NEWS

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

CFPB Focus

November 2013

This is an advertisement.

CFPB Implements New Mortgage Disclosure Rules and Forms

Jonathan E. Green, 404.221.6518, jegreen@bakerdonelson.com

The CFPB issued its "Know Before You Owe" rule on November 20, 2013. The center pieces of the rule are the Loan Estimate form, which replaces the early Truth in Lending statement; and the Good Faith Estimate and the Closing Disclosure form, which replaces the final Truth in Lending statement and the HUD-1 settlement statement. The purpose of this rule is to combine certain disclosure requirements required under the Truth in Lending Act and the Real Estate Settlement Procedures Act in a uniform disclosure scheme. The loan estimate form is to be provided to consumers within three business days after they submit a loan application. The closing disclosure form is to be provided to consumers three business days before they close on the loan. This rule is effective as of August 15, 2015.

CFPB's New Regulations Will Affect Local Banks and Small Servicers

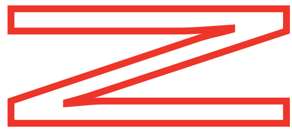
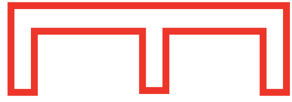
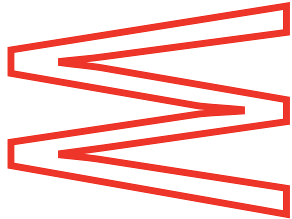
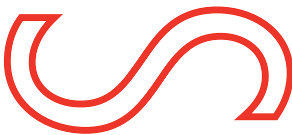
Dylan W. Howard, 404.589.3406, dhoward@bakerdonelson.com

While the new regulations implemented by the Consumer Financial Protection Bureau (CFBP) are designed to apply primarily to big banks and loan servicers, the regulatory environment for small and community banks will also be transformed. Since many of these new rules are currently set to go into effect on January 10, 2014, and revisions are still being issued, small and community banks around the country should already be studying them and establishing policies and procedures for immediate compliance.

This is an area of particular concern for small banks, as they often lack the regulatory compliance resources of their larger cousins. This likely means that small banks will be more reliant on third party vendors, as they have less ability to craft in-house solutions. Since small and community banks also tend to have less control over third party vendors, the potential for trouble meeting CFPB deadlines and ultimately for increased attention from the CFPB itself is substantial. The CFPB has indicated that it expects all loan servicers to comply with the new rules as they go into effect. No servicer should expect a grace period or special consideration.

Many of the new CFPB regulations contain an exemption for small loan servicers, however. Generally, the exemption applies when a loan servicer, including any affiliates, services 5,000 or fewer mortgage loans, as of January 1st of each year. If a servicer grows and no longer qualifies, it is given 6 months or until the following January 1, whichever occurs later, to comply with the full panoply of CFPB regulations. The exemption does not apply if the servicer services any loans it neither originated nor owns, however, even if the total number of loans serviced is fewer than 5,000.

Continue on next page

CFPB's New Regulations Will Affect Local Banks and Small Servicers,
continued

If the small servicer exemption applies, what is the effect?

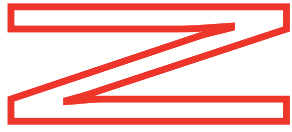
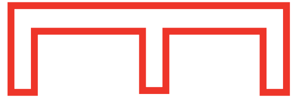
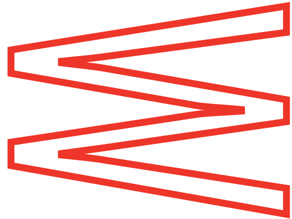
Some of the mortgage servicing rules effective January 10, 2014, will simply not apply to small servicers.

- One example is the periodic statement rule, which requires very specific account and payment information to be included in each monthly periodic statement.
- Another example is the continuity of contact provision, which requires servicers to establish procedures assigning specific personnel to be available to communicate with delinquent borrowers.
- A third example is the early intervention rule which requires a servicer to establish or make good faith efforts to establish live contact with a delinquent consumer by the 36th day of his or her delinquency, and to provide the consumer with written information about any available loss mitigation options by the 45th day of delinquency.

Other rules apply to small servicers but in a limited fashion. For example, early intervention and loss mitigation provisions which require a very specific schedule of notices once a borrower defaults on a mortgage loan and which further bar dual tracking generally do not apply. However, small servicers are required to comply with two loss mitigation requirements: (1) they may not make the first notice or filing required for a foreclosure process unless a borrower is more than 120 days delinquent, and (2) a small servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a loss mitigation agreement.

Small servicers are also exempt from the rule against obtaining force-placed insurance in cases in which hazard insurance may be maintained through an escrow account, so long as any force-placed insurance purchased by the small servicer is less expensive to a borrower than the amount of any disbursement the servicer would have made to maintain hazard insurance coverage.

Other rules do not include an exemption for small servicers. For example, there is no exemption for the adjustable rate mortgage provision that requires disclosures in connection with the initial reset of an adjustable-rate mortgage and each time an interest rate adjustment results in a payment change. Another provision lacking the exemption is the requirement for prompt crediting and payoff statements that mandates all servicers have to credit payment on the day the payment is received and further requires payoff statements be provided within seven days of a written request. Finally, there is no exemption for the error resolution and information request provisions which require acknowledgment of a request for information within five days and a detailed response either correcting the error or providing the information sought within 45 days. Small and community banks will have to comply with each of these provisions.

Recent CFPB Report to Congress

Courtney H. Gilmer, 615.726.5747, cgilmer@bakerdonelson.com

On November 12, 2013, Richard Cordray, Director of the CFPB, appeared at the hearing of the Senate Banking, Housing and Urban Development Committee to discuss the CFPB's Annual Report to Congress. During the hearing, Senators continued to express concern regarding the quickly approaching implementation deadline of January 10, 2014. Committee ranking member Senator Mike Crapo (R-ID) voiced apprehension about the "sheer volume" of new regulations and the lack of resources available to financial institutions and other entities to meet the demands of compliance. In response to questions regarding timing of enforcement actions, Director Cordray stated that the Bureau did not expect "perfection" but rather would be looking for "good faith efforts to come into substantial compliance" by January 10, 2014. Specifically, Director Cordray emphasized that "good faith effort" would mean an institution had a compliance system in place and would be monitoring its own compliance with the various rules.

Much of the hearing focused on the data collection efforts of the CFPB, including the monitoring by the Bureau of credit card data for 900 million individuals. Director Cordray addressed concerns about the mechanisms to "de-identify" such data and to protect the data from dissemination. Senators also expressed concern regarding student loan debt, car loan debt and prepaid cards. Director Cordray indicated that the Bureau was interested in each of these issues.

New Loans: Harder to Make, Easier to Keep?

Heidi Weinzetl, 954.768.1601, hweinzetl@bakerdonelson.com

Stringent lending rules aim to ensure borrowers have the ability to repay, and hold lenders accountable at origination

The new CFPB mortgage rules are tough on lenders, beginning with the loan application process. In order to issue a mortgage, lenders must collect information about income and assets, employment status, credit history, monthly payments for the mortgage and other debts, and the borrower's debt-to-income ratio. The lender may also look at how much money a consumer will have left over after debts are paid monthly. Some lending requirements may be relaxed if a lender is assisting a consumer by refinancing them out of a risky mortgage and into a more stable loan.

The good news for lenders is that they have the benefit of an automatic presumption that they have complied with these requirements when a Qualified Mortgage is issued. In order to earn the label of a Qualified Mortgage, the loan generally may have no "toxic" features, such as an interest-only period, balloon payment or loan term shorter than 30 years (an exception is made for balloon payments in rural or underserved areas). Negative amortization loans also do not qualify. Qualified Mortgages also

Continue on next page

New Loans: Harder to Make, Easier to Keep?, *continued*

limit the amount of income which can go toward paying monthly debts. Specifically, monthly debt (including a mortgage) may not be more than 43% of a consumer's gross income. While not all new loans must be Qualified Mortgages, lenders who make these loans get some legal protection, even if the loan goes into default. Consumers can still assert that the subject loan did not comply with Qualified Mortgage requirements, but they will have to overcome the presumption in favor of the lender.

In addition to rules which require heightened scrutiny of borrowers prior to extending credit, lenders are now obligated to abide by record-maintenance requirements aimed at increasing transparency and accountability.

Loan originators are assigned an identification number by the Nationwide Mortgage Licensing System and Registry (NMLSR ID). Pursuant to the new rules, this number must appear on the credit application, note or contract, and security instrument (for example, a mortgage). The name and ID of the individual loan originator with primary responsibility for the mortgage must also be included.

But restrictions don't end at the application stage. Once credit approval is obtained, creditors may no longer include terms that require arbitration or other non-judicial procedures to resolve any controversy or dispute. The parties may – by agreement – utilize non-judicial means when a dispute arises, but this cannot be a standard term.

Four Tips for Responding to a Civil Investigative Demand: A Report from the Trenches

Kavita Shelat, 901.577.8120, kshelat@bakerdonelson.com

Simply being served with a Civil Investigative Demand (CID) means enormous financial strain and reputational risk for some companies. On top of that, in this heightened regulatory environment, federal agencies seem to be trying to prove that each is the toughest enforcer on the block. Based on recent experience, this tough-on-enforcement attitude manifests as:

1. At the start of the investigation, little to no negotiating with the government on the scope of a broad CID.
2. During the course of the investigation, little to no feedback from the government as to any issues/violations it is finding.
3. At the conclusion of the investigation, little to no information as to the number of any issues/violations identified and no specific examples of any issues/violations identified.
4. At each stage, no guidance from the government about what practices should be adopted, ceased or modified in order to satisfy the government.

Continue on next page

Four Tips for Responding to a Civil Investigative Demand: A Report from the Trenches, *continued*

Despite this unfortunate reality, at least forewarned is forearmed. If your company knows that it likely cannot alter the scope of the CID, then your company can concentrate on complying with the CID as efficiently and cost-effectively as possible. To that end, here are some practical tips learned from recent experience.

Retain outside counsel as soon as possible, and involve outside counsel early on for two reasons. First, to ensure the attorney client privilege protects communications pertaining to the investigation. Second, so that the privilege protects communications pertaining to issues/challenges of which your company is already aware and already trying to address.

Notify and involve your IT person early on. The CID will likely require your company to produce huge volumes of data and to produce it in a format that the government can review with its software. Your IT person may have to communicate with various third party vendors to access certain data if the data is stored in a proprietary system. Also, your IT person may need to undertake "trial runs" of producing samples of data in order to be able to provide reliable estimates to the government as to how long it will take your company to produce certain categories of documents in the necessary format.

Decide early on whether to disclose the fact of the CID beyond the immediately relevant employees who will be responsible for complying with it. If the fact of a CID is disclosed too widely, it could result in loss of business and negatively affect employee morale. On the other hand, disclosing the existence of a CID to targeted individuals can prevent problematic email communications about issues/challenges that the company is trying to address. Also disclosing the CID to certain former employees may be necessary if there is sufficient reason to believe that the government will attempt to contact them.

In selecting the "team" within the company that will be responsible for complying with a CID, it is important to consider seniority alongside personal characteristics like being responsive, thorough, protective, and willing and able to delegate. While the government will likely extend certain production deadlines based on a legitimate reason for the delay, given the vast scope of a CID, one delay in production can easily result in a domino effect of other deliverables falling behind.

In this new heightened regulatory environment, simply responding to a Civil Investigative Demand is more difficult. However, if a company knows what to expect going into the process, the company can at least focus its energies on complying with the CID as efficiently and cost-effectively as possible.

The Rules of Professional Conduct of the various states where our offices are located require the following language: THIS IS AN ADVERTISEMENT. Ben Adams is Chairman and CEO of Baker Donelson and is located in our Memphis office, 165 Madison Avenue, Suite 2000, Memphis, TN 38103. Phone 901.526.2000. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST. © 2014 Baker, Donelson, Bearman, Caldwell & Berkowitz, PC