



## **Financial Services Update**

**April 23, 2015**

### **HIGHLIGHTS**

#### **Federal Regulatory Developments**

CFPB Issues Final Interpretive Rule on Housing Counselor Requirements

HUD Seeks Nominations for New Housing Counseling Advisory Committee

House Passes Legislation Amending Definition of Qualified Mortgage

#### **Litigation Developments**

Quicken Loans Preemptively Sues HUD, DOJ Citing FCA "Shakedown," Arbitrary Loan Sampling

#### **WBK News**

**Mitch Kider** will conduct a webinar entitled "Are You Ready for TRID", hosted by Mortgage Coach, on April 28 at 1:00 pm EDT. To attend the webinar, go to <https://attendee.gotowebinar.com/register/3030919616541058050>

**Weiner Brodsky Kider PC** recently held exclusive TRID Workshops for clients which provided an overview and understanding of the key elements of TRID, and how the rule will affect the policies, procedures and training implemented by mortgage lenders. The firm now has made available the WBK TRID Workbook, which covers integrated disclosure readiness as the workshops did, from pre-application to post-closing under TRID. [Purchase a copy for \\$250.](#)

## **SUMMARIES**

### **Federal Regulatory Developments**

#### **CFPB Issues Final Interpretive Rule on Housing Counselor Requirements**

The CFPB on April 15, 2015 issued a final interpretive rule on the proper procedures for lenders to provide mortgage applicants with a list of local housing counseling groups. The final rule restates guidance provided by the CFPB in its 2013 Homeownership Counseling (HC) Interpretive Rule to assist lenders in complying with counseling list requirements and provides further guidance for lenders putting together their own lists of housing counselors.

The Dodd-Frank Act requires mortgage lenders to provide such a list to applicants soon after they apply for a mortgage to help them learn how to acquire the best loan terms. The 2013 HC Interpretive Rule provided guidance on the requirements of the High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (TILA) and the Homeownership Counseling Amendments to RESPA, together known as the 2013 HOEPA Final Rule.

Lenders have two ways in which they can meet their mandate to provide local housing counseling lists, either by using lists developed by the CFPB, which are available online, or constructing their own lists using the same HUD data the bureau uses.

For lenders putting together their own counseling lists, the additional guidance in the final interpretive rule covers the following areas:

- how to provide mortgage applicants living abroad with counseling lists;
- geolocation tools that are permitted;
- combining counseling lists with other required disclosures;
- using an applicant's mailing address to provide the list; and
- high-cost mortgage counseling qualifications, including lender participation in such counseling.

In the new final interpretive rule, the CFPB clarifies the qualifications required to provide high-cost mortgage counseling by stating that counseling agencies already approved by HUD to offer homeownership counseling are also qualified to provide the required counseling for high-cost mortgages. They must cover the key terms of the mortgage transaction contained in the relevant disclosures, such as the Good Faith Estimate or, after August 1, 2015, the Loan Estimate.

The CFPB also clarified in the final interpretive rule elements of the anti-steering provision in the 2013 HOEPA Final Rule, stating that the lender may be considered to be impermissibly steering a consumer if the lender "insists on participating or listening in

to counseling call or session if such behavior results in a consumer's selection of a particular counselor."

The CFPB press release on the final interpretive rule, which includes a link to the text of the rule, is available here: <http://www.consumerfinance.gov/newsroom/cfpb-issues-guidance-on-housing-counselor-requirement/>.

## **HUD Seeks Nominations for New Housing Counseling Advisory Committee**

HUD is requesting nominations for its new Housing Counseling Federal Advisory Committee, which was mandated by Dodd-Frank. In a notice published in the Federal Register on April 14, 2015, HUD established the committee, which will advise the director of HUD's Office of Housing Counseling (OHC) on its mission to provide individuals and families with the knowledge to find and keep decent housing. The deadline for submitting applications to be a nominee is May 14, 2015.

OHC helps to coordinate the national network of HUD-approved housing counseling agencies and HUD-certified counselors, who last year helped more than 1.3 million families with housing opportunities. The advisory committee will be made up of 12 individuals serving three-year terms, who will equally represent the mortgage and real estate industry, HUD counseling agencies and consumers. The members will be appointed by the HUD Secretary.

The committee has only an advisory role and is prohibited from reviewing or awarding housing counseling grants.

More information on the Housing Counseling Federal Advisory Committee, including links to the nomination application and the candidate qualification criteria, can be found here:

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/sfh/hcc/OHC\\_HCFA\\_C](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hcc/OHC_HCFA_C).

## **House Passes Legislation Amending Definition of Qualified Mortgage**

The House of Representatives on April 14, 2015 passed H.R. 685, the Mortgage Choice Act of 2015, which would amend the Truth in Lending Act's definition of points and fees that can be included in a qualified mortgage. The bipartisan bill would narrowly change the CFPB's Ability to Repay Rule by excluding charges from affiliated title companies and escrows for insurance and taxes from the calculation of the 3% cap on points and fees for qualified mortgages.

H.R. 685 is similar to legislation that passed the House last year but was never considered in the Senate. The Senate Banking Committee last week announced it has scheduled a vote for May 14 on regulatory reform legislation, which likely will include the Mortgage Choice Act.

The White House came out with a statement saying, “Because H.R. 685 would weaken key consumer protections and provisions of the Dodd-Frank Wall Street Reform Act, if the President were presented with H.R. 685, his senior advisors would recommend that he veto the bill.

Meanwhile, the House also passed last week H.R. 601, the Eliminate Privacy Notice Confusion Act. This bipartisan bill amends the Gramm-Leach-Bliley Act by exempting financial institutions from the law’s annual privacy notice requirement for those institutions that have not changed their policies and practices regarding the disclosure of nonpublic personal information from those disclosed in the most recent privacy notice sent to consumers, and that only share personal information under specified requirements.

The text of H.R. 685, the Mortgage Choice Act of 2015, is available here:  
<https://www.govtrack.us/congress/bills/114/hr685/text>.

The text of H.R. 601, the Eliminate Privacy Notice Confusion Act, can be found here:  
<https://www.govtrack.us/congress/bills/114/hr601/text>

## **Litigation Developments**

### **Quicken Loans Preemptively Sues HUD, DOJ Citing FCA “Shakedown,” Arbitrary Loan Sampling**

Quicken Loans Inc., the nation’s largest Federal Housing Administration (FHA) mortgage lender, recently filed suit in federal district court against the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD), alleging that the government had pressured the lender to enter into settlement and had acted unlawfully in assessing Quicken’s 2007-2011 FHA loan portfolio during a three-year investigation.

Quicken points out that the DOJ recently threatened to sue unless the lender agreed to publicly state that it had committed fraud under the False Claims Act (FCA) and to pay “hypothetical” losses incurred by the FHA – estimated using a small sample of “cherry picked” loans.

Quicken claims that the DOJ is merely carrying out a “political agenda,” bolstered by recent settlements with many of the nation’s largest lenders, including recent settlements

with MetLife Home Loans, LLC (\$123.5 million) and First Tennessee Bank (\$212.5 million, pending).

Quicken seeks declaratory and injunctive relief under the Administrative Procedures Act (APA) and the Due Process Clause of the Fifth Amendment, claiming that the DOJ and HUD's inspector general "hijacked" the investigation and unlawfully departed from HUD's "well-established processes" for evaluating FHA loans on an "individual basis."

Rather than evaluating the facts or circumstances underlying each particular loan, the DOJ used "Conjectural Extrapolation Sampling" to estimate the quality of many thousands of loans – and thus, estimate losses to the FHA – using a sample of only 116 loans from a universe of more than 100,000 non-streamline FHA loans originated during the relevant time period.

In the complaint, Quicken asks the court to require the DOJ to reexamine the company's lending practices on a loan-by-loan basis. Citing a 2013 HUD notice in the Federal Register that sampling would not be applied retroactively to evaluate FHA compliance, Quicken claims that the DOJ's use of sampling is wholly "inconsistent" with the terms under which Quicken—and other FHA lenders—have participated in the FHA program. This, Quicken claims, is arbitrary and capricious agency action.

Sampling issues aside, Quicken asserts that many of the loan "defects" identified by the DOJ in 55 of the 116 sample loans were illegitimate or wholly immaterial. For example, Quicken explains that the DOJ alleges false claims for payment under the FCA "where a single immaterial document in a loan file was missing, where Quicken purportedly miscalculated a borrower's income by as little as \$17, and where Quicken was alleged to have loaned a borrower \$26 too much on a \$99,500 loan."

In one instance, Quicken was accused of poor underwriting because it miscalculated an FHA applicant's monthly income by only \$2.10. Such loans, Quicken claims, were not underwritten improperly, did not create an undue risk of loss to the FHA, and simply do not amount to fraud.

The complaint repeatedly emphasizes Quicken's willingness to engage in a loan-level review, which does not appear to have been done in any of the prior settlements. In filing a pre-emptive suit, Quicken is seeking to force the government into such a loan-by-loan resolution.

Generally, challenges to administrative actions under the APA face rigorous scrutiny because of the wide discretion afforded agencies with respect to the conduct of their investigations, but issues relating to the government's waiver of sovereign immunity and the "sue and be sued" clause will make this case interesting to follow.

The attorneys at Weiner Brodsky Kider PC regularly handle FCA investigations and APA actions.

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