    - Maintaining high levels of interaction, communication and engagement
    - Reporting and measurement methods must be implemented to permit continued effective management and control functions

# POTENTIAL FUTURE ISSUES

# Potential Future Issues

- Risk of Fair Lending and/or ECOA issues increases as operations become more disbursed
- Replacing ill or unavailable licensed employees may be difficult
- Financial impacts of many initial intervention measures could be devastating
- Future potential litigation is difficult to predict
- Disruptions caused by this emergency will adversely impact ongoing regulatory initiatives

# WBK CLIENT SERVICES

# WBK Client Services

- We are striving to provide clients useful and effective support
  - COVID-19 focused information on our website
  - Financial impacts of many initial intervention measures could be devastating
- We are fully committed to maintaining high performance standards despite remote work challenges