

Mortgage Banking Update

PATTON BOGGS LLP | December 14, 2009

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DID YOU KNOW?

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FED ISSUES GUIDANCE ON LOAN MOD ADVERSE ACTION NOTICES, BUT QUESTIONS REMAIN

On December 4, 2009, the Federal Reserve Board ("Fed") issued guidance on whether a borrower who applies for, and is denied, a loan modification must receive an adverse action notice under Regulation B of the Equal Credit Opportunity Act. The guidance uses loan modifications under the Making Home Affordable Modification Program (HAMP), but it states that the same factors should be considered for loan modifications outside of HAMP as well. According to the Fed, there are four factors that must be considered in determining whether an adverse action notice is warranted: (1) whether there is an extension of credit; (2) whether there is an application; (3) whether there is an adverse action on the application; and (4) whether the borrower is delinquent or in default on the loan.

The guidance provides that a HAMP trial period plan or modification is an extension of credit and that the submission by a borrower of significant information for evaluation under HAMP guidelines is an application. The guidance then provides that, subject to an exception, "if a HAMP servicer evaluates a borrower's information according to HAMP guidelines, declines the request, and communicates the decision to the borrower, then the servicer has taken adverse action on an application and must comply with Regulation B's adverse action notice requirements." The exception is if the borrower is currently delinquent or in default. The Fed states that under Regulation B, a creditor is not required to provide an adverse action notice to a borrower whose account is currently delinquent or in default.

Because adverse action notices are the responsibility of the creditor, the guidance clarifies that the term "creditor" includes a servicer who participates in the credit decision. What is not clear from the guidance is who must provide the adverse action notice in the case where the servicer does not participate in the credit decision. For example, if the holder of the mortgage advises the servicer to decline the modification request, then arguably the servicer has not participated in the credit decision, which means the servicer does not meet the definition of "creditor". The Fed suggests that regardless of whether Regulation B requires an adverse action notice, borrowers may find it helpful to be notified of why their loan modification request was denied. As an example, the Fed cites Treasury's directive that HAMP servicers give borrowers written notice they have been evaluated under HAMP but are not being offered a trial period plan or modification, or that the borrower's failure to provide the required financial documentation may result in a loss of eligibility under HAMP.

LOOKING AHEAD:

Webinar: Preparing for Changes to FHA Appraisals

January 20, 2010

Topic: FHA's impending changes to appraisal order guidelines

Time: 1:00 – 2:00 p.m. EST

Patton Boggs participant:
Michael Waldron

NEWS FROM CAPITOL HILL: HOUSE PASSES FINANCIAL REGULATORY REFORM LEGISLATION

On December 10, 2009, the U.S. House of Representatives voted 223 – 202 to approve a comprehensive financial regulatory reform proposal entitled the “Wall Street Reform and Consumer Protection Act” (HR 4173). The legislation was supported by Democrats (223 – 27) and unanimously rejected by Republicans (0 – 175). HR 4173 would overhaul the financial services regulatory system and make significant changes to the oversight of banks and other financial institutions.

The House legislation is a comprehensive package that encompasses individual bills previously passed out of the House Financial Services Committee and reflects portions of the Obama Administration’s previously announced initiatives for an overhaul of the U.S. financial regulatory framework. Key components of the legislation include (1) expanding the role of the Federal Reserve and consolidation of the Office of Thrift Supervision into the Office of the Comptroller of Currency; (2) creating a systemic risk regulator; (3) establishing resolution authority for regulators over financial institutions; (4) creating a new Consumer Financial Protection Agency; (5) increasing regulation of credit rating agencies; (6) additional regulation of the insurance industry; (7) increased investor protection; (8) regulation of derivatives; (9) regulation of investment advisers; and (10) more restrictive executive compensation provisions.

The legislation also includes the Mortgage Reform and Anti-Predatory Lending Act, which had previously been adopted by the House in May 2009. The goal of this piece is to prevent predatory and abusive lending practices by banning abusive compensation structures encouraging brokers to promote more costly mortgages. It also mandates new federal rules to be written to require creditors to retain an economic interest in a material portion of the credit risk of each loan that the creditor transfers, sells or conveys to a third party. Federal banking agencies would have the authority to make exceptions to the bill’s risk retention provisions, including form and amount.

HR 4173 also requires servicers participating the Making Home Affordable Program to report loan modification activity on a monthly basis. Further, servicers participating in the Home Affordable Modification Program must disclose “net present value” analysis inputs to a borrower when denying loan modification applications and the Treasury Department is required to publish a net present value calculator on its website for homeowners to use as a reference material.

This bill will still need to be reconciled with a Senate proposal, the “Restoring American Financial Stability Act” (“RAFSA”), which has yet to be reported out of the U.S. Senate Banking Committee. RAFSA will most likely be formally considered by the Senate Banking Committee towards the end of January 2010, and it is still likely that the Senate Agriculture Committee will offer its own derivatives legislation and other provisions that relate to Senator Dodd’s proposal.

Assuming that the Senate acts on their legislation sometime in the beginning of 2010, negotiations to reconcile Senate and House versions are anticipated to continue through early to mid-2010, as numerous key differences between the House and Senate versions remain.

For more details or if you have any questions, please contact any member of the [Patton Boggs Financial Services Group](#).

HUD PUBLISHES PROPOSED RULE IMPLEMENTING SAFE ACT

As On Tuesday, December 15, 2009, the Department of Housing and Urban Development (HUD) published in the Federal Register its long-awaited Proposed Rule implementing the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). By and large, the Proposed Rule is consistent with HUD's SAFE Act-related Commentary on Model State Law and its Frequently Asked Questions, both of which are posted on HUD's SAFE Mortgage Licensing Act page (<http://www.hud.gov/offices/hsg/ramh/safe/sfea.cfm>).

Among others, HUD reiterated that all loan originators must be licensed under a SAFE Act compliant law no later than July 31, 2010, except for loan originators who were already licensed under a state law enacted prior to the state's enactment of a SAFE Act compliant law. In such cases, loan originators must be licensed under a SAFE Act compliant law no later than December 31, 2010. Despite some fairly significant opposition from industry members, trade groups and even CSBS/AARMR, HUD is sticking to its position that employees of servicers (and others) who work on loan modifications, except those working exclusively under the Making Home Affordable Program, must be licensed as loan originators. Apparently, HUD was not moved by the various arguments against licensing loan modification personnel (or request to further delay the effective date), including that it would stifle the pace of loan modifications. Interestingly, as reported in the [November 30, 2009 Mortgage Banking Update](#), the federal regulators have taken a contrary position and, pursuant to the Joint Final Rule on SAFE Mortgage Licensing Act, individuals working for certain depository institutions and/or their subsidiaries who provide loan modification services do not have to be registered as loan originators.

HUD is seeking comment on the Proposed Rule. The deadline for submission is February 16, 2009..

DID YOU KNOW

- During January 2010, the Nationwide Mortgage Licensing System will launch "NMLS Consumer Access." NMLS Consumer Access will allow members of the public to view information concerning licensed

mortgage companies, their licensed branch locations, and their licensed mortgage loan originators. It is anticipated that NMLS Consumer Access will provide detailed contact information for each licensee, as well as information regarding the status of particular licenses (i.e., whether licenses are in an approved, expired or another status).

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