WEINER BRODSKY SIDMAN KIDER PC

brodsky@wbsk.com

milano@wbsk.com

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Legislative Changes and Regulatory Updates Impacting the Residential Mortgage Industry[i]

Federal Law Updates

State Law Updates

The Dodd-Frank Wall Street Reform and Consumer Protection Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which incorporates several separate new laws, including the Mortgage Reform and Anti-Predatory Lending Act (the "Mortgage Reform Act"), which is Title XIV of the Dodd-Frank Act, and the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Act), which creates the new Bureau of Consumer Financial Protection (the "Bureau"). The Dodd-Frank Act also made amendments to the Securities Exchange Act (contained in Title IX of the Act), requiring certain federal agencies to propose and implement risk retention rules for securitizations.

Below is a summary of some of the more important parts of the Dodd-Frank Act for reverse mortgage lenders. Title XIV of the Act will be of most immediate concern as the Bureau begins to exercise its rulemaking authority.

The Mortgage Reform Act (Title XIV)

The Mortgage Reform Act contained in Title XIV of the Act amends the Truth in Lending Act ("TILA") and other consumer protection statutes in myriad ways to add provisions imposing specific standards on residential mortgage loans including limitations on mortgage originator compensation and permissible activities (Subtitle A), to add an ability to repay standard for residential mortgage loans (Subtitle B), to add many additional disclosure for residential mortgage loans (Subtitle B), to add a new Office of Housing Counseling in the Department of Housing and Urban Development (Subtitle D), to add new obligations on loan servicers by amendments to TILA and RESPA (Subtitle E), to add new loan appraisal requirements to replace the Home Valuation Code of Conduct (Subtitle F), and to make various other changes.

Although the Act provides for extensive, wide sweeping changes across the industry, it largely defers the parsing out of the details to the federal agencies and primarily to the new Bureau of Consumer Financial Protection ("Bureau").

Section 1400 of the Mortgage Reform Act provides that regulations under the various provisions added by the Mortgage Reform Act must be prescribed in final form before the end of the 18 month period beginning on the "designated transfer date." The designated transfer date was set as July 21, 2011. Thus, final rules must be in place no later than January 21, 2013.

Regulations issued by the Bureau implementing the changes made by the Mortgage Reform Act must be effective not later than 12 months after they are issued (i.e., January 21, 2014). Presumably, the Bureau could set an effective date for regulations of less than the full twelve months.

The new provisions in the Mortgage Reform Act that require regulatory implementation will be effective on the date the regulations are effective. If regulations are not needed or the regulations are not in place 18 months after the designated transfer date, the provisions in Title XIV requiring rulemaking will generally take effect on that date, which is January 21, 2013.

Subtitle A—Residential Mortgage Loan Origination Standards

The primary focus of Subtitle A is the placing of significant restrictions on two practices prevalent in the mortgage industry: mortgage originator compensation and steering incentives.

Please note, however, that the Federal Reserve Board issued final Loan Originator Compensation Rule under

Regulation Z, and those rules (originally slated to become effective on April 1, 2011) became effective for loan applications received by creditors on or after April 6, 2011, due to a temporary stay issued by the U.S. Court of Appeals for the D.C. Circuit and a subsequent appeal that delayed the effective date. Those rules are discussed in more detail in the Weiner Brodsky Sidman Kider Handout that was issued with the NRMLA 2011 Annual Meeting & Expo, October 24 – 26, 2011, and which may be found on NRMLA's website in the Members Only section.

Mortgage Originator Compensation

The revisions to the federal Truth-in-Lending Act made by the Mortgage Reform Act in the area of mortgage originators is similar to the Loan Originator Compensation Rule implemented by the Federal Reserve Board through changes to Regulation Z, but there are also several differences. As explained above, these statutory changes to TILA made by the Mortgage Reform Act will not be effective until the earlier of the Bureau finalizes implementing regulations or January 21, 2013. If the Bureau finalizes implementing regulations, it can specify an effective date of up to 12 months after the date a final rule is issued (which could as late as January 2014).

Like the Loan Originator Compensation Rule, under TILA as revised, a mortgage originator will be able to receive compensation from either the creditor or the consumer – but not both. The mortgage originator cannot receive compensation that varies based upon any term of the loan except for the amount of principal, including an express prohibition on yield-spread premiums. Incentive payments to a mortgage originator based on the number of residential mortgage loans originated within a specified period of time are expressly permitted. The Act does not limit the amount of compensation received by a creditor upon the sale of a consummated loan to a subsequent purchaser (other than in a table-funded transaction).

Section 1403 of the Dodd-Frank Act (which amends Section 129B of the Truth in Lending Act (as added by section 1402(a) of the Dodd-Frank Act) provides that for any residential mortgage loan, no mortgage originator shall receive from any person and no person shall pay to a mortgage originator, directly or indirectly, compensation that varies based on the terms of the loan (other than the amount of the principal).

Further, for any mortgage loan, a mortgage originator may not receive from any person other than the consumer and no person, other than the consumer, who knows or has reason to know that a consumer has directly compensated or will directly compensate a mortgage originator, may pay a mortgage originator any origination fee or charge except bona fide third party charges not retained by the creditor, mortgage originator, or an affiliate of the creditor or mortgage originator. This provision of the Dodd-Frank Act effectively codifies the "dual compensation" prohibition provided under the Federal Reserve Board's Loan Originator Compensation Rule, discussed below.

Notwithstanding the foregoing, a mortgage originator may receive from a person other than the consumer an origination fee or charge, and a person other than the consumer may pay a mortgage originator an origination fee or charge, if: (i) the mortgage originator does ***not*** receive any compensation directly from the consumer; and (ii) the consumer does ***not*** make an upfront payment of discount points, origination points, or fees, however denominated (other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or originator), except that the Board (now the Bureau) may, by rule, waive or provide exemptions to this clause if the Board determines that such waiver or exemption is in the interest of consumers and in the public interest. This provision of the Dodd-Frank Act effectively would preclude lender paid loan originator fees if the borrower pays the lender points. This is a change from the Federal Reserve Board's Loan Originator Compensation Rule, however the Bureau has authority under the Dodd-Frank Act to amend this provision by regulation.

Steering Prohibitions

Future regulations will prohibit mortgage originators from steering any consumer to a residential mortgage loan that: (a) the consumer lacks a reasonable ability to repay; or (b) has predatory characteristics such as equity stripping, excessive fees or abusive terms. Unlike the Federal Reserve Board's Loan Originator Compensation Rule, this provision of the Dodd-Frank Act is broad enough to cover conduct of mortgage originators employed by creditors when such creditors are acting as creditors (as opposed to merely brokering a loan).

The Bureau is required to prescribe regulations prohibiting mortgage originators from steering any consumer away from a qualified loan to a loan that is not a qualified loan. See the discussion below for a definition of a qualified loan.

Key Definitions

The definition of "mortgage originator" is much broader than under the S.A.F.E. Act and many state law definitions. A mortgage originator is any person (e.g. individuals or entities) who, for or in the expectation of direct or indirect compensation or gain, (a) takes a residential mortgage loan application; (b) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (c) offers or negotiates terms of a residential mortgage loan. A person "assists a consumer in obtaining or applying to obtain a residential mortgage loan" by, among other things, advising on residential mortgage loan terms (including rates, fees and other costs), preparing residential mortgage loan packages or collecting information on behalf of the consumer with regard to a residential mortgage loan.

However, individuals who perform purely administrative or clerical tasks on behalf of a mortgage originator are expressly exempt from the mortgage originator requirements.

Other Notable Exemptions

Servicers (as defined under RESPA) and servicer employees, agents and contractors are exempt, including but not limited to those who offer or negotiate terms of a residential mortgage loan for purposes of renegotiating, modifying, replacing and subordinating principal of existing mortgages where borrowers are behind in their payments, in default or have a reasonable likelihood of being in default or falling behind. Licensed real estate brokers not compensated by a mortgage lender, mortgage broker or mortgage originator are also exempt.

Additional Requirements

TILA is modified to require mortgage originators to be qualified and (when required) registered and licensed as a mortgage originator under applicable State or Federal law. Additionally, a mortgage originator must include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry (NMLS).

Regulatory Authority

The Bureau has broad discretionary authority to regulate terms, acts or practices relating to residential mortgage loans that the Bureau finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA, necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections or are not in the interest of the borrower. The Bureau's regulations will, at a minimum, prohibit a mortgage originator from:

(a) Engaging in abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender or age;

(b) Mischaracterizing the credit history of a consumer or the residential mortgage loans available to a consumer; or

(c) Mischaracterizing or suborning the mischaracterization of the appraised value of the property securing the extension of credit.

Section 1413 Defense to Foreclosure

This section provides that a borrower can assert a violation of the limitations on steering and loan officer compensation or the ability to repay standard at any time as a defense by recoupment from the creditor in response to a collection action or a foreclosure. There is no time limit on the period for which the borrower can assert these violations in this type of action.

Section 1416 Amendments to Civil Liability Provisions

Civil Liability under Truth in Lending. This section amends the civil liability provisions of TILA and extends the statute of limitations for certain violations to 3 years.

For consumer leases, the minimum statutory damages award is increased from $100 to $200 and the maximum is increased from $1000 to $2000, to be consistent with credit transactions. Of more significance for lenders, the maximum statutory damages award in class actions is increased from $500,000 to $1,000,000. The statutory damages are awarded in addition to actual damages and attorney's fees.

Of most significance to residential mortgage lenders, the violations of the steering and loan originator compensation provisions and the ability to repay provisions added by this statute will carry additional statutory damages equal to the sum of all finance charges and fees paid unless the lender can demonstrate that the violation was not material.

Most actions for a violation of TILA must be brought within one year of the date of the violation. This bill would extend this time period to three years for violations related to Section 32 loans (HOEPA loans), violations related to the new provisions on steering and loan officer compensation and violations related to the new ability to repay standard.

Section 1419 Required Disclosures

This section provides for new items of information that must be included in closed-end loan Truth in Lending disclosures.

Section 1420 Disclosures Required in Monthly Statements for Residential Mortgage Loans

Billing Statements for Closed End Loans. This section will require monthly billing statements. The billing statements must include the following:

• The amount of the principal obligation under the loan;

• The current interest rate in effect for the loan;

• The date on which the interest rate may next adjust or reset;

• The amount of any prepayment penalty fee to be charged, if any;

• A description of any late payment penalty fees;

• A telephone number and email address that may be used to obtain information regarding the loan;

• The names, addresses, telephone numbers and internet addresses of HUD or State housing authority approved counseling agencies reasonably available to the consumers; and

• Additional information that the Bureau may require.

For fixed rate loans, this information, as applicable, must be provided in a coupon book if monthly statements are not provided.

The Bureau is to develop standard forms for this disclosure requirement.

Subtitle E—Mortgage Servicing

Section 1463 Real Estate Settlement Procedures Act of 1974 Amendments

This section makes several changes to RESPA.

Force Placed Insurance. This amendment will impose requirements on servicers of federally related mortgage loans with respect to force placed insurance.

The servicer may not obtain force placed insurance unless there is a "reasonable basis" to believe the borrower has failed to comply with the loan contract requirements. The servicer will not be deemed to have a reasonable basis unless the servicer complies with the following:

• The servicer has sent a notice by first class mail containing a reminder of the borrower's obligation to maintain insurance; a statement that the servicer does not have evidence of the insurance; a clear and conspicuous statement of the procedures by which the borrower can demonstrate that the borrower has insurance coverage; and a statement that the servicer may obtain coverage at the borrower's expense if the borrower does not demonstrate coverage in a timely manner;

• The servicer has sent a second notice at least 30 days after the first notice with all of the same information; and

• The servicer has not received any demonstration of insurance coverage by the end of the 15 day period beginning on the date the second notice was sent.

A demonstration of insurance coverage shall include the existing policy number along with the identity of, and contact information for, the insurance company or agent.

Within 15 days of receiving confirmation of existing insurance coverage, the servicer must terminate any force placed insurance and refund any premiums paid for the force placed insurance during the period the borrower's insurance was in effect.

All charges for force placed insurance must be "bona fide and reasonable."

Additional Prohibitions for Servicers. RESPA is amended to prohibit the following:

• Charging fees for responding to qualified written requests;

• Failing to take timely action to correct errors relating to payment allocations, final balances for purposes of a payoff or avoiding foreclosure, or other servicer duties;

• Failing to respond in 10 business days to a request for identity and contact information for the owner or assignee of the loan;

• Failing to comply with other obligations as established by the Bureau by regulation.

Qualified Written Requests. The time limits for responding to qualified written requests have been reduced. The initial response will now be due in 5 days (reduced from 20) and final resolution will be due in 30 days (reduced from 60). The servicer can take an additional 15 days to provide the final response if the servicer provides a notice to the borrower of the need for the extension and the reason it is needed.

Increased Penalties. The penalties are increased for certain violations of RESPA from $1,000 to $2,000 per violation and $500,000 to $1 million for class actions. These penalties relate to the RESPA provisions related to notices with respect to transfer of servicing, the administration of escrow accounts, the handling of qualified written requests and the new provisions added by this Section 1463.

Subtitle F—Appraisal Activities

Subtitle F of the Mortgage Reform Act (Title XIV of the Act) addresses appraisal activities, including imposing a requirement on lenders to use only appraisals provided by certified or licensed appraisers in connection with higher-risk mortgages and imposing independence and disclosure requirements in connection with all appraisals. Significantly, the provisions abolish the Home Valuation Code of Conduct ("HVCC"), effective on the date the interim final regulations are promulgated under the newly enacted section 129E of TILA (as created by § 1472 of the Dodd-Frank Act).

Section 1472(g)(2) of the Mortgage Reform Act required the Federal Reserve Board to prescribe interim final regulations no later than 90 days after the date of enactment of section 1472 defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations.

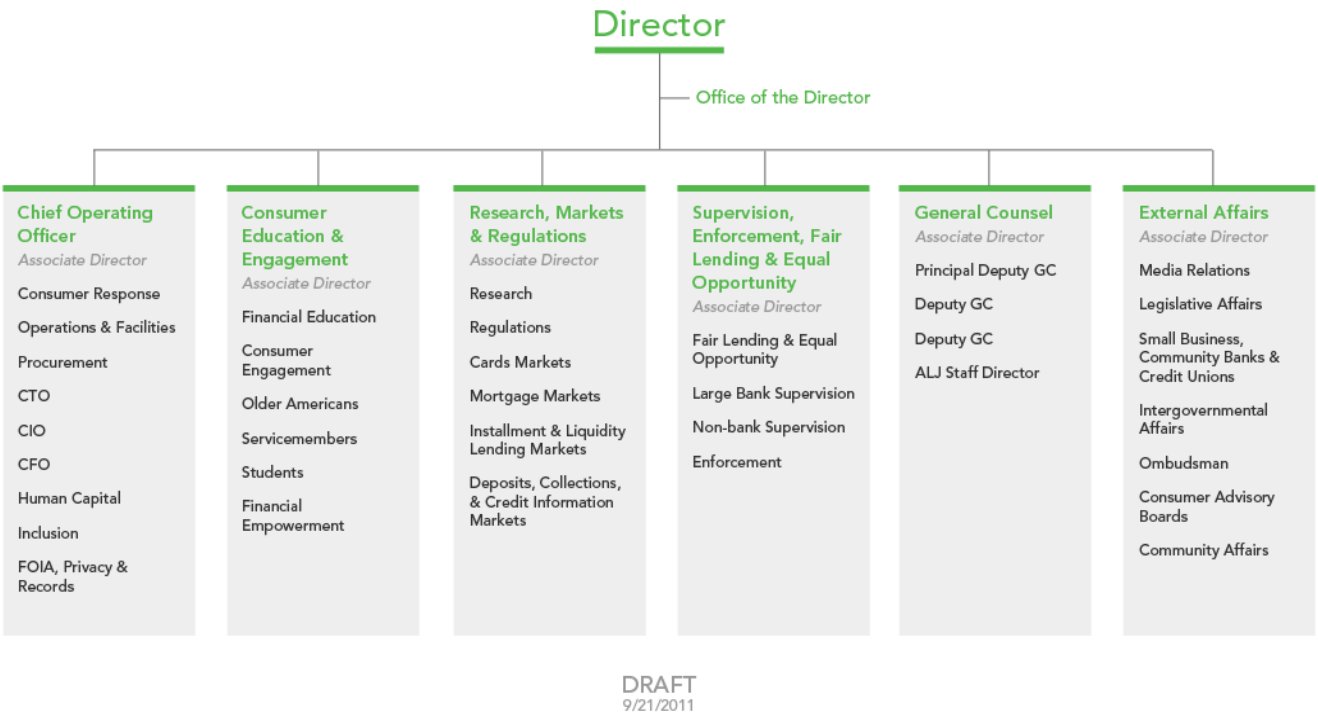
The Board, on October 28, 2010, published an interim final rule pursuant to its mandate under the Dodd-Frank Act to implement the appraisal independence provisions added to the Truth-in-Lending Act. The Interim Rule replaces the Home Valuation Code of Conduct, which Dodd-Frank set for expiration on the date the Interim Rule issued. The Board solicited comments on the Interim Rule generally and on a variety of specific issues. The Rule had an interim effective date of December 27, 2010, comments were due on or before December 27, 2010 and compliance with the Interim Rule became mandatory on April 1, 2011.

Those rules are discussed in more detail in the Weiner Brodsky Sidman Kider Handout that was issued with the NRMLA 2011 Annual Meeting & Expo, October 24 – 26, 2011, and which may be found on NRMLA's website in the Members Only section.

Bureau of Consumer Financial Protection (Title X)

Title X of the Dodd-Frank Act creates a Bureau of Consumer Financial Protection (the "Bureau") as an independent entity within the Federal Reserve System ("Federal Reserve"), to regulate the offering and provision of consumer financial products or services under federal consumer protection laws. The Bureau's expansive power to make and revise rules on a panoply of subjects, as well as its unprecedented enforcement authority, mean that all financial services companies will be impacted by the changes brought on by this statute.

Below is an organizational chart of the CFPB.



Authority and Purpose. The Act states that markets should be "fair, transparent, and competitive," and directs the Bureau to ensure that: 1) consumers are provided with timely and understandable information to make responsible decisions; 2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; 3) outdated, unnecessary and unduly burdensome regulations are identified and eliminated; 4) federal consumer financial law is enforced consistently to promote fair competition; and 5) markets operate transparently and efficiently to promote both access and innovation. In light of these provisions, the Bureau is likely to take an aggressive position on fair lending and access to credit, which, based upon previously announced administration policy, will probably include enforcement based upon the so-called disparate impact theory.

The Bureau will have rulemaking and enforcement authority under federal consumer protection laws with respect to persons offering or providing financial products or services to consumers, assuming most non-supervisory consumer protection authority over depository institutions from all agencies except for the Federal Trade Commission, and exercising supervisory authority with respect to consumer protection over depository financial institutions with more than $10 billion in assets. Prudential regulators will retain primary consumer protection

enforcement authority over depository financial institutions with less than $10 billion in assets. Prudential regulation of all depository financial institutions will remain with the prudential regulators, except that the Office of Thrift Supervision has been abolished and its functions and employees incorporated into the Office of the Comptroller of the Currency. Among the laws for which the Bureau will assume responsibility, all of HUD's consumer protection functions under RESPA, the S.A.F.E. Act, and the Interstate Land Sales Full Disclosure Act will be transferred to the Bureau. In addition, the Bureau will have primary rulemaking authority for TILA, FCRA, FDCPA, and other major consumer laws. The Bureau will publish a list of the existing rules and orders that it will enforce in the Federal Register before the designated transfer date.

Title X makes it unlawful to engage in any unfair, deceptive or abusive act or practice with respect to the offering or provision of consumer financial products or services, and gives the Bureau broad authority to interpret these terms by regulation. This has the effect of giving the Bureau its own federal trade commission act to interpret and enforce, as well as expanding the Federal Trade Commission Act ("FTCA")'s prohibitions beyond the jurisdictional requirements of the FTCA (which are relaxed under the Act for the FTC as well). Additionally, the Act makes it unlawful for any person (including people otherwise not covered by the Act) to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the Act.

Beyond this very broad authority to prescribe rules to implement the Act, the Bureau is instructed to study a broad array of issues, from reverse mortgages to mandatory arbitration clauses, and to report on many of these issues to Congress at various times over the next one to three years, and is varyingly required or authorized to propound rules regarding many of them. The Bureau is further required periodically to review essentially all regulations under federal consumer law regarding financial products and services, propounding changes as needed. The combined effect of all of this rulemaking, studying, reporting and recommending, will be a volume of regulatory activity without precedent since the New Deal, affecting almost every aspect of the markets for consumer financial products and services. Companies and trade organizations, and their attorneys, will have to be prepared to monitor and submit comments with respect to multiple simultaneous studies and regulations, covering everything from all aspects of long-established regulatory regimes to proposals for entirely new fields of regulation.

In addition to the existing enforcement mechanisms in each of the enumerated consumer laws, the Bureau is given extremely broad enforcement powers. The Bureau may commence both administrative proceedings and civil suits. The Bureau can go to court in its own name, using its own attorneys, and ask the court to order rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement, compensation for unjust enrichment, damages, public notification of violations with costs to be borne by the violator, limits on activities or functions, and civil money penalties of up to $1 million per day. The Bureau may not seek punitive damages, however, and settlements must be approved by the court. Additionally, even companies not subject to the Bureau's jurisdiction under the Act may have to submit information to the Bureau to establish that, in fact, they are not subject to its jurisdiction.

Preemption. Title X limits federal preemption of state consumer laws, which will only be preempted if they discriminate against national banks, if they permit lower standards than federal law requires, or if they prohibit alternative mortgage transactions. Moreover, state attorneys general will have the authority to enforce certain consumer law provisions in court, as parens patriae for consumers in their states, including seeking damages on behalf of individual consumers.

Effective Date. The Bureau was created as of the enactment of the statute. The transfer of rulemaking, supervisory and enforcement authority will take place on a "designated transfer date," which was announced to be July 21, 2011.

Additionally, the Act provides a broad range of effective dates and timetables for regulatory changes and reports, ranging from immediate to several years in the future. We will be providing updates, including detailed regulatory

analysis, as key dates approach.

Formal Studies. Under Title X, the Bureau and certain other agencies have been tasked with conducting formal studies and/or proposing new rules on a broad range of topics, including a **study of reverse mortgages that may result in the issuance of regulations. The Bureau may prescribe an integrated disclosure form, and may issue regulations before completing the study**.

Transfer of Rulemaking Authority

The Bureau will take over rulemaking authority for the following "enumerated consumer laws":

• Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. § 3801 et seq.);

• Consumer Leasing Act of 1976 (15 U.S.C. § 1667 et seq.);

• Electronic Fund Transfer Act (15 U.S.C. § 1693 et seq.), except with respect to section 920 of that Act;

• Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.);

• Fair Credit Billing Act (15 U.S.C. § 1666 et seq.);

• Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. §§ 1681m(e), 1681w);

• Home Owners Protection Act of 1998 (12 U.S.C. § 4901 et seq.);

• Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.);

• Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. § 1831t(c)–(f));

• Sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6802–6809), except for section 505 as it applies to section 501(b);

• Home Mortgage Disclosure Act of 1975 (12 U.S.C. § 2801 et seq.);

• Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1601 note);

• Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.);

• S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. § 5101 et seq.);

• Truth in Lending Act (15 U.S.C. § 1601 et seq.);

• Truth in Savings Act (12 U.S.C. § 4301 et seq.);

• Section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111–8);

• Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701); and

• Large portions of the Mortgage Reform and Anti-Predatory Lending Act, which is Title XIV of the Act, are also designated as enumerated consumer laws, under the purview of the Bureau.

The Bureau has the authority to exempt most classes of covered persons by rule, whether in whole or in part. It may also prescribe rules regarding registration requirements for non-depository covered persons and may publicly disclose the registration information.

The Dodd-Frank Act also provides a mechanism for the states to force the Bureau to engage in a rulemaking. When a majority of states has enacted a resolution in support of the establishment or modification of a consumer protection regulation, the Bureau shall issue a notice of proposed rulemaking.

Enforcement Key Points

The Bureau may conduct hearings and adjudication proceedings in order to enforce both Title X and the other laws that it enforces.

Civil penalties are available in three tiers. The first tier, for all violations, is up to $5,000 per day of the violation; the second tier, for reckless violations, is up to $25,000 per day; and the third tier, for knowing violations, is up to $1 million per day.

The Bureau can seek an extremely broad array of relief, including rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement, compensation for unjust enrichment, damages, public notification of violations with costs to be borne by the violator, limits on activities or functions, and civil money penalties.

The Bureau and the FTC will negotiate a coordination agreement. When the FTC or the Bureau has initiated an enforcement action, the other can intervene but can't initiate a separate action. The Bureau can issue subpoenas and go to court to enforce them. The Bureau can issue civil investigative demands, which may require written or oral answers as well as documents. Each civil investigative demand must state the nature of the conduct constituting the alleged violation and the applicable provision of law. The Bureau can grant immunity in order to compel answers.

The statute of limitations for violations under Title X is 3 years, but the statutes of limitations for other statutes will continue to apply to claims under those statutes. The Bureau is required to pass along evidence regarding the commission of any crime, or failure to pay federal taxes, to the appropriate authorities.

Additional Information Gathering

ECOA is amended to require financial institutions to track whether an applicant for credit is a women-owned, minority-owned, or small business. The information is to be reported and made available to the public, similar to HMDA data.

HMDA will now require collection and reporting of data on:

• The age of the applicant;

• Points and fees;

• APR spread;

• Term of prepayment penalty;

• Value of real property to be pledged;

• Term of introductory rate;

• Presence of terms permitting payments other than fully amortizing payments;

• Term of loan;

• Channel through which application was made; and

• If the Bureau decides to require them by rule, unique identifiers for originator, loan, and property parcel, as well as applicants' credit score.

Offices Established within the Bureau

Within the Bureau, there is to be established several Offices, including the Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Member Affairs, and, **most importantly for the reverse mortgage industry, the Office of Financial Protection For Older Americans**.

Within the 180-day period beginning on the designated transfer date (i.e., July 21, 2011), the Director of the Bureau must establish the Office of Financial Protection for Older Americans (the "OFPOA"). Thus, the OFPOA must be established by January 2012. The functions of the OFPOA shall include activities designed to facilitate the financial literacy of individuals who have attained the age of 62 years or more (referred to as ''seniors'') on protection from unfair, deceptive, and abusive practices and on current and future financial choices, including through the dissemination of materials to seniors on such topics.

The OFPOA shall be headed by an assistant director. The OFPOA shall:

(A) develop goals for programs that provide seniors financial literacy and counseling, including programs that—

(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices;

(ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and

(iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices;

(B) monitor certifications or designations of financial advisors who advise seniors and alert the FTC and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive;

(C) not later than 18 months after the date of the establishment of the Office (thus, by July 2013), submit to Congress and the FTC any legislative and regulatory recommendations on the best practices for—

(i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;

(ii) methods in which a senior can identify the financial advisor most appropriate for the senior's needs; and

(iii) methods in which a senior can verify a financial advisor's credentials;

(D) conduct research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—

(i) protecting themselves from unfair, deceptive, and abusive practices;

(ii) long-term savings; and

(iii) planning for retirement and long-term care;

(E) coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement; and

(F) work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors (including the National Education and Resource Center on Women and Retirement Planning).

CFPB Regulatory Pronouncements and Related Announcements

Obama Names Richard Cordray Director of the CFPB

On January 4, 2012, President Obama used a recess appointment to name former Ohio Attorney General Richard Cordray as the Director of the Consumer Financial Protection Bureau ("CFPB"). The appointment is effective through the end of the Senate's next full session, which is schedule for the end of 2013.

CFPB Background

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). In addition to reforming the regulation of the financial industry, the Dodd-Frank Act created the CFPB to operate as an independent agency within the Federal Reserve System and to regulate consumer financial protection issues under federal consumer financial laws. The Act also provided that the CFPB be headed by a Director to be "appointed by the President, by and with the advice and consent of the Senate."

The CFPB was created as a response to the 2008 financial crisis and was originally championed by Elizabeth Warren, who was also President Obama's first choice for the Director of the CFPB. However, Warren became a polarizing figure and strong opposition from Congressional Republicans as well as financial institutions made her appointment to head the CFPB politically unattainable.

In an effort to move forward, President Obama nominated Richard Cordray for the Director position in July 2011. While acknowledging Cordray's qualifications, Senate opponents vowed to block the appointment of any director until substantial changes are made to the organization and funding of the CFPB. In particular, opposing Senators argued that structural changes needed to be made to the CFPB, including replacing the Director's position with a five-person commission, making the CFPB subject to the congressional appropriations process, requiring that

CFPB rules be subject to review by the OMB, and giving Congress more power to overrule the CFPB, among other things. In December 2011, a Republican-led filibuster in the Senate denied Cordray a vote and blocked his nomination. Consequently, on January 4, 2012, President Obama named Cordray Director of the CFPB by using a recess appointment.

The CFPB became operational on July 21, 2011, but could not exercise the full authority granted it under the Dodd-Frank Act until a Director was appointed. With a Director, the CFPB can now issue new rules and supervise non-bank financial institutions, in addition to using only powers inherited from existing banking regulators.

CFPB Begins Supervision of Nonbanks

With the appointment by President Obama of Richard Cordray as the Director of the Consumer Financial Protection Bureau ("CFPB"), on January 5, 2012, the CFPB initiated its nonbank supervision program (the "Program"). The Program is an extension of the program the CFPB has had in place since July 21, 2011 to supervise certain banks.

Effective immediately upon appointment of a Director, the CFPB asserts that it has the authority to oversee certain nonbank businesses, regardless of size. These include mortgage originators, brokers and servicers, businesses engaged in loan modification or foreclosure relief services, payday lenders, and private education lenders. Additionally, the CFPB will supervise "larger participants" in all other markets, including debt collection, consumer reporting, and money services, once the CFPB has defined the term "larger participants."

The CFPB reportedly will utilize the same Supervision and Examination Manual (the "Manual") for the examination of nonbanks that it is currently using to examine banks. The current version of the Manual can be found at:

http://www.consumerfinance.gov/guidance/supervision/manual/.

Pursuant to the Manual, the CFPB will examine nonbanks to ensure compliance with a host of Federal consumer financial laws where applicable, including but not limited to the Truth in Lending Act, the Equal Credit Opportunity Act, the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, the S.A.F.E. Act, and the Home Owners Protection Act. The CFPB has stated that it intends the examination process to be similar to that conducted by prudential or State regulators, including requests for information and data, interviews with employees, on-site inspections, and examination follow-ups. In addition to scheduled examinations, the CFPB may on occasion conduct targeted or industry-wide reviews, based on specific complaints or allegations of wrongdoing.

The CFPB is also authorized to conduct more formal investigations of supervised entities. Pursuant to this power, the CFPB can issue subpoenas or civil investigative demands for information, bring administrative enforcement proceedings, or even civil actions in Federal district court. It can seek a variety of remedies in these venues, including but not limited to restitution, rescission of contracts, and civil money penalties (although the CFPB has no criminal enforcement authority, and will refer such matters to the Department of Justice).

It is important to note that the CFPB has stated that it expects full cooperation from supervised entities (including nonbanks) pursuant to the CFPB's supervisory requests for information. To that end, the CFPB has provided that all provision of otherwise-privileged information to the CFPB (such as information subject to attorney-client privilege) pursuant to a supervisory request will not waive the privilege. This is intended to remove the ability of nonbanks to object to providing certain information requested by the CFPB due to privilege concerns. Additionally, the CFPB has stated that it will treat all information it acquires through the examination process as confidential and privileged, and exclude it from disclosure under the Freedom of Information Act. While the

CFPB may share such information with other supervisory governmental agencies, it has stated that it does not plan to routinely share information with nonsupervisory agencies.

"Know Before You Owe" (or RESPA-TILA Reform, Again, But this Time We Mean It!)

Sections 1032, 1098 and 1100A of the Dodd-Frank Act provided the CFPB with authority to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

This proposal is discussed in more detail in the Weiner Brodsky Sidman Kider Handout that was issued with the NRMLA 2011 Annual Meeting & Expo, October 24 – 26, 2011, and which may be found on NRMLA's website in the Members Only section.

Importantly, on February 21, 2012, as part of its the Small Business Review Panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA), that the Bureau posted on its Blog section on its website (at http://www.consumerfinance.gov/blog/sbrefa-small-providers-and-mortgage-disclosure/#more-12152), in a document entitled "An overview of the proposals we are considering and their potential implications for small providers" the Bureau indicated that "The CFPB is planning to combine the disclosures that consumers receive shortly after application (the early TIL and the GFE) and the disclosures that consumers receive at or before closing (the final TIL and the HUD-1 settlement statement). ***The proposals under consideration by the CFPB would apply only to closed-end credit transactions (i.e., home equity lines would not be covered) and would not apply to reverse mortgages***."

Importantly, nonetheless, under Section 1076 of the Dodd-Frank Act, the Bureau is authorized to: "provide for an integrated disclosure standard and model disclosures for reverse mortgage transactions, consistent with section 4302(d) (sic), that combines the relevant disclosures required under the Truth in Lending Act (15 U.S.C. 1601 et seq.) and the Real Estate Settlement Procedures Act, with the disclosures required to be provided to consumers for Home Equity Conversion Mortgages under section 255 of the National Housing Act."

CFPB Proposes Rule on Confidential Treatment of Privileged Information

The Consumer Financial Protection Bureau, on July 28, 2011, proposed a rule regarding the treatment of privileged information disclosed to the CFPB. The CFPB indicates that the submission of information to the CFPB for any purpose in the course of the CFPB's supervisory or regulatory processes will not waive, destroy, or otherwise affect any privilege that a person could claim with respect to that information under Federal or State law. Further, the proposed rule states that the foregoing clarification will not be construed as meaning that a person waives any privilege for submittal of information to the CFPB under circumstances to which the foregoing clarification may not apply, and that no person would waive any privilege applicable to any information by submitting that information to the CFPB but for the previous clarification. Finally, the proposed rule states that the CFPB is not deemed to have waived any privilege applicable to information by transferring that information or permitting that information to be transmitted to any Federal or State agency.

The proposed rule can be found at:

https://www.federalregister.gov/articles/2012/03/15/2012-6254/confidential-treatment-of-privileged-information#p-3.

We anticipate a significant challenge to this rule, and the statutory language is far from clear. We strongly encourage all interested and effected parties to comment.

The comment due date is April 16, 2012.

CFPB Extends "Response" Due Date on Streamlining Inherited Regulations

The Consumer Financial Protection Bureau published in the Federal Register, December 5, 2011, a request for advice on streamlining inherited regulations. Pursuant to requirements of Dodd-Frank, the CFPB republished the regulations of prior agencies that implement fourteen consumer laws as regulations of the CFPB. The Inherited Regulations implement the following:

- the Consumer Leasing Act;
- the Electronic Fund Transfer Act (except section 920);
- the Equal Credit Opportunity Act;
- the Fair Credit Reporting Act (except sections 615(e) and 628);
- the Fair Debt Collection Practices Act;
- subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act;
- sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)),
- the Home Mortgage Disclosure Act;
- the Real Estate Settlement Procedures Act;
- the S.A.F.E. Mortgage Licensing Act;
- the Truth in Lending Act;
- the Truth in Savings Act;
- section 626 of the Omnibus Appropriations Act, 2009, and;
- the Interstate Land Sales Full Disclosure Act.

As part of the process of republishing, the CFPB has solicited comments regarding whether portions of the Inherited Regulations can be streamlined in any way. The CFPB recognizes that some regulations may have become overly complex, that differences in definitions for the same term among regulations can lead to confusion, that some provisions may be redundant in light of other revisions, and that due to changing technology, some provisions may no longer be necessary. In light of that, the CFPB has stated that the principal goal of this initial review is to identify the highest priority areas for streamlining the Inherited Regulations through updating, modifying, or removing unnecessary or overly burdensome regulations.

To this end, the CFPB has identified five factors that it will consider in streamlining regulations:

- the potential benefits and costs of a regulatory change for consumers and covered entities;
- the likelihood that the CFPB would be able to achieve the benefits consistent with the underlying statute;
- the speed with which the public would realize the benefits;
- the governmental and private resources it would take to realize the benefits, and;
- the state of the evidence with which to judge these factors.

Proposals to streamline the Inherited Regulations should take all these factors into account. With these factors in mind, the CFPB has listed a set of general requests for information from commenters. One of the relevant requests asks that each commenter single out their top priority for revision, and focus on revisions that would not require Congressional action to amend the underlying statute. The CFPB has also suggested that commenters can propose that the CFPB focus on a particular regulation or set of regulations, focus on a market sector and all of the regulations applying to that sector, or suggest another approach entirely. A third request asks for suggestions for required disclosures (other than mortgage disclosures under TILA and RESPA) that should be considered for modification or elimination.

The CFPB has included in its release specific examples of opportunities for potential streamlining, although the CFPB notes that it has not yet determined whether it would have the authority to make such revisions. Some of these specific examples include making the definition of "consumer" consistent across the Inherited Regulations and raising or amending the thresholds of applicability of Regulation Z to creditors (i.e., extension of consumer credit more than 25 times in the past calendar year or more than 5 times for transactions secured by a dwelling).

Comments were due by March 5, 2012

As stated above, the Consumer Financial Protection Bureau, on December 5, 2011, issued proposed rules for streamlining the regulations that the CFPB will inherit under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Initial comments were due on March 5, 2012, and that date has not changed. However, responses to initial comments now have a new deadline.

This additional comment due date is June 4, 2012.

CFPB to Address Force-Placed Insurance

The Consumer Financial Protection Bureau recently announced that it will address the practice of force-placed insurance by mortgage servicers. The CFPB indicated that it will require servicers to demonstrate that they have a reasonable belief that borrowers have fallen behind on requisite payments before charging them for forced-place insurance. Additionally, the CFPB has noted that it plans to allow borrowers to select their own insurance, instead of relying on the insurance provided by servicers.

CFPB Servicing Statement Initiative

The Consumer Financial Protection Bureau, on February 13, 2012, announced plans to create a new standardized periodic mortgage billing statement. According to the agency, the statement would ease understanding by borrowers and reduce costs and fees. The CFPB's draft statement addresses the

requirements of Section 1420 of the Dodd-Frank Wall Street Reform and Consumer Protection Act that a periodic mortgage billing statement contain information about the principal loan amount, the current interest rate, the date on which the interest rate may next reset, a description of any late payment and penalty fees, information about housing counselors, and a telephone number and email address that may be used to contact the servicer. The CFPB posted the draft statement online and is soliciting comments. A copy of the current draft and instructions for commenting may be found at http://www.consumerfinance.gov/a-model-form-for-mortgage-statements.

NRMLA has formed a task force to draft together informal comments to the Bureau on the specific periodic statements required by long-standing and current applicable regulations, and that HECM servicers have utilized for years.

FTC and CFPB Enter into Cooperation Agreement Regarding Overlapping Investigatory and Enforcement Authorities

The Federal Trade Commission and the Consumer Financial Protection Bureau have entered into an agreement regarding their overlapping authority for investigating and enforcing consumer financial laws. The FTC's press release is available here:

http://www.ftc.gov/opa/2012/01/ftccfpb.shtm.

The CFPB's press release is available here:

http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-federal-trade-commission-pledge-to-work-together-to-protect-consumers/.

The Memorandum of Understanding between the two agencies is available here:

http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf.

The agreement requires both agencies to notify each other of planned investigations and enforcement actions prior to instituting any such actions, in order to reduce duplicative efforts by the government as well as reduce the corresponding burdens on responding businesses. The agreement also sets forth a mechanism for the two agencies to comment on each other's rulemakings, and to share information received by either agency pursuant to investigations conducted by either agency. The agreement will hopefully ensure more consistent regulation, investigatory standards, and enforcement remedies, and reduce duplicative enforcement efforts. The agreement is valid for three years, and is in effect as of January 20, 2012.

Because the CFPB now has an appointed director, we expect the CFPB to begin aggressively exercising its authorities pursuant to the Dodd-Frank Act. The CFPB has already announced plans to pursue investigations of non-bank lenders.

CFPB Issues Non-Bank Exam Procedures

The Consumer Financial Protection Bureau announced, on January 11, 2012, the release of its Mortgage Origination Examination Procedures for nonbanks, consistent with the CFPB's new authority to oversee nonbanks in the wake of the appointment of Richard Cordray as the CFPB's director. The CFPB had previously released its procedures for examining mortgage servicing.

The Procedures detail the methods that the CFPB will use in conjunction with its Supervision and Examination Manual to examine each supervised entity's systems to confirm compliance in the origination process with all applicable Federal consumer financial laws, to identify practices that put the entity at risk of violating such laws, to determine if such violations have in fact occurred, and to further determine whether further supervisory or enforcement actions are necessary in the face of apparent violations.

The Procedures are divided into seven "modules," which describe the areas that each examination can cover. It is not yet apparent whether a typical examination will cover all seven modules. The first module generally examines the entity's business model, and looks at (among other items) what lending channels the entity uses, how its loans are funded, the reporting structures and responsibilities of key internal managers, whether quality control functions are independent of production functions, and the types of products the entity offers.

The second module examines in general the entity's advertising and marketing practices, in particular for compliance with the requirements of the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the SAFE Act. Under this module the CFPB will also examine, among other things, whether an entity's advertising or marketing acts and practices are misleading or contain material misrepresentations, and whether they provide timely, clear, and understandable information about their loan products, particularly with regard to non-traditional mortgage loans and reverse mortgages.

The third module focuses on the entity's policies and procedures surrounding loan disclosures and terms. It calls for an examination to determine if the entity provides the requisite disclosures under TILA, RESPA, ECOA, the Fair Credit Reporting Act, and the Home Owners Protection Act. The module also provides for examinations to determine if loan documentation has been altered or forged and whether consumers lose their rate locks prior to their expiration.

The fourth module generally examines the entity's underwriting practices, appraisals, and originator compensation. For underwriting, the CFPB will examine a mortgage lender's compliance with TILA requirements for high-cost or higher-priced loans and its underwriting practices more generally, including with respect to non-traditional or subprime loans, and will assess compliance with ECOA. For appraisals, the module calls for a review of the entity's compliance with TILA's valuation independence requirements, among other items. Finally, for originator compensation, the CFPB will examine the entity's compliance with TILA's rules on loan originator compensation and prohibitions on steering.

The fifth module in general examines an entity's closing practices, particularly to determine whether the entity provides all requirement documentation at closing and whether escrow accounts are established as applicable. The sixth module hones in on an entity's compliance with fair lending requirements. It includes a review of the entity's HMDA data (in addition to non-HMDA data) and its compliance with ECOA. Finally, the seventh module generally examines an entity's privacy policies and its compliance with the Gramm-Leach-Bliley Act and FCRA.

The current version of the Procedures may be found at:

http://www.consumerfinance.gov/wp-content/uploads/2012/01/Mortgage-Origination-Examination-Procedures.pdf.

It is apparent that the CFPB's origination compliance examination process will be comprehensive, and will apply not just to banks, but to non-bank originators as well. All originators should study the CFPB's Procedures carefully, in order to ensure that they are in full compliance at all times.

NRMLA offered informal comments to the CFPB on the Mortgage Origination Examination Procedures as they relate to reverse mortgages. That comment letter can be found on NRMLA' website at http://www.nrmlaonline.org/ in the Members Only section.

CFPB Interim Final Rules on FDCPA and SAFE

The Consumer Financial Protection Bureau, on December 16, 2011, issued an interim final rule addressing the federal Fair Debt Collection Practices Act. Three days later, on December 19, 2011, the CFPB issued two additional interim final rules: (i) one addressing the federal registration of residential mortgage loan originators under the Secure and Fair Enforcement for Mortgage Licensing Act; and (ii) another addressing state compliance with the SAFE Act and the maintenance of a licensing and registration system under the SAFE Act. All three interim final rules became effective December 30, 2011.

FDCPA Regulations - Regulation F

The regulation primarily provides for the transfer of rulemaking authority related to the state exemptions under the FDCPA from the Federal Trade Commission to the CFPB, effective July 21, 2011. The regulation substantially duplicates the FTC's rule as found in 16 C.F.R. Part 901, and does not impose any new substantive obligations on regulated entities. The CFPB indicates that regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this interim final rule.

Additionally, the preamble to Regulation F states that the CFPB anticipates that it will adopt any additional guidance on the FDCPA as part of Regulation F, as opposed to through formal advisory opinions or informal staff interpretations, as the FTC had in the past.

In general, Regulation F provides for the procedures under which a state may apply to the CFPB for exemption of one or more classes of state debt collection practices from the provisions of the FDCPA, which exemption may be granted if the CFPB determines that those classes of state debt collection practices are subject to state law that is substantially similar to, or provides greater protection to consumers than, the provisions in Sections 803 through 812 of the FDCPA and that there is adequate provision for state enforcement of such law. The regulation also provides the criteria by which the CFPB may make such determination. Note that such review includes consideration of each state provision in comparison to its corresponding provision in the FDCPA, as opposed to comparison of the entire applicable state law with the corresponding portions of the FDCPA. Notices of the determinations will continue to be published in the Federal Register.

The above provisions have been included in Subpart A of Regulation F, and the CFPB has indicated in the preamble to the regulation that it has reserved Subpart B for any of the CFPB's future rulemaking under the FDCPA. The comment deadline ended on February 14, 2012

SAFE Act Regulations - Regulations G and H

These regulations primarily are intended to provide for the transfer of rulemaking authority for the SAFE Act to the CFPB, effective July 21, 2011. These regulations substantially duplicate pertinent existing rules of the following agencies: the Office of the Comptroller of the Currency; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; the Office of Thrift Supervision; the Farm Credit Administration; the National Credit Union Administration; and the U.S. Department of Housing and Urban Development. Due to the nature of these changes, the CFPB indicates that regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this interim final rule.

As a brief summary, Regulation G addresses mortgage loan originator Federal registration requirements applicable to entities regulated by the OCC, FRB, FDIC, OTS, FCA, and NCUA (i.e., those that are defined as "covered financial institutions" under the regulation), including proper use of mortgage loan originator unique

identifiers. The regulation also provides minimum requirements for policies and procedures for covered financial institutions that employ one or more mortgage loan originators.

Additionally, Regulation H incorporates provisions that are substantially similar to those found in certain existing regulatory text of HUD's rules, but does not include those provisions regarding HUD enforcement proceedings for violations of the SAFE Act or HUD civil money penalties when applicable. In brief, Regulation H provides minimum standards for state licensing and registration of mortgage loan originators. To the extent that a state does not incorporate a system that complies with these minimum standards or that the NMLS does not meet the minimum requirements set forth in the regulation, the regulation provides for the CFPB's ability to establish such a system for those states or such a registry, respectively, if necessary. Regulation H includes illustrative examples of activities that do and do not constitute mortgage loan originator activity. The comment deadline ended on February 17, 2012

FCC Issues New Rules on Robocalls

The Federal Communications Commission, on February 15, 2012, adopted an order with new rules under the Telephone Consumer Protection Act of 1991. The FCC indicated the new rules are designed to protect consumers from telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message (a/k/a "robocalls") and maximize consistency with the Federal Trade Commission's Telemarketing Sales Rule, as contemplated by the Do-Not-Call Implementation Act.

The agency stated that the three primary goals of the rules are: 1) requiring express written consent for all robocalls to wireless numbers and residential lines, eliminating the established business relationship exemption in this regard while maintaining an exemption for informational calls; 2) allowing customers to opt out of future robocalls during a robocall; and 3) limiting permissible abandoned calls on a per-calling campaign basis.

First, the rules require prior express written consent for telemarketing robocalls to wireless numbers and residential lines. The FCC notes that robocalls have become increasingly intrusive in the wireless context given the increase in the number of customers using wireless phone service, and the fact that many customers use wireless as their only phone service. Wireless customers must often absorb the costs of such calls, either by paying for each incoming call, or because the time of such calls is deducted from the customer's monthly allotted minutes.

The FCC noted, however, the new rules requiring prior express written consent do not change the existing requirements for prerecorded messages that are non-telemarketing, informational calls, such as calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes. Prior express consent does continue to be required if such informational calls are placed to wireless numbers and other specified recipients, but such consent may be written or oral.

The FCC views calls made by a consumer's loan servicer pursuant to the American Recovery and Reinvestment Act of 2009 (the Recovery Act), which established certain outreach requirements designed to prevent foreclosure, as fulfilling the statutory outreach requirement rather than offering a service for sale. The agency indicated that such calls generally would not be considered solicitations, but the facts would be considered on a case-by-case basis should such calls be challenged as TCPA violations. Issues might occur where the primary motivation appears to be sending a telephone solicitation or unsolicited advertisement rather than complying with the Recovery Act. The FCC also pointed out that if a Recovery Act robocall is made to a wireless number, either oral or written prior express consent is still required under the TCPA.

Like the FTC's rules, the new rules eliminate the established business relationship exemption for prerecorded telemarketing calls. The FCC pointed to complaint data indicating that even if an established business relationship exists between the consumer and the caller, consumers are still unhappy with such calls.

Second, the rules impose a new requirement that telemarketers must implement an automated, interactive opt-out mechanism for telemarketing robocalls which would allow a customer to opt out of receiving additional calls immediately during a robocall. The existing rules allow a consumer to opt out of such calls by dialing a telephone number to register his or her do-not-call request. Under the new rules, an interactive opt-out mechanism must be identified at the beginning of the call and be available throughout the duration of the call. When invoked, it must automatically add the consumer's number to the seller's do-not-call list and immediately disconnect the call.

Finally, to discourage intrusive calling campaigns, the FCC revised its rules regarding abandoned call rates to match the FTC's rules. Under the new rules, the three percent call abandonment rate must be calculated for each calling campaign over a 30-day period. This way, telemarketers cannot shift more abandoned calls to certain campaigns, as is possible if calculation is made across multiple calling campaigns.

These rules are available at the following link:

http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf

Money Laundering: Non-Depository Lenders Must Have AML Programs, File SARs

The Financial Crimes Enforcement Network, Department of the Treasury, on February 7, 2012, released a "final" version of regulations that require non-bank residential mortgage lenders and originators to establish anti-money laundering (AML) programs and file suspicious activity reports (SARs), as already required of many other types of financial institutions.

In 2002, FinCEN temporarily exempted loan and finance companies and other financial intuitions from compliance with AML and SAR regulations as well as other reporting and recordkeeping requirements intended to help prevent money laundering and fraud, and support law enforcement efforts. However, FinCEN's investigations have since identified that this exemption is a regulatory gap that can be exploited particularly in the conduct of mortgage fraud.

FinCEN stated the new regulations will help close the regulatory gap and mitigate some of the risks and vulnerabilities that criminals have exploited in the non-bank residential mortgage sector. Analysis of suspicious activity reports show that independent mortgage lenders and brokers originated many of the mortgages that were the subject of bank SAR filings. In addition, suspicious activity reports provide a critical source of information to law enforcement and regulatory agencies in their investigation and prosecution of mortgage fraud and other financial crimes.

FinCEN indicates the rules represent a commitment to preventing and combating mortgage fraud and other financial crimes. The new regulations will likely increase the number of mortgage related SAR filings and will give law enforcement and regulators more comprehensive data on specific crimes. In addition, the new regulations will provide the government and industry a more complete perspective on mortgage related crime trends nationwide.

As indicated above these rules will now apply to Residential Mortgage Loan Originators (or "RMLOs") and will require such entities to establish an AML policy and file SARs in the event the RMLO suspects or discovers illegal activity in its residential mortgage processes. An AML program must contain four components, as follows: (i) establishment of a ***written*** AML policy; (ii) designation of an AML compliance officer; (ii) AML training for employees; and (iv) provision for a third party independent review of the RMLO's AML processes and procedures. As defined, an RMLO includes a non-bank mortgage company.

An RMLO must file a SAR within thirty (30) days of detection of suspected reportable the activity. In the event the RMLO cannot identify a suspect at the time of detection, the RMLO is permitted to delay the filing of the SAR for an additional 30 days. For situations requiring immediate attention, the RMLO must notify law enforcement in addition to filing a SAR.

An RMLO must maintain SARs related records (including supporting documentation) for five (5) years. The SAR and related information are confidential and may not be disclosed, even under subpoena, except that a SAR and related information may be shared with (1) FinCEN, and other law enforcement agencies with authority over Bank Secrecy Act matters, (2) other financial institutions for the purpose of creating a joint SAR, and (3) within the RMLO's internal corporate structure in compliance with provisions of the Bank Secrecy Act. The rule contains a safe harbor from liability for filing a SAR report.

Regarding the confidential nature of a SAR, if a an RMLO finds that it cannot grant credit due to the existence of suspicious activity (and it must file a SAR), it would appear that the RMLO is precluded from listing the suspicious activity or the existence of a SAR as a reason for the denial of credit in an ECOA mandated adverse action (or "turn down") notice. However, the ECOA would appear to require an RMLO to give an accurate reason for the denial of credit. This is one area where two bodies of federal law may conflict, and RMLOs will have to consider a "best practice" solution as to how to comply with both sets of laws and regulations.

The rule becomes effective 60 days after publication in the Federal Register and compliance is required six months after publication, which is August 13, 2011, and RMLO's will have to file SARs, if applicable, in connection with residential mortgage loan transactions initiated after that date.

FHA Updates

FHA Proposes to Reduce and Further Limit Seller Concession on Forward FHA-Insured Single Family Loans

On July 15, 2010, HUD issued a notice seeking comment on three initiatives that HUD proposed would contribute to the restoration of the Mutual Mortgage Insurance Fund (MMIF) capital reserve account, one of which was to the proposal to reduce the amount of closing costs a seller may pay on behalf of a homebuyer purchasing a home with financing insured by the FHA. Previously, HUD has stated that seller concessions are not allowed in connection with HECM for Purchase transactions. (See Mortgagee Letter 2009-11).

On February 23, 2012, HUD published a revised rule on seller concessions rule on seller concessions, The rule the proposes to reduce the amount of closing costs a seller may pay on behalf of a homebuyer purchasing a home with financing insured by the FHA. HUD seeks comments on its revised proposal for limiting seller concessions. NRMLA submitted comments asking HUD to allow seller concessions s in connection with HECM for Purchase transactions. As stated above, seller concessions are not allowed in connection with HECM for Purchase transactions.

In its proposal, HUD proposed to cap the seller concessions in FHA-insured, single-family mortgage transactions at 3 percent of the lesser of the sales price or appraised value, for the purpose of calculating the maximum insured mortgage amount, reducing it from the 6 percent limitation currently in place. HUD also proposes to revise the definition of seller concessions as follows:

Current seller concession definition	Proposed seller concession definition
The seller and/or interested third party may contribute towards the buyer's: • Closing Costs • Prepaid Expenses • Discount Points • Interest Rate Buydowns and other payment supplements (i.e. Homeowner Association fees) • Payments of mortgage interest for fixed-rate mortgages • Mortgage Payment Protection Insurance and Up-Front Mortgage Insurance Premium All other third-party contributions are considered inducements to purchase, resulting in a dollar-for-dollar reduction to the lesser of sale price or appraised value before applying the appropriate LTV factor (96.5%). This excludes closing costs and prepaid items paid by the lender through premium (rebate) pricing.	The seller and/or interested third party may contribute towards the buyer's: • Closing Costs • Prepaid Expenses • Discount Points • UFMIP • Interest Rate Buydowns All other third-party contributions are considered inducements to purchase, resulting in a dollar-for-dollar reduction to the lesser of sale price or appraised value before applying the appropriate LTV factor (96.5%). This excludes closing costs and prepaid items paid by the lender through premium (rebate) pricing.

HUD also proposed to "clarify" the definition of "Interested Party." The current interested third party definition includes sellers or other interested parties such as real estate agents, builders, developers, etc., or combination of these parties. The clarified definition of "Interested Party" includes seller or other interested party such as a real estate agent, builder, developer, ***mortgage broker, lender***, and/or settlement company.

Thus, seller concessions include any payment toward the borrower's closing costs and other fees, by any third party with an interest in the transaction, including the seller, builder, developer, ***mortgage broker, lender***, or settlement company.

NRMLA commented that seller concessions should be allowed in connection with HECM for Purchase transactions, that an Interested Party should not include a mortgage lender (in order to allow a lender to more easily and effectively offer closing credits to a HECM for purchase borrower), or, in the alternative, that the "clarified" definition of Interested Party be applied prospectively only.

FHA Tightens Approvals and Indemnifications

The Federal Housing Administration published in the Federal Register, on January 25, 2012, a final rule that raises the standards for approving lenders for the FHA's Lender Insurance program. The final rule also requires indemnification by the approved lender in the event of fraud, misrepresentation, or other serious and material violations of FHA origination standards.

The Lender Insurance program enables mortgagees approved for the FHA's Direct Endorsement process to insure single family mortgages that have been originated and underwritten through the Direct Endorsement process without first having to submit documentation to FHA. The final rule, which was originally proposed in October of 2010, establishes stricter performance standards for lenders to gain and retain Lender Insurance approval. In addition to being unconditionally approved for the Direct Endorsement program, HUD's related press release indicates that a Lender Insurance mortgagee must show "a two-year seriously delinquent and

claim rate at or below 150 percent of the aggregate rate for the states in which the lender does business." Once approved, the FHA will monitor the lender's ongoing performance for continued compliance with these eligibility standards.

In addition, for any loan that defaults within five years of its origination, HUD may require the lender to indemnify HUD if the lender knew or should have known of serious and material violations of FHA origination requirements. Violations are considered serious and material when they should have precluded the loan from being endorsed by the lender in the first place. Examples of serious and material violations include the lender's failure to:

• verify the creditworthiness, income, and/or employment of the mortgagor in accordance with FHA requirements;

• verify the assets brought by the mortgagor for payment of the required down payment and/or closing costs in accordance with FHA requirements;

• address property deficiencies identified in the appraisal affecting the health and safety of the occupants or the structural integrity of the property in accordance with FHA requirements; or

• ensure that the appraisal of the property serving as security for the mortgage loan satisfies FHA appraisal requirements, in accordance with 24 CFR § 203.5(e).

Additionally, if the lender knew or should have know that fraud or misrepresentation was involved in connection with the origination of the loan, then the lender may be required to indemnify HUD regardless of whether the fraud or misrepresentation actually caused the loan to default and regardless of when the loan defaults.

The final rule regarding the Lender Insurance program eligibility and enforcement is codified at 24 CFR §§ 203.4 and 203.255. The proposed rule regarding maximum seller concessions will soon be published in the Federal Register, although no specific timeframe was given. The effective date is February 24, 2012.

FHA Clarifies Closing Requirements for TPO Lenders

On February 10, 2012, the FHA issued Mortgagee Letter 2012-2, providing guidance to FHA-approved lenders acting as third party sponsored originators. The requirements are effective immediately.

According to ML 2012-2, an FHA approved mortgagee that acts in the capacity of a sponsored TPO in originating loans to be underwritten and approved by its FHA approved mortgagee sponsor, may close the loans in its own name. All TPOs must be sponsored by an FHA-approved Direct Endorsement lender.

FHA approved DE lenders that sponsor TPOs are fully responsible for ensuring that the TPO complies with FHA requirements when originating loans for the sponsor.

FHA requires each sponsor to carefully monitor and evaluate the performance of their TPOs. Failure to do so may result in action against both parties, or any individual acting on either party's behalf.

Non-FHA approved TPO's may not close loans in their own name. They must be closed in the name of their sponsors.

Financial Assessment for HECM Borrowers

In a letter published on October 5, 2011, Acting FHA Commissioner Carol Galante stated that HECM lenders are authorized to underwrite HECM loans so they can identify customers who are potentially at risk of defaulting on their reverse mortgages because they can no longer meet their financial obligations.

FHA is developing new rules outlining procedures for conducting financial assessments of HECM borrowers. The purpose of Commissioner Galante's letter is to clarify for lenders that they already have the authority to conduct assessments to ensure clients have the capacity to continue paying property taxes, homeowners insurance and other obligations after the reverse mortgage is made.

The letter notes that HUD does not prohibit the inclusion of additional financial capacity and credit assessment criteria and processes in the origination and approval of HECM transactions, unless such criteria or processes violate FHA statutes and regulations or other applicable law, such as Fair Housing/Fair Lending laws, and the Equal Credit Opportunity Act, Regulation B.

HUD Confirms Loan Limits for 2012

On December 2, 2011, HUD issued Mortgagee Letter 2011-39 to set the loan limits for FHA-insured loans, including HECMs, per HUD's indication as authorized under H.R. 2112, the Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112-55. Thereunder, HUD indicated that the maximum claim amount and loan limit for HECMs are not affected by H.R. 2112 and remain subject to the limits set forth in section 255(g) and (m) of the National Housing Act. The maximum claim amount and loan limit for HECMs will remain at $625,500 as stated in Mortgagee Letters 10-40 and 11-29 for calendar year 2012.

HUD Dramatically Revises FHA Lending Requirements

On September 23, 2011, the Department of Housing and Urban Development ("HUD") released Mortgagee Letter 2011-34 (the "Letter"). The requirements set forth in the Letter, which became effective on the Letter's release, substantially change the playing field for FHA lenders. We address the most important changes in this release.

In a sweeping and far-reaching change to FHA lender requirements, HUD has expanded the single family origination lending area of each home office and registered branch office to include all HUD field office jurisdictions. Previously, a specific office could only make loans in a geographically-designated lending area. Now, however, an FHA single-family lender is free to make loans on a nation-wide basis out of any home or registered branch office, provided that the lender independently meets the loan origination requirements of each State in which the loans are made. This is a dramatic expansion of the ability of FHA lenders to make loans nationally.

Additionally, HUD has reiterated its position on net branching arrangements. Net branching is a practice in which a party other than the approved FHA lender (often the branch manager) pays some or all of the branch's office expenses. HUD has previously disallowed this practice and held that FHA lenders must pay all operating expenses of each of their home, branch, and direct lending offices. However, it appears that some lenders may still engage in prohibited net branching arrangements. Consequently, HUD has reaffirmed that FHA lenders may not engage in prohibited net branching activities. If you have questions concerning your branching arrangements, we would be pleased to review them to ensure that you are in compliance with HUD's requirements on this issue.

Finally, HUD has amended its requirements regarding office facilities. The Letter states that an approved FHA lender may conduct loan origination and/or servicing activities from its home office and from any branch or direct lending branch office, so long as these offices fully comply with all applicable State licensing requirements in the jurisdiction where the office is located. Additionally, while HUD is maintaining the home office requirements set forth in paragraph 2-11.A of Handbook 4060.1, HUD has rescinded the requirements for traditional branch offices, non-traditional branch offices, and direct lending branch offices set forth in paragraphs 2-11.B through D of Handbook 4060.1. Furthermore, non-supervised mortgagee and non-supervised loan correspondent applicants are no longer required to submit evidence of acceptable home office facilities as part of the mortgagee approval process; HUD will verify that the home office complies with the home office requirements through on-site visits.

These changes are significant to virtually every FHA lender and provide opportunities that you should take into account in connection with your lending and servicing activities.

New and Revised HECM Counseling Requirements

On August 26, 2011, HUD issued Mortgagee Letter 2011-31 (ML 11-31) revising HECM counseling requirements and providing an updated form of the HECM counseling certificate. The guidance and requirements in ML 11-31 become effective 30 days from the date of ML 11-31.

ML 11-31 requires non-borrowing spouses to obtain HECM counseling. Thus, the following parties will now be required to obtain HECM counseling and sign the HECM counseling certificate: (a) all property owners appearing on the title to the property (or their legal representative if the case involves lack of competency), and (b) the non-borrowing spouse. This requirement in ML 11-31 represents a change in HUD's policy by requiring the non-borrowing spouse to attend HECM counseling and sign and date the HECM counseling certificate. HUD previously recommended, but did not require, that the HECM non-borrowing spouse receive counseling.

ML 11-31 also announced the following changes to the HECM counseling certificate (Form HUD-92902):

a. name and signature line was added for the attorney-in-fact holding the power of attorney;

b. the HECM Saver was added as one of the options that counselors will present to HECM applicants;

c. Agency Tax Identification Number was replaced with Agency Housing Counseling System Identification number;

d. HECM for Purchase Certification by the homebuyer was added to the HECM counseling certificate.

According to ML 11-31, lenders should use the Case Number Assignment screen or the Insurance Application screen in FHA Connection to associate the HECM counseling certificate number with a new FHA case number. According to ML 11-31, existing case numbers may be transferred by one HECM lender to another without regard to the HECM counseling certificate expiration date.

Under HUD's existing rules, HECM counseling certificates expire 180 days from the date of counseling. ML 11-31 indicates that FHA case numbers expire six (6) months after the date of the last activity on FHA Connection. ML 11-31 reminds lenders to act expediently to obtain a new FHA case number because each case must be associated with a unique HECM counseling certificate which expires 180 days from the date of counseling.

HECM Loan Limit Remains at $625,500

Via Mortgagee Letter 2011-29 (August 19, 2011) HUD indicated that all purchase, traditional and HECM to HECM refinance mortgages insured on or after October 1, 2011, cannot exceed 150 percent of the national conforming limit of $417,000, which is set in conformance with section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)).

For the period October 1, 2011 through December 31, 2011, the loan limit and maximum claim amount for FHA-insured HECMs will remain at $625,500 (150 percent of Federal Home Loan Mortgage Corporation's (Freddie Mac) national conforming limit of $417,000). This maximum FHA loan limit and maximum claim amount of $625,500 is also applicable to special exception areas - Alaska, Hawaii, Guam and the Virgin Islands.

HUD Approves New HECM Counseling Intermediaries

Also, on August 12, 2011, HUD issued Mortgagee Letter 2011-26 (ML 11-26) that requires HECM lenders to provide borrowers with the names of counseling intermediaries that have been awarded HECM counseling grant funds by HUD. According to ML 11-26, such intermediaries could change each year. For 2011, the following three intermediaries have been added to the list: ClearPoint Financial Solutions, Neighborhood Reinvestment Corporation, and Springboard.

Please note that under existing HECM requirements, HECM lenders must provide each borrower with a list of HECM counseling agencies, including no fewer than nine HUD-approved counseling agencies. The list must include at least five counseling agencies within the local area, state or both of the borrower, with one of the local agencies located within a reasonable driving distance for the purpose of face-to-face counseling. The list also must include the following four national intermediaries: National Foundation for Credit Counseling (NFCC), Money Management International (MMI), National Council on the Aging (NCOA), and CredAbility.

According to ML 11-26, if the "referral date" is on or after May 1, 2011, the list of counseling agencies provided to the borrower must also include the three additional intermediaries, for a total of seven intermediaries (i.e., the four national intermediaries listed above plus the three additional intermediaries receiving HECM grant funds set out in ML 11-26). The "referral date" is the date when the borrower received the list of HECM counselors from the lender. According to ML 11-26, a new field for the "referral date" has been added to the HECM Referral List Update screen on FHA Connection.

Potential HUD Policy Changes on Short Payoffs for HECMs

In July of 2011, HUD issued updated HECM Servicing Frequently Asked Questions ("FAQs"), providing guidance on repayment of HECM loans that become due and payable as a result of the death of the last surviving borrower. According to the FAQs, the borrower's estate or heirs, including a non-borrowing spouse, may satisfy a HECM loan by paying the lesser of: (a) the loan balance, or (b) 95% of the current appraised value of the property. As described in the FAQs, this right to satisfy the loan by paying 95% of the current appraised value arises when the property is transferred by will or operation of law to the borrower's estate or heirs (including a surviving spouse) following the death of the last surviving borrower.

It should be noted that under HUD's existing regulations, the borrower's heirs or estate have always had the option to sell the property for 95% of the appraised value and apply the net proceeds to the balance of the due and payable HECM loan. In the event of such short payoff, the lender would release its security interest in the property.

The new guidance under the FAQs allows a short payoff without the actual "sale" of the property. According to the FAQs, HUD considers any post-death conveyance by will or operation of law to the borrower's heirs or estate (including a surviving spouse) to fall within the meaning of the term "sale." According to the FAQs, the loan payoff must occur simultaneously with or immediately following the post-death conveyance.

The FAQs also remind lenders and servicers that the property must be appraised after the HECM loan becomes due and payable. According to Section 206.125(b) of the HUD HECM regulations, an appraisal must be obtained: (a) no later than 30 days after receiving notice that the loan is due and payable, (b) no later than 30 days after learning of the borrower's death, or (c) upon the borrower's request in connection with a pending sale. The property also must be appraised no later than 15 days before a foreclosure sale.

FHA Issues Guidance on HECM Counseling Fees

On February 4, 2011, the FHA published Mortgagee Letter 2011-09 (ML 11-09), providing guidance to FHA-approved counseling agencies and HECM lenders on the amount and the waiver of a HECM counseling fee. ML 11-09 is effective 30 days from the date of publication.

HUD previously indicated in Mortgagee Letter 2008-12 (ML 08-12) that a HECM counseling fee of $125 per counseling session is considered reasonable. ML 11-09 overrides this part of ML 08-12 and authorizes counseling agencies to charge more than $125 per session. According to ML 11-09, HECM counseling agencies may establish a fee structure as long as the fee is (a) reasonable and customary, (b) does not exceed a level commensurate with the counseling services that are provided, and (c) is not being charged to pay for the service that is already funded with HUD's grants or other funds. The fee structure must be included in the counseling agency's workplan and must be disclosed to the borrower during intake. In any event, a borrower may not be turned away because of an inability to pay a HECM counseling fee.

ML 11-09 also provides that HECM counseling agencies should not collect a HECM counseling fee at the time of the counseling session if the borrower's income is below 200 percent of the Federal Poverty level. However, counseling agencies may charge such borrowers a HECM counseling fee at the time of loan closing provided the borrower has been advised during the counseling session of the amount of the fee. ML 11-09 also describes procedures for determining the borrower's ability to pay a HECM counseling fee, including the documentation required for the waiver of the fee.

According to ML 11-09, only the actual time spent on providing counseling to the borrower (in person or by telephone) may be recorded on the HECM Counseling Certificate. Time other than actual counseling, such as intake, putting together the information packet, and follow-up may not be included on the HECM Counseling Certificate, but can be included when determining the cost of HECM counseling.

FHA Issues Guidance for HECM Loans with Delinquent Property Charges

On January 3, 2011, the FHA issued Mortgagee Letter 2011-01 (ML 11-01), providing guidance to FHA-approved lenders and servicers on how to handle home equity conversion mortgage (reverse or "HECM") loans with delinquent property charges (i.e., real estate taxes, ground rents, flood and hazard insurance premiums, and special assessments). ML 11-01 applies to HECM loans where the borrower has failed to pay property charges or the lender has made a corporate advance of property charges on behalf of the borrower, or both. ML 11-01 also applies to HECM loans where HUD has previously granted a deferred due and payable status.

According to ML 11-01, HECM lenders must begin to work with the borrower to cure the delinquency as early as possible. Lenders must inform the borrower that the loan is delinquent within thirty (30) days of the first missed payment for property charges. A lender may not submit a due and payable request to HUD until the lender exhausts all loss mitigation options. Available loss mitigation options include, but are not limited to:

- Establishing a repayment plan (pursuant to a repayment schedule provided by ML 11-01);
- Contacting a HUD-approved Housing Counseling Agency (HCA); and

- Refinancing the delinquent HECM loan into a new HECM loan, if sufficient equity in the borrower's home to satisfy the existing loan and outstanding property charges is available.

ML 11-01 requires HECM lenders to send a Property Charge Delinquency Letter, providing the borrower with thirty (30) days to respond and cure the default. For loans delinquent as of January 3, 2011, lenders must send the letter by April 29, 2011. For loans that become delinquent after that date, lenders must send the letter as soon as the lender receives notice of a missed payment for property charges. ML 11-01 provides a model letter for use by HECM lenders. Although HUD allows lenders to vary the model letter to a certain extent, the letter must contain the substantive information provided in ML 11-01.

As of January 3, 2011, lenders must report all delinquent loans to HUD (including loans on a repayment plan and loans in a deferred due and payable status). Initially, lenders must submit an Excel file via email to: HECMAdmin@hud.gov by February 7, 2011 pursuant to special formatting requirements provided in ML 11-01. Lenders may report future delinquencies in a monthly Excel file or by manually updating HUD's IACS system as delinquencies occur.

HECM lenders must send a due and payable request to HUD's National Servicing Center if the borrower is unwilling to reimburse the lender for property charges, or if the lender exhausts all available loss mitigation options and the borrower is unable to cure the loan. ML 11-01 requires lenders to include documentation supporting their efforts to resolve the delinquency in the lender's due and payable request. Lenders also must inform the borrower that he or she has thirty (30) days to respond to the due and payable notice. ML 11-01 requires lenders to include certain information in the due and payable letter to the borrower, including all available options to cure the delinquency and avoid foreclosure.

New Financial Requirements for HMBS Issuers

On January 7, 2011, Ginnie Mae announced its implementation of increased base net worth requirements for Home Equity Conversion Mortgage-Backed Securities ("HMBS") Program participants. The new capital requirements have been increased to $5 million base net worth plus an additional net worth calculation of one percent of the aggregate amount of the Issuer's Remaining Principal Balance outstanding and available commitment authority to issue securities.

Ginnie Mae has also instituted a new liquid asset requirement. HMBS Issuers are now required to maintain liquid assets of 20 percent of the Ginnie Mae required net worth.

Additionally, Ginnie Mae adopted an institution-wide capital requirement to ensure that Issuers have sufficient capital to manage their financial risks. The capital requirements are based on institution type.

Existing approved Issuers had until October 1, 2011 to meet the new financial requirements. New applicants to the Ginnie Mae program are required to meet the new net worth requirements effective January 7, 2011.

Ginnie Mae instituted a new minimum servicing fee margin of 36 basis points, which includes six basis points for the Ginnie Mae guarantee fee.

On September 30l, 2011, Ginnie Mae issued All Participants Memorandum (APM) 11-16, revising the Institution-Wide Capital Requirements for Single Family, Multifamily, and HMBS program participants. Ginnie Mae revised these requirements as follows:

1. The formulas used to calculate capital requirements for banks and thrifts will further apply to bank holding companies and savings and loan holding companies. Ginnie Mae recognizes that credit unions are examples of thrifts and depository institutions, however, these formulas are not applicable to credit unions.

2. These formulas that apply to the entities listed above in Item 1 have been updated to clarify the ratio calculations and to reflect a minimum acceptable ratio for each of the required formulas.

a. Tier 1 Capital/Total Assets ratio of 5 percent or greater;

b. Tier 1 Capital/Risk-Based Assets ratio of 6 percent or greater; and

c. Total Capital/Risk-Based Assets ratio of 10 percent or greater.

3. The formula used to calculate capital requirements for non-depository institutions will further apply to subsidiaries of banks and thrifts, credit unions, and all other entities that are not listed above in Item 1.

4. The formula for non-depository institutions and those entities listed above in Item 3 has been updated to reflect a minimum acceptable ratio, and to replace the term Total Equity in the numerator of the ratio with the term Total Adjusted Net Worth, as defined by Ginnie Mae, and presented by Issuers as part of their annual financial reporting obligations. This formula is not applicable to holding companies.

State Law Updates

State Mortgage Related Legislation and Regulatory Developments in 2011

California Department of Real Estate Adopts New Rules for Disciplinary Actions Against Real Estate Licensees

The California Department of Real Estate ("DRE") adopted new rules ("Rules") regarding disciplinary actions against real estate licensees. The Rules were filed on September 26, 2011 and became operative on October 26, 2011.

The Rules set forth the grounds pursuant to which the DRE may issue an order of suspension or debarment pursuant to § 10087 of the Business and Professions Code ("BCP"). (Cal. Admin. Code tit. 10, § 2961). The Rules further clarify that any person that receives a notice of intention to issue an order of suspension or debarment under § 10087 of the BCP is, upon receipt of the notice, prohibited from engaging in any business activity involving real estate that is subject to regulation under Division 4 of the BCP in the State of California. (Cal. Admin. Code tit. 10, § 2962).

The Rules also specify the effect of an order of debarment. For example, any person subject to an order of debarment is prohibited from, among other things, participating in any real estate-related business activity of a finance lender or residential mortgage lender. (Cal. Admin. Code tit. 10, § 2963). The Rules also set forth model language to be used in drafting any final order of debarment. (Cal. Admin. Code tit. 10, § 2930).

Finally, the Rules require real estate brokers to screen their employees and regular business associates engaging in real estate-related business to confirm that such employees or business associates are not subject to an order of suspension or debarment under § 10087 of the BCP. Brokers are responsible for, among other things, conducting quarterly reviews of the DRE's online listing of debarred persons and of the listing of disciplinary actions published in the DRE's quarterly bulletin. A broker who becomes aware of violations of § 10087 of the BCP is responsible for reporting such violations to the DRE. (Cal. Admin. Code tit. 10, § 2725.5).

Illinois Amends Regulations Under RMLA

The Illinois Department of Financial and Professional Regulation issued amended regulations under the Illinois Residential Mortgage License Act. The amended regulations increase certain mortgage loan originator licensing fees, revise notification provisions and impose new regulatory requirements.

With respect to fees, the amended regulations increased the MLO license application fee from $125 to $200 and increased the renewal fee from $100 to $150. The amended regulations also increased the license transfer fee from $35 to $50 and increased the license reactivation fee from $100 to $150. A MLO's license application may be deemed withdrawn if the applicant fails to provide a written response within 21 business days after receiving a deficiency letter from the Department. The amended regulations also require a non-refundable fee of $500 for the notice of change of ownership or control or a Residential Mortgage Licensee.

The amended regulation provide that a MLO will be considered on inactive or inoperative status at any time a MLO is not actively employed by a licensee prior to the expiration date of the license. A person may not act as a MLO while on inactive or inoperative status or any time prior to the Department accepting the new sponsor in the Nationwide Mortgage Licensing System and Registry. If a MLO has been on inactive or inoperative status for more than 90 calendar days, prior to resuming active status, the MLO must pay the license reactivation fee.

The amended regulations also require each licensee under the Act that purchases residential mortgage loans to file on or before March 1 of each year an annual report of purchasing activity. The report must include the names of originating entities, dollar amounts for each loan by property address or dollar amount of Illinois loans contained in a multi-state property portfolio, identifying the portfolio, and a total dollar amount for all Illinois loans purchased. The effective date is January 1, 2012.

Montana Servicer Licensing Update

Montana amended its Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act to become the Montana Mortgage Act, effective October 1, 2011.

In this regard, Montana now requires that anyone wishing to act as a mortgage servicer in Montana must be licensed. The Act defines "mortgage servicer" as an entity that:

• engages, for compensation or gain from another or on its own behalf, in the business of receiving any scheduled periodic payment from a borrower pursuant to the terms of a residential mortgage loan, residential mortgage servicing documents, or a residential mortgage servicing contract; or

• meets the definition of a "servicer" under section 6 of RESPA (12 U.S.C. 2605(i)(2)) with respect to residential mortgage loans, which, in turn, defines "servicer" as the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan).

Montana recently informally confirmed that only the entity actually doing the servicing work, and not an entity merely holding the servicing rights, needs to be licensed in Montana.

New York Places Restrictions on Home Improvement Contractors' Arrangements with Mortgage Brokers

On October 14, 2011 the New York legislature passed Senate Bill 4038 which amends the New York Banking Law to provide that a home improvement contractor may not represent, act as an agent for, or advertise, promote or arrange for the services of a mortgage broker while soliciting home improvement contracts. A home

improvement contractor also is prohibited from receiving anything of value from a mortgage broker or its affiliate for the referral of a borrower to a mortgage broker.

If a mortgage broker has solicited, processed, placed or negotiated a mortgage loan, a home improvement contractor may not be paid directly, but instead must receive payment from the proceeds of a home improvement loan payable solely to the borrower.

Alternatively, at the election of the borrower, the proceeds of a home improvement loan payable may be paid through an independent third party escrow agent in accordance with the terms established in a written agreement signed by the borrower, the lender and the contractor prior to disbursement.

Any such agreement shall contain a clear and conspicuous disclosure: YOU ARE NOT REQUIRED TO EXECUTE THIS AGREEMENT. YOU MAY INSTEAD RECEIVE PAYMENT DIRECTLY. (NAME OF MORTGAGE BROKER) MAY NOT OFFER YOU DIFFERENT TERMS ON YOUR LOAN TO SIGN THIS AGREEMENT.

A mortgage broker is prohibited from offering a homeowner different loan terms contingent on the homeowner executing an agreement for payment through an independent third party.

A mortgage broker shall not permit a home improvement contractor to be a cosigner or to act as a guarantor for a mortgage loan for home improvement.

This law became effective in mid-January 2012, ninety (90) days after its enactment.

New York Revisions to Licensing for Exempt Organizations and Products

On January 4, 2012, the New York Department of Financial Services amended its regulation of exempt organizations, exempt subsidiaries, and exempt mortgage products. The amendment eliminates the exemption of consolidated subsidiaries from license and registration requirements. Therefore, consolidated subsidiaries of exempt organizations (such as banks, insurance companies, etc.) are no longer exempt. The amendment also eliminates or modifies exemptions that apply to entities dealing solely in certain loan products.

Previously, the regulation exempted consolidated subsidiaries of exempt organizations from licensing or registration requirements. However, since many exempt organizations, including banks and insurance companies, have increasingly operated large mortgage banking or brokerage subsidiaries, this has resulted in exempting many important participants in the mortgage industry.

In addition, the Dodd-Frank Act has made it clear that nothing in the National Bank Act or Section 24 of the Federal Reserve Act preempts the application of state laws to a non-bank subsidiary or affiliate of a national bank.

As a result, the Department amended the regulation in two respects. First, the regulation no longer exempts consolidated subsidiaries of exempt organizations from mortgage banker or broker licensing and registration requirements. The term “exempt organization” includes any insurance company, banking organization, foreign banking corporation licensed to transact business in New York, national bank, Federal savings bank, Federal savings and loan association, Federal credit union, any bank, trust company, savings bank, savings and loan association, and credit union organized under the laws of any other state, and any instrumentality created by the United States or any state with the power to make mortgage loans.

Second, the revisions eliminate the exemption for mortgage bankers and mortgage brokers dealing solely in certain loan products, such as credit line mortgages, installment loans, and home improvement loans. Therefore, mortgage bankers and mortgage brokers dealing solely in credit line mortgages, such as HELOCs, are no longer exempt from licensing and registration requirements in New York.

Entities which previously were, but are no longer, exempt are required to file an application to become licensed or registered by April 3, 2012, and to become licensed or registered by July 2, 2012 or such later date as the Superintendent may approve for good cause.

New York Creates New Department of Financial Services

Effective October 3, 2011, the New York State Banking Department and the New York State Insurance Department will merge into one regulatory agency known as the Department of Financial Services. The new Department of Financial Services will have three divisions: The Banking Division; The Insurance Division; and a Financial Fraud Investigative Unit. The Department of Financial Services will be lead by Benjamin Lawsky as Superintendant. The banking division and insurance division will each have a deputy superintendant who will oversee operations. The current laws governing the Banking Department will remain intact for the new banking division, except that the new department will have wider authority to investigate fraud. The new regulatory agency was created by the New York State Governor, Andrew Cuomo, as part of the 2011-2012 budget bill, which was enacted on March 31st.

New York Amends Mortgage Loan Servicer Registration Requirement

On August 24, 2011, the New York State Banking Department ("NYSBD") enacted emergency regulations that impact the licensing requirement for Mortgage Loan Servicers. The emergency regulations now require an entity that holds mortgage servicing rights to obtain and maintain a New York Mortgage Loan Servicer Registration, unless exempt. The NYSBD has informally advised that entities that are now required to hold such registration have until October 15, 2011 to submit an application through the NMLS. If an application is submitted by such date, then the entity is permitted to continue conducting business in the state of New York pending review of its application.

The emergency regulations also revised the financial responsibility requirements for New York Mortgage Servicer Registrants. Previously, applicants for a Mortgage Loan Servicer Registration were required to maintain an adjusted net worth of at least 1% of the outstanding principal balance of aggregate mortgages serviced regardless of collateral location, but not less than $250,000. N.Y. Comp. Codes R. & Regs. tit. 3, § 418.12.

The emergency regulations provide that a Mortgage Loan Servicer Registration applicant must maintain a net worth of at least $250,000 plus 0.25% of the outstanding principal balance of aggregate mortgages serviced regardless of collateral location.

Additionally, the emergency regulations adopt a separate requirement for third-party servicers. "Third-party servicer" is defined as a servicer that does not own the mortgage loans or servicing rights, but only performs servicing or sub-servicing for the owner of such loans. N.Y. Comp. Codes R. & Regs. tit. 3, § 418.3(g). For third-party servicers, the net worth calculation is based only on the amount of New York mortgage loans serviced. Accordingly, the net worth requirement for third-party servicers would be $250,000 plus 0.25% of the outstanding principal balance of aggregate mortgages serviced in New York. If an entity acts as both a servicer and a third-party servicer, the entity must maintain a net worth of at least $250,000 plus 0.25% of 1% of the outstanding principal balance of the non-third-party servicer loans and 0.25% of the outstanding principal amount of the New York mortgage loans for which it is a third-party servicer.

Note that the emergency regulations do not change the requirement that at least 10% of the net worth required must consist of cash, cash equivalents or readily marketable securities.

Additionally, the emergency regulations clarify the definition of net worth. For purposes of the requirement, net worth consists of total equity capital, determined in accordance with Generally Accepted Accounting Principles, at the end of the most recent reporting period for which financial results are available, less: (i) goodwill and other intangible assets (excluding mortgage servicing rights), (ii) assets pledged to secure obligations of a person other than the servicer, (iii) any amounts due from officers or stockholders of the servicer or from a related company, (iv) any amount in excess of the lower of cost or market value of mortgages in foreclosure, construction loans or property acquired through foreclosure, and (v) any other receivables that the Superintendent determines are not collectable.

Finally, the emergency regulations amend the standard for modification or waiver of the net worth requirement. Under the new standard, a waiver may be granted when the servicer services less than $4 million in mortgage loans and does not collect money for taxes or insurance. Previously, the standard was $5 million.

The emergency regulations were effective August 24, 2011 and are valid for 90 days or less. The emergency regulations are currently set to expire November 21, 2011. At the end of the 90 days, the regulations will either be passed permanently or will expire. We have been informally advised by the NYSBD that the regulations will likely be passed permanently.

New York Requires Wage Notices

New York enacted in 2010 the Wage Theft Prevention Act, which required, beginning April 2011, that employers provide their New York employees with a Notice of Pay Rate and Payday upon hire and upon certain changes in an employee's compensation. Beginning January 1, 2012, however, the Notice must also be provided to all New York employees annually, between January 1 and February 1 of each year. There is no exception for employees who are exempt from overtime requirements, nor is there any exception for smaller employers.

An employer may provide its own Notice, so long as it includes all of the following required information:

- The employee's pay rate(s), including overtime rate if applicable;
- How the employee is paid (e.g. hourly, per week, commission, etc.);
- The employee's regular payday;
- The official name of the employer and any other names under which it does business;
- Address and phone number of the employer's main office or principal location;
- Any allowances taken as part of the minimum wage, such as tips, meal, and lodging deductions.

Alternatively, an employer may utilize New York Department of Labor sample notices. The samples may be found on the Department's website at:

http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm.

The WTPA requires that the Notice be signed by the employer (as preparer) and provided to the employee for his or her signature. The Notice must be given in English and also in the employee's primary language if the Department offers a translation to such language. Currently, the Department of Labor offers translations in Spanish, Chinese, Haitian Creole, Korean, Polish, and Russian.

The Notice must be received by the employee, and the employee must sign a written acknowledgement of receipt dated prior to the February 1 deadline. The acknowledgment must include an affirmation by the employee that the employee accurately identified his or her primary language to the employer and that the Notice was provided to the employee in that language. The employer must retain the signed acknowledgement for a period of six years.

Note that the required annual Notice is in addition to the requirement under Section 191(c) of the New York State Labor Law that the terms of all commissioned salespersons' employment in New York must be set forth in a signed writing. Such written commission agreements must describe when and how the employee's commission is earned, include the terms of any draw account, describe the frequency with which the employee's draw and actual commission are reconciled, and set forth the manner in which any remaining commissions will be paid out to the employee when his or her employment has been terminated.

An employer that fails to comply with the requirement of providing the annual Notice may be fined $50 per week per employee for the time that the Notice has not been provided. In addition, any employee who has not received the Notice by the February 1 deadline may bring a private action against the employer, under which damages are capped at $2,500 plus costs and attorney's fees.

Texas Adopts New Rule for Payoff Statements

The Finance Commission of Texas adopted new rules regarding payoff statements on December 16, 2011. Chapter 155 is adopted pursuant to Texas Finance Code § 343.106 which requires the Finance Commission to adopt rules governing requests from title insurance companies for payoff information from mortgage servicers in connection with home loans. The new rules promulgate a standard Payoff Statement Form that must be used by mortgage servicers when providing payoff statement information to borrowers. Servicers are required to use the Form beginning 90 days after adoption of the rule.

State Reverse Mortgage Legislation and Regulation in 2011

California

On September 6, 2011, CaliforniaGovernor Jerry Brown approved Assembly Bill 793. This adds Section 785.1 to the California Insurance Code to prohibits an insurance broker or agent from participating in, be associated with, or employing any party that participates in, or is associated with, the origination of a reverse mortgage, unless the insurance agent or broker maintains procedural safeguards designed to ensure that the agent or broker transacting insurance has no direct financial incentive to refer the policyholder or prospective policyholder to a reverse mortgage lender.

Individuals transacting insurance shall not receive compensation, commission, or direct incentive for providing reverse mortgage borrowers with a non-casualty insurance product that is connected to or a result of the reverse mortgage, except that an agent or broker may offer title insurance, hazard, flood, or other peril insurance, or other similar products that are customary and normal under a reverse mortgage loan.

Prior and existing California insurance statutes provides that all insurers, brokers, agents, and others engaged in the transaction of insurance owe a prospective insured who is 65 years of age or older, a duty of honesty, good faith, and fair dealing. This duty is in addition to any other duty, whether express or implied, that may exist.

Massachusetts

In October 2011, the Massachusetts Division of Banks ("Division") adopted regulations ("Regulations"), 209 CMR 55.00 implementing the reverse mortgage provisions of Chapter 258: An Act Relative to Mortgage Foreclosures ("Chapter 258"), which was signed into law August 8, 2010. The Regulations clarify the opt-in and in person counseling requirements under Chapter 258 and also establish the eligibility, procedures, disclosures and counseling requirements for a reverse mortgage program. The Division proposed the Regulations on September 2, 2011 and held a hearing on September 14, 2011, which was followed by a brief comment period. The final Regulations were released on September 30, 2011 and become effective October 14, 2011.

The Regulations implement the definition of "mortgagor" set forth in Chapter 258. Under Chapter 258, a mortgagor is defined as an applicant for a reverse mortgage who: (1) has a gross income of less than 50 percent of the area median income, as periodically determined by the Department of Housing and Urban Development ("HUD"); and (2) possesses assets, excluding a primary residence, valued at less than $120,000.

The Regulations implement the requirement under Chapter 258 that a mortgagor affirmatively opt in writing for the reverse mortgage loan. The Regulations require the mortgagor to execute a written form ("Opt-in Form") to affirmatively consent to the reverse mortgage loan transaction. The Opt-in Form must be segregated from all other information provided to the mortgagor. Additionally, the content of the Opt-in Form must strictly conform to the sample form set forth in the Regulations. The Opt-in Form must be executed after the mortgagor has completed reverse mortgage counseling through an approved counselor and before the lender issues a written commitment to make the loan.

The Regulations require lenders to use the form ("Required Form") found in 209 CMR 55.06. We note that the language of the Required Form was improved as a result of NRMLA's comments to the proposed Regulations. For example, the Required Form states that a reverse mortgage loan lets the mortgagor use the equity in his or her home as a source of "cash" (rather than "income" as initially proposed) and defines home equity as the "market value" of the home (rather than the "value" of the home). Additionally, as a result of NRMLA's comments, the Required Form states that the mortgagor will be signing binding legal documents that have legal and financial consequences for the borrower and its "family" (rather than "spouse" as initially proposed). Further, NRMLA's comments led the Division to add the following underlined language to the Required Form: "I understand that my loan balance will increase over time because I will be charged interest and other loan fees. This may substantially deplete the equity that I have built up in my home."

As initially proposed, the Regulations would have allowed a mortgagor that submitted an executed Opt-in Form to elect not to proceed with the reverse mortgage at any time prior to closing by providing oral or written notice to the lender. Additionally, under the proposed Regulations, a mortgagor that opted out would have been entitled to all fees collected by the lender. However, as a result of NRMLA's comments, the final Regulations require a mortgagor to provide written notice to the lender to opt out of a reverse mortgage loan. Additionally, as a result of NRMLA's comments, under the final Regulations, the mortgagor that opts out is entitled all fees paid to the lender, rather than all fees collected by the lender.

The Regulations require mortgagors to complete a reverse mortgage counseling program that has been approved by the Executive Office of Elder Affairs. Additionally, effective August 1, 2012, the Regulations require a mortgagor to receive in person counseling from a counselor employed by an organization whose reverse mortgage counseling program has been approved by the Executive Office of Elder Affairs. A reverse mortgage loan executed with a mortgagor that has not received counseling by an approved counselor is unenforceable.

The counselor must provide the reverse mortgage lender with a written certification that the mortgagor has completed the counseling program before the issuance of the Opt-in Form. For HECM products, the HECM counseling certificate promulgated by HUD can be used to satisfy the written certification requirement under the Regulations. For non-HECM products, the written certification must be substantially similar to the HUD HECM counseling certificate.

The Regulations also set forth certain prohibited practices in connection with reverse mortgage loans. For example, the Regulations prohibit a lender from making a reverse mortgage loan in Massachusetts without having a reverse mortgage program that has been approved by the Commissioner or from making a reverse mortgage loan to a mortgagor that has not received counseling by a third party approved by the Executive Office of Elder Affairs. Additionally, the Regulations prohibit lenders from shifting the burden of determining whether a prospective borrower is a "mortgagor" to the mortgagor. Lenders are prohibited from making false promises to influence, persuade or induce a consumer to sign a reverse mortgage loan application or loan documents. Additionally, lenders are prohibited from pressuring or coercing consumers to sign reverse mortgage loan applications or documents by misrepresenting or omitting crucial information about the terms of the mortgage. The Regulations make it a prohibited practice for a lender to discourage a mortgagor from (i) seeking or obtaining independent legal counsel or legal advice; (ii) including family members in the counseling session; or (iii) otherwise participating in the process. Finally, the Regulations prohibit a lender from engaging in a pattern or practice of failing to make any disclosure to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive. A violation of these practices constitutes grounds for terminating the reverse mortgage program and may constitute grounds for an administrative fine or penalty.

NRMLA is working with interested stakeholders in Massachusetts to assure that counseling, including counseling over the telephone at the senior's option, will continue to be available in Massachusetts.

Minnesota – Case Law - Preemption – "Interest" Definition Preempted in Reverse Mortgage Case

On November 1, 2011, in the case of *Taft v. Wells Fargo Bank, N.A.*, the United States District Court for the District of Minnesota dismissed a putative class action lawsuit involving a reverse mortgage. In this case, the borrower who resided in Minnesota obtained a Home Equity Conversion Mortgage loan from the defendant in 2006.

The complaint, filed by the borrower's daughter acting as a personal representative, alleged that the defendant violated state usury laws by including in the principal balance of the loan the origination fee, monthly servicing fees and mortgage insurance premiums. HECM loans are authorized by the National Housing Act, which allows certain charges, including the origination fee, servicing fees, and mortgage insurance premiums, to be included in the principal balance of the loan. The central issue in this case was whether the definition of "interest" under state law was preempted by the Federal law. The Court concluded that the defendant, a national bank, is not bound by the state law definition of interest when originating a loan authorized by Federal law.

The plaintiff's first argument was that the parties opted out of the Federal preemption under the National Bank Act by virtue of a choice of law provision contained in the HECM loan agreement. The HECM loan agreement in this case provided that the loan was governed by "federal law and the law of the state in which the property is located." This provision parallels the language in the model HECM loan agreement promulgated by HUD that lenders are required to use with HECM loans. The Court found that this choice of law provision in the HECM loan agreement does not invalidate the applicability of Federal preemption with respect to the HECM loan.

Plaintiffs also argued that the state had opted out of the Federal preemption under the National Housing Act. The National Housing Act (NHA) sets limits on "the amount of interest which may be charged" and provides that state laws purporting to limit such amount of interest do not apply to NHA mortgages. The Court stated that, although the NHA allows states to opt out of the NHA preemption with respect to "the amount of interest which

may be charged," it would be excessively broad to interpret this provision to allow states to also opt out of all NHA regulations. The Court therefore concluded that a state's ability to opt out from preemption under the NHA does not extend to the definition of interest.

Having found no opt out from Federal preemption, the Court examined Minnesota statutes which, among other things, limit the lender's ability to include certain charges in the loan balance. The Court stated that the regulations by the Office of the Comptroller of the Currency clearly prohibit state definitions of interest from applying to national banks. Thus, the Court concluded that Minnesota limitations on the borrower's ability to include amounts for the HECM origination fee, servicing fees and mortgage insurance premiums in the principal balance of the loan were preempted.

It should be noted that this case was decided based upon the preemption principles under the NBA as it existed prior to the amendments under the Dodd-Frank Act. The Dodd-Frank Act clarified the preemption analysis under the NBA by making the conflict preemption standard in Barnett Bank of Marion County, N.A. v. Nelson available to national banks if a state consumer financial law "prevents or significantly interferes" with a national bank's exercise of its powers. The Dodd-Frank Act also changed the Federal preemption analysis for federal savings associations to conform to the clarified standard applicable to national banks. Thus, although on its facts the Taft case applies to national banks, the applicability of this case following the Dodd-Frank Act amendments may be viewed to also extend to federal savings associations.

Puerto Rico

On July 29, 2011, the Puerto Rico legislature enacted the Reverse Mortgage Consumer Protection Act ("Act") (Law No. 164). The Act became effective 60 days after its enactment, or September 29, 2011. Among other things, the Act imposes a duty of good faith on reverse mortgage lenders and brokers, requires certain disclosures in connection with a reverse mortgage loan, and establishes a "cooling-off" period for potential borrowers. Importantly, the Act requires all information and documentation related to reverse mortgage loans to be available in both English and Spanish.

Duty of Good Faith

The Act imposes a duty of honesty, good faith and fair treatment on any entity that recommends, processes or sells a reverse mortgage loan for compensation in Puerto Rico. Pursuant to this duty, the Act prohibits certain practices, including the making of a false or misleading statement or omission in connection with a reverse mortgage loan. The Act also prohibits a person from originating a reverse mortgage loan (i) for a an "improper purpose" (which is defined as a purpose that the person had reason to know would be to the detriment of the borrower); (ii) where the person knew or should have known that the borrower did not have legal capacity to do business or did not have a clear understanding of the consequences of the loan; or (iii) where the person knew or should have known that the reverse mortgage loan would be used as a means of financial exploitation of an elderly person under Puerto Rico law.

Borrower Notice

The Act requires lenders to provide borrowers with a written notice explaining the importance of obtaining counseling. This notice must be provided before the lender processes an application for a reverse mortgage loan. Additionally, it must be written in large font (at least 14-point) and contain specific language set forth in the Act.

Spanish Language

The Act states that all informational material and documentation relating to a reverse mortgage loan must be available to the applicant in both English and Spanish. The borrower can select the language in which the materials will be provided, but the lender must have available both English and Spanish versions of these materials.

Borrower Counseling

The Act requires lenders to refer an applicant to a HUD-approved counselor prior to accepting an application for a reverse mortgage loan or any charges from the borrower. The lender must provide the borrower with a list of at least three counselors as well as a checklist containing the 10 topics that must be covered by the counselor under the Act. Additionally, the borrower must provide a certification indicating that it has received counseling from a qualified counselor.

Cooling-Off Period

The Act provides borrowers with a "cooling-off" period of seven days from the time the borrower receives a written offer to make a reverse mortgage loan during which the borrower cannot be compelled to proceed with the loan. Lenders must provide borrowers with written notice of this cooling-off period, contained in a separate document and in at least 12-point type. The Act states that the cooling-off period cannot be waived by the borrower.

Annual Statements

The Act requires lenders to provide borrowers at closing with the name of an employee or agent of the lender that will handle consumer complaints. The lender must update this information annually or whenever there is a change. Additionally, at the end of each calendar year and at the end of the mortgage term, the lender must provide the borrower with an annual account statement, free of charge. The annual account statement must include certain information as set forth by the Act, and must cover the activity during the period since the last statement. Additionally, the annual account statement must be available in both English and Spanish. If the lender that originated the reverse mortgage loan sells the loan, the lender that originated the loan is responsible for ensuring that the purchasing entity has the capacity to provide all account information in Spanish and to respond to consumer complaints in Spanish.

False or Misleading Representations

The Act prohibits an entity that recommends, processes or sells a reverse mortgage loan for compensation from making potentially false or misleading representations in connection with the reverse mortgage loan. The Act also sets forth a list of prohibited statements, including that a lender may not state that the borrower can use lona proceeds for purposes other than those set out in the federal HECM program..

Agency Authority

The Act authorizes the Office of the Commissioner of Financial Institutions and the Public Corporation for the Supervision and Insurance of Cooperatives of Puerto Rico to establish any regulations necessary for the implementation of the Act. Additionally, these agencies will be responsible for implementing a public education campaign on issues related to reverse mortgage loans.

Penalties

The Act contains very severe and onerous penalties, including the possibility of criminal liability, treble civil damages, voiding of the loan, and fines of up to $50,000

Pending State Mortgage Related Legislation in 2012

California

California Assembly Bill 2010 would require face to face counseling for interested reverse mortgage applicants in that state. The bill has been read for the first time, assigned to the Committee on Banking and Finance and a hearing is scheduled to be held on April 30, 2012. NRMLA is working with the bill's sponsor and interested parties to assure counseling, including counseling over the telephone at the senior's option, will continue to be available in California.

Illinois

Senate Bill 3522 amends the Illinois High Risk Home Loan Act by excluding reverse mortgage loans from the definition of "high risk home loan" under that Act. NRMLA supports the passage of this bill.

Puerto Rico

Senate Bill 2380 was filed on October 20, 2011 and proposes to make certain technical amendments to the Reverse Mortgage Consumer Protection Act ("Act") (Law No. 164). NRMLA and several of its members are working with local stakeholders to have the Act revised to remove onerous and amorphous provisions of the Act so that legitimate reverse mortgage lending activity will not be discouraged in Puerto Rico.

[i] PLEASE TAKE NOTE: The above materials are only an overview of some of the federal and state laws and regulations that may affect reverse mortgage lending, servicing and investing. These materials are designed to alert the reader to the general provisions of law and regulation that may have a bearing upon the reader's business activities. The materials are not intended to and do not provide legal advice. Most provisions described are paraphrased, and a careful reading of the relevant laws, regulations or cases thereunder may reveal exceptions or different interpretations that might be applicable to particular facts. The materials cover areas in which the proper interpretation of law and regulation can be highly dependent upon particular facts. Accordingly, taking action simply upon the basis of information provided in these materials is not advisable. The materials are not a substitute for consultation with qualified legal counsel regarding the manner in which the laws and regulations referenced herein may be interpreted and apply to particular facts. These materials are for informational purposes only and are not a solicitation and should not be construed as such.