WEINER BRODSKY SIDMAN KIDER PC

Financial Services Update–*Special Alert*

July 21, 2010

This morning, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "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 Act, and the Consumer Financial Protection Act of 2010 (Title X of the Act), which creates the new Bureau of Consumer Financial Protection (the "Bureau").

While you have no doubt been inundated with communications from pundits who say that they are experts in every aspect of the Act, the reality is that no one yet fully understands all of the implications of this massive piece of legislation and the even larger amount of regulatory activity that it will engender. WBSK is at the forefront of analyzing the Act and its impact on our clients, and we will be providing information accordingly.

Following is the more detailed summary of some of the most important parts of the Act for mortgage lenders that we promised. Over time, we will provide you with more and greater detail on these and other provisions of the Act, after talking with the regulators involved and thoroughly analyzing the implications of the many details in the Act. In the meantime, please feel free to call us to discuss the Act's impact on your business and to develop a plan to participate in and respond to the regulatory processes that will soon be taking place. We recognize that even this summary is a lot to absorb. We hope that it will help you identify the provisions of most concern or use to your business.

Title XIV will be of most immediate concern as the Bureau begins to exercise its rulemaking authority and so we address it first. However, over time the Bureau will have a major role in regulating mortgage lending as well as other financial products. A summary of Title X which creates the Bureau and describes its authority and priorities follows. The Bureau will have the ability to seek and obtain incredibly broad relief from lenders on its own behalf as well as on behalf of particular consumers.

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 definition and new requirements with respect to high cost mortgage loans (Subtitle C), 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), to add enhancements to the HAMP program (Subtitle G) 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"). The Mortgage Reform Act states the provisions under Subtitle A, B, C and E, below are "enumerated consumer laws," and as a result, the provisions in those subtitles will fall under the supervision of the new Bureau. At this point it is not possible to know how much the Bureau will defer to prior interpretations, regulations and statements from the other agencies.

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 will be set within 60 days of the date of enactment of the Act and will fall not less than 180 days nor more than 12 months after the date of enactment (today).

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. Presumably, the Bureau could set an effective date for regulations of less than the full twelve months. Nevertheless, lenders should be assured that no immediate changes are needed with respect to their forms and compliance procedures.

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 issued 18 months after the designated transfer date, the provisions in this title will generally take effect on that date.

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.

Mortgage Originator Compensation.

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).

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.
- 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 SAFE 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.

- Notable other 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; and
    - 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.

Subtitle B: Minimum Standards for Mortgages

Because of the many detailed provision is this Subtitle and certain of the other subtitles to the Mortgage Reform Act, we present certain subtitles in a Section by Section description of the new provisions. We have omitted some few sections which are of lesser interest to mortgage lenders.

Section 1411 Ability to Repay.

This section adds a new provision to TILA to create a new "ability to repay" standard for residential mortgage loans. Lenders will see that there is significant complexity, and implementation will benefit from the regulations to be written.

Reasonable Ability to Repay. New Section 129C of TILA provides that a creditor may not make a "residential mortgage loan" unless the creditor makes a reasonable and good faith determination that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms.

- The determination must be based on "verified and documented information." See the discussion below on Income and Asset Verification.
- The determination must consider all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. See the discussion below regarding the Basis for Determining Ability to Repay.

Residential Mortgage Loan Definition. The term "residential mortgage loan" is defined as a consumer credit transaction secured by a mortgage or deed of trust on a dwelling or residential

real property that includes a dwelling. It does not include a consumer credit transaction under an open-end credit plan or a time share plan.

Basis for Determining Ability to Repay. The statute provides that a determination under this standard must include consideration of the following:

- The consumer's credit history;
- The consumer's current income and expected income the consumer is reasonably assured of receiving;
- Current obligations;
- Debt to income ratio and the residual income the consumer will have after paying non-mortgage debt and mortgage related obligations;
- Employment status;
- Other financial resources, other than the consumer's equity in the dwelling or real property securing the loan.

Separately, the lender must determine the ability to repay using a payment schedule that fully amortizes the loan over the term of the loan. See the discussion below regarding non-standard loans.

Income and Asset Verification. To verify income and expected income, the creditor must review the consumer's IRS Form W-2, tax returns, payroll receipts, financial institution records, or other third party documents that provide reasonably reliable evidence of income and assets.

In verifying income history, the creditor must use IRS transcripts of tax returns or another method that quickly and effectively verifies income that is approved by the Bureau by regulations. This provision was added as a means of preventing consumer fraud. Unless the Bureau approves an alternative method, this could potentially delay transactions while creditors wait to receive IRS transcripts.

Multiple Loans. If a creditor knows of or has reason to know of any separate loans on the property such as a second lien loan to be held by the seller, the lender must combine all loans for purposes of making its determination of ability to repay.

Exemptions. The statute specifically exempts reverse mortgage and bridge loans with a term of 12 months or less, including any purchase loan of a new dwelling where the consumer plans to sell a different dwelling within 12 months

In addition, FHA, VA and other government agencies which insure or guarantee residential mortgage loans will be able to exempt any streamlined refinancing program from the reasonable ability to repay standard provided the refinancing meets certain standards:

- The consumer is not more than 30 days or more past due on the prior loan.
- The refinancing does not increase the principal balance on except to the extent of fees and charges allowed by the agency.

- Total points and fees (as defined in Section 103(aa)(4)), other than bona fide third party charges not retained by the mortgage originator, creditor or an affiliate do not exceed 3 percent of the total new loan. See the discussion regarding the new definition of points and fees under Section 1431, below.
- The interest rate on the new loan is lower than the interest rate on the existing loan or the borrower is refinancing from an adjustable rate loan to a fixed rate loan.
- The new loan provides for a payment schedule that fully amortizes the loan in accordance with agency regulations.
- The new loan does not have a balloon payment.
- The existing and new loan both meet the agencies' standards for insuring or guaranteeing the loan.

Non-Standard Loans. The statute provides special provisions for certain types of loans. The effect of these provisions on the determination of ability to repay is unclear in some situations. Presumably, the Bureau regulations will provide clarification.

- Variable Rate Loans with Deferral of Principal or Interest. The statute provides that for loans with a variable interest rate that also permit or require the borrower to defer the repayment of any principal or interest, the lender must use a fully amortizing repayment schedule in determining the ability to repay.
- Interest Only Loans. For interest only loans, the creditor must use a payment amount that would be required to amortize the loan by its final maturity.
- Negative Amortization Loans. The credit must consider any balance increase that may result in a loan providing for negative amortization.

In making the reasonable ability to repay determination for these types of loans, the lender must calculate the payment amount by (1) assuming the loan is fully disbursed as of the date of consummation; (2) the loan is to be repaid in substantially equal monthly installments over the entire term of the loan with no balloon payment; and (3) the interest rate over the entire loan is a fixed rate equal to the fully indexed rate at the time of loan closing. A "fully indexed rate" is defined as the index rate at the time the loan is made plus the margin that will apply after the expiration of any introductory interest rate.

If the loan provides for more rapid payments (including a balloon payment), the determinations shall be made in accordance with regulations to be written by the Bureau if the APR on the loan does not exceed the average prime offer rate by 1.5 percent or more (first lien loan) or 3.5 percent or more (subordinate lien loan).

If the APR on the loan exceeds the average prime offer rate by 1.5 percent or more (first lien loan) or 3.5 percent or more (subordinate lien loan), the lender must use the contract repayment schedule in making its determination.

If the lender documents income that is seasonal and irregular, the lender may consider the seasonality and irregularity of the income in scheduling payments on the loan.

Refinance of Hybrid Loan by the Same Creditor. If the lender refinances a hybrid loan it holds into a standard loan which results in a reduction in the monthly payment and the borrower has not been delinquent on any payment on the existing loan, the creditor may give consideration to additional items in making its determination. The creditor may consider:

- The mortgagor's good standing on the existing mortgage;
- Whether the new loan would likely prevent a default on the existing loan;
- Whether the new loan offers rate discounts and other favorable terms that would be available to new customers with high credit rating.

Section 1412 Safe Harbor and Rebuttable Presumption.

Despite its title, this section does not create any safe harbor for lenders seeking to meet the Ability to Repay Standard described above. It does attempt to create a class of loans called "qualified mortgages" that qualify for a rebuttable presumption that the loan meets the standard. Note, however, that the definition of qualified mortgage is used for other purposes such as the limitations on prepayment penalties discussed below.

Qualified Mortgage Defined. A qualified mortgage is any residential mortgage loan that meets the following standards:

a. Except for certain balloon loans describe below, the regular periodic payments on the loan may not result in an increase in the principal balance or allow the consumer to defer repayment of any principal.

b. Except for certain balloon loans as described below, the loan cannot provide for any payment that is twice as large as the average of earlier scheduled payments.

c. The income and financial resources relied upon to qualify the consumers are verified and documented.

d. For fixed rate loans, the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments.

e. For variable rate loans, the underwriting is based on the maximum rate permitted under the loan during the first five years of the loan and a payment schedule that fully amortizes the loan over the loan term and takes into account applicable taxes, insurance and assessments.

f. The loan meets debt to income ratios established by the Bureau or alternative measures of ability to pay established by the Bureau.

g. Total points and fees for the loan do not exceed 3% of the loan amount. See Section 1431 below, for a discussion of the new definition of points and fees.

The Bureau may publish rules with respect to smaller balance loans that would permit lenders to meet the presumption with respect to those loans. The Bureau is to consider the impact of the rules on rural areas where home values are lower.

Balloon Payment Loans. For balloon payment loans, the Bureau may issues regulations defining such loans as qualified mortgages if the loans meet qualifications c., e., f., and g., above, and the following additional requirements:

a. The regular periodic payments do not result in an increase in the principal balance.

b. The creditor determines that the borrower can make all regularly scheduled payments, except the balloon payment, from income and assets other than the property securing the loan.

c. Underwriting is based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance and assessments.

d. The loan is made by a creditor that (1) operates predominately in a rural or underserved area; (2) together with affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Board; (3) retains the loans in its portfolio; and (4) meets any asset size threshold and any other criteria as the Bureau may establish.

Points and Fees. For purposes of calculating the 3% cap on points and fees, the lender will begin with the new definition of points and fees described in Section 1431, below. From this total of points and fees, the creditor may exclude either (1) two bona fide discount points payable by the consumer, but only if the interest rate from which the borrower's rate will be discounted does not exceed the average prime offer rate by more than 1 percentage point; or (2) one bona fide discount point, but only if the interest rate from which the borrower's rate will be discounted does not exceed the average prime offer rate by more than 2 percentage points.

Bureau Regulations. The Bureau will have authority to revise, add to, or subtract from the criteria for determining what constitutes a qualified mortgage, upon a finding that the regulations are necessary and proper, to (1) ensure that responsible, affordable credit remains available to consumers; (2) to effectuate the purposes of the ability to repay standard and the provisions regarding loan originator compensation; or (3) to prevent evasion or circumvention of the requirements.

Agency Definitions. In addition to the exemption from the requirements for the ability to repay standard for certain refinancings described above, the Department of Housing, Department of Veterans Affairs, the Department of Agriculture and the Rural Housing Service may, after consultation with the Bureau, define the loans that they insure, guarantee or administer that are "qualified mortgages." The rules may revise, add to, or subtract from the qualified mortgage criteria. The agencies must make a finding that the rules are consistent with the purposes of the rules on qualified mortgages, prevent circumvention or evasion of the rules or facilitate compliance with the rules.

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 1414 Additional Standards and Requirements.

Prepayment Penalties. TILA is amended to prohibit prepayment penalties on certain residential mortgage loans and limit prepayment penalties on others. Prepayment penalties are prohibited on the following residential mortgage loans:

- Loans that are not qualified mortgages as defined above
- Loans with an adjustable rate
- Loans with a rate which exceeds the average prime offer rate by more that 1.5 percent in the case of a certain smaller first lien loans, 2.5 percent for larger first lien loans and 3.5 percent for subordinate lien loans. The Bureau can adjust these limits to reflect significant changes in the market.

For qualified mortgage for which prepayment penalties are not prohibited by the foregoing restriction, the prepayment penalties are limited. During the first year, the prepayment penalty cannot exceed 3 percent of the outstanding balance. During the second year, the prepayment penalty cannot exceed 2 percent. During the third year, the prepayment penalty cannot exceed 1 percent. After three years, not prepayment penalty can be applied. Note that this section would not authorize prepayment penalties only limit their use. If limited prepayment penalties not permitted by this section they would also have to be authorized under applicable state law or the lender would need to have the advantage of federal preemption of state law.

Single Premium Credit Insurance. For residential mortgage loans and open end credit plans secured by the consumer's principal dwelling, lenders will be prohibited from financing most credit insurance premiums that are not calculated and paid in full on a monthly basis. The prohibition covers credit life, credit disability, credit employment or credit property insurance or debt cancellation or suspension agreements. There is an exception for credit unemployment insurance if the premiums are reasonable and the creditor and the creditor's affiliates receive no direct or indirect compensation in connection with the insurance.

Arbitration. Arbitration clauses will be prohibited in any residential mortgage loan or any open end credit plan secured by the consumer's principal dwelling. Lenders and borrowers can agree to arbitration after a dispute or controversy arises.

Negative Amortization Disclosure and Counseling. The statute provides for a new disclosure for an loan or open end credit plan secured by a dwelling or residential real property if the loan

provides for a payment that may, at any time during the term of the loan result in negative amortization. The disclosure shall:

- State that the transaction will or may result in negative amortization;
- Describe negative amortization in a manner described by the Board;
- State that negative amortization increases the outstanding principal balance of the account; and
- State that negative amortization reduces the consumer's equity in the dwelling or real property.

If the borrower is a first time borrower, and the loan with negative amortization is not a qualified mortgage, the lender must have documentation that the borrower receive homeownership counseling through HUD.

Notices regarding Anti-Deficiency Statutes. Truth in Lending Act is amended to provide for two new notices with respect to anti-deficiency statutes.

The first notice must be provided to a consumer who is involved in a residential mortgage loan transaction where the borrower will be protected by an anti-deficiency statute. The notice must describe the protection provided and the significance of the loss of such protection. The notice must be provided before the loan is consummated.

The second notice will require lenders to identify when the borrower is applying or a loan that would result in the borrower not being protected by an anti-deficiency statute and the loan would refinance a loan where the borrower is protected by an anti-deficiency statute. Before consummation, the lender would be required to provide a notice which describes the protection provided by the anti-deficiency statute and the significance of the loss of such protection.

Policy on Partial Payments. TILA is amended to required lenders to disclose the lender's policy with respect to handling partial payments. The disclosure would be required prior to settlement on each new loan and prior to becoming a creditor with respect to the transfer of an existing loan. The disclosure must state the lender's policy with regard to accepting partial payments and, if partial payments are accepted, how such payments will be applied or placed in escrow.

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 1417 Lender Rights in the Context of Borrower Deception.

This section provides that a borrower could not seek damages under TILA after the borrower or a co-borrower had been convicted of fraud in obtaining the loan.

Section 1418 Six-Month Notice Required Before Reset of Hybrid Adjustable Rate Mortgages.

This section creates a new servicing notice that must be given prior to rate adjustments on certain mortgages.

Loans and Lines Covered. The new disclosure required by this section applies to any consumer credit transaction secured by the consumer's principal dwelling with a fixed introductory period that adjusts or resets to a variable rate after such period. The bill does not state how long the fixed introductory period must be. Accordingly, this provision could be applied by the Bureau to almost all adjustable rate mortgages that begin with a rate that is not based on the index and margin used to make later adjustments. Note also that the provisions are not limited to transactions involving closed end credit. Accordingly, these disclosures could be required for some open end credit plans.

Timing of Disclosure. The disclosure must be given within the 1 month period that ends on 6 months before the introductory period ends. If the introductory period ends within six months of consummations, the disclosure must be given at consummation.

Content of Disclosure. The disclosure must be separate and distinct for all other correspondence to the borrower and must include the following:

- The index or formula for making rate adjustments and a source of information about the index or formula;
- An explanation of how the new interest rate and payment would be determined, including an explanation of how the index was adjusted, such as by the addition of a margin;
- A good faith estimate of the amount of the monthly payment that will apply after the date of adjustment or reset, along with the assumptions used in making that estimate;
- A list of alternative the consumer may want to consider, including refinancing, renegotiation of loan terms, payment forbearances and pre-foreclosure sales;

- Names, addresses and telephone numbers and Internet addresses of counseling agencies or counseling programs that would reasonably be available to the consumer that are approved by HUD or as state financing authority;
- The address, telephone number and Internet address for the State housing finance authority for the state in which the consumer resides.

Section 1419 Required Disclosures.

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

New Truth in Lending Disclosures. For residential mortgage loans with a variable rate and for which an escrow or impound account is established for payment of taxes and insurance, the lender must disclose the following:

- The amount of the initial monthly payment of principal and interest and the amount of such payment including the amount to be deposited in escrow.
- The amount of the fully indexed monthly payment and the amount of the fully indexed payment which includes the amount to be deposited in escrow.

For all residential mortgage loans, the following new disclosures are required:

- Aggregate amount of settlement charges for all settlement services to be provided in connection with the loan;
- The amount of the charges that are included in the loan;
- The amount of the charges that the borrower must pay at closing;
- The approximate "wholesale rate of funds" in connection with the loan;
- The aggregate amount of other fees or required payments in connection with the loan;
- The aggregate amount of fees paid to the loan originator, including the amount paid directly by the consumer and any additional amounts paid by the creditor;
- The amount of interest that the consumer will pay over the life of the loan stated as a percentage of the loan amount.

Section 1420 Disclosures Required in Monthly Statements for Residential Mortgage Loans.

Billing Statements for Variable Rate Loans. This section will do away with coupon billing for residential mortgage loans with variable rates and 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.

Section 1422 State Attorney General Enforcement Authority.

This section extends authority to state attorneys general to enforce the provisions added by Subtitle B similar to the authority they have to enforce the HOEPA provisions.

Subtitle C—High-Cost Mortgages

Section 1431 Definitions Relating to High-Cost Mortgages.

This section provides a new, more extensive definition of a "high cost mortgage" for purposes of TILA and HOEPA. It adjusts the percentages for the annual percentage rate test for high cost mortgages, redefines "points and fees" for purposes of the points and fees test and adds a new prepayment penalty test.

High Cost Mortgages Defined. The term "high cost mortgage" will include any consumer credit transaction that is secured by the consumer's principal dwelling other than a reverse mortgage if it meets one of the three tests shown below. Note that the definition will no longer exclude purchase money transactions or open end credit transactions.

> Annual Percentage Rate Test: If the loan is secured by a first mortgage on the consumer's principal dwelling, the loan will be a high cost mortgage if the annual percentage rate at consummation will exceed the average prime offer rate for a comparable transaction by 6.5 percentage points. If the principal dwelling is personal property and the transaction is for less than $50,000, the annual percentage rate can exceed the average prime offer rate for a comparable transaction by 8.5 percentage points.
>
> If the loan is secured by a subordinate or junior lien on the consumer's principal dwelling, the loan will be a high cost mortgage if the annual percentage rate at consummation will exceed the average prime offer rate for a comparable transaction by

8.5 percentage points. There is no higher rate for personal property in connection with subordinate lien loans.

For purposes of this test, the annual percentage rate used will change if the loan is a variable rate loan. For variable rate loans where the interest rate varies "solely in accordance with an index" the annual percentage rate would be calculated using an interest rate equal to the index rate in effect on the date of consummation plus the maximum margin permitted at any time during the term of the loan. For all other variable rate loans, the annual percentage rate will be calculated using the maximum interest rate that can be charged during the term of the loan. It is not clear how this provision will apply to variable rate loans with a discounted initial interest rate (regardless of how slightly the rate is discounted). Unless the Bureau's regulations provide clarification, such loans could become high cost mortgages even if initial interest rates are consistent with current market rates. Lenders may be forced to avoid locking initial interest rates on variable rate loans until closing to avoid adverse consequences from this section.

Points and Fees Test: The loan will be a high cost mortgage if the points and fees payable in connection with the transaction, other than bona fide third party charges not retained by the mortgage originator, the creditor or an affiliate of the mortgage originator or creditor exceed:

- 5% of the total transaction amount if the total transaction amount is $20,000 or more; or
- 8% of the total transaction amount or $1,000, whichever is less, if the total transaction amount is less than $20,000.

For purposes of calculating the points and fees for purposes of this test, the creditor may exclude any insurance premium provided by an agency of the Federal Government or the agency of any state, upfront MIP for an FHA loan and any insurance premiums paid after closing.

New Prepayment Penalty Test: The loan will be a high cost mortgage if the loan documents permit the creditor to collect any prepayment penalty more than 36 months after the loan closes or any prepayment penalty that exceeds 2% of the amount prepaid. Note that this test is inconsistent with the provision of Section 1414 which prohibits prepayment penalties on loans that are not qualified mortgages. This test replaces the current prohibition on prepayment penalties in high cost mortgages. The current prohibition on prepayment penalties for high cost mortgages is repealed.

The section permits the Bureau to adjust the annual percentage rate tests just as the Federal Reserve has been able to do. However, the adjustments are limited. For first lien loans, the Bureau could reduce the percentage points to as low as 6 percentage points and raise the percentage points to as high as 10 percentage points. For subordinate lien loans, the Bureau could reduce the percentage points to as low as 8 percentage points and could raise the percentage points to has high as 12 percentage points.

Points and Fees Definition. The new definition of "points and fees" for purposes of the high cost mortgage test and for other purposes (see Section 1413 discussed above) shall include the following:

- All items included in or defined as a "finance charge" other than interest or time price differential;
- All compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is a creditor in a table funded transaction (this will capture any compensation paid to and retained by a mortgage by the lender);
- All of the charges normally excluded from the finance charge such as title insurance premium, notary fees, appraisals, pest inspections, credit reports and the like unless the fees are reasonable, the creditor receives no direct or indirect compensation, and the charge is paid to a third party who is not an affiliate of the creditor;
- Premiums or other charges payable at or before closing for any credit life, credit disability, credit unemployment, or credit property insurance or any other accident, loss-of-income, life or health insurance, debt cancelation contract. Premiums calculated and paid on a monthly basis are not included;
- The maximum prepayment penalty that may be collected under the terms of the agreement;
- All prepayment penalties incurred by the consumer if the loan refinances another loan made by or currently held by the same creditor; and
- Any other charges the Bureau adds by regulation.

For purposes of an open end credit plan, the total points and fees would also include the minimum additional fee that the consumer would incur if the consumer were to drawn down the entire line amount.

Bona Fide Discount Points. Certain bona fide discount points can be excluded from the total of the points and fees. A bona fide discount point is a point knowingly paid by the consumer for the purpose of reducing, and which in fact does result in a reduction in the interest rate on the mortgage. The amount of the reduction must be consistent with established industry norms.

The lender can exclude two bona fide discount points if the interest rate that is being reduced does not exceed the average prime offer rate for comparable transactions by more than one percentage point.

If the interest rate exceeds the average prime offer rate by more than one percentage point, the lender can still exclude one bona fide discount point if the interest rate does not exceed the average prime offer rate for comparable transactions by more than two percentage points.

Section 1432 Amendments to Existing Requirements for Certain Mortgages

Balloon Payments in High Cost Mortgages. Currently high cost mortgages cannot contain a balloon payment if the term of the loan is less than five years. This section would prohibit balloon payments for all high cost mortgages but would allow larger payments based on the seasonal or irregular income of the consumer.

Section 1433 Additional Requirements for Certain Mortgages.

Limits on High Cost Mortgages. The following new limits are placed on high cost mortgages:

- No creditor can recommend that a consumer default on an existing loan in connection with closing a high cost mortgage that refinances the existing loan.
- No late fees can be imposed on a high cost mortgage that exceed 4% of the amount of the past due payment or before the end of the 15 day period beginning on the date the payment is due or more than once with respect to a single payment. If interest is payable in advance, the 15 day period is extended to 30 days. The loan documents must specifically authorize any late fee.
- The lender may not pyramid late fees. In other words, the lender cannot impose a late fee if the only delinquency is attributable to a prior late fee.
- A high cost mortgage cannot provide for acceleration of the debt except based on default in payment, pursuant to a due-on-sale provision or pursuant to a material violation of a provision of the loan documents unrelated to the repayment schedule.
- A lender in a high cost mortgage may not finance any prepayment penalty payable in a refinancing transaction or any "points and fees."
- A lender in a high cost mortgage may not charge the consumer any fees for a modification, renewal, extension or amendment to the loan or for deferring any payment.
- Payoff statements for high cost mortgages must be provided free of charge. If the statement is sent by fax or a courier, a fee comparable to the fee charged for non-high cost mortgage payoff statements sent by fax or courier can be charged, provided the consumer is informed that the statement is available for free. After four requests in one calendar year reasonable payoff statement fees can be charged for additional statements for the remainder of the calendar year.
- Payoff statements for high cost mortgages must be provided within five business days of a request.
- Pre-closing counseling by a HUD certified counselor is required before a high cost mortgage can be extended. The counseling can be done only after the borrower has received a RESPA Good Faith Estimate. The lender must obtain a certificate from the counselor that the consumer has received counseling on the advisability of the mortgage.

If a creditor or an assignee in a high cost mortgage, when "acting in good faith," makes an error in complying with the disclosure or other requirements related to high cost mortgages, the creditor assignee can avoid penalty and liability by establishing that within 30 days of loan

closing, and prior to the consumer taking action, the lender notified the consumer of the error and made appropriate restitution and adjustments necessary to make the loan, at the consumer's option, to either satisfy the requirements of a high cost mortgage or change the terms in a manner to make the loan no longer be a high cost mortgage.

Subtitle D: Expand and Preserve Home Ownership through Counseling Act

Subtitle D contains the Expand and Preserve Home Ownership through Counseling Act ("EPHOTCA"). Among other things, EPHOTCA creates the Office of Housing Counseling ("OHC") within the Department of Housing and Urban Development ("HUD") and imposes a requirement that only HUD-certified counselors may be used to meet any homeownership counseling or rental housing counseling required under, or provided in connection with, any program administered by HUD.

EPHOTCA modifies the Department of Housing and Urban Development Act (42 U.S.C. § 3533) to give the OHC Director the primary responsibility within HUD for all activities and matters relating to homeownership counseling and rental housing counseling, including:

- Research, grant administration, public outreach and policy development relating to such counseling; and
- Establishment, coordination and administration of all regulations, requirements, standards and performance measures under programs and laws administered by HUD that relate to housing counseling, homeownership counseling (including maintenance of homes), mortgage-related counseling (including home equity conversion mortgages and credit protection options to avoid foreclosure) and rental housing counseling.

The OHC Director must establish rules necessary for each of the following:

- The counseling procedures for homeownership counseling and rental housing counseling provided in connection with any HUD program, including all requirements, standards and performance measures that relate to homeownership and rental housing counseling;
- Contributing to the distribution of home buying information booklets pursuant to RESPA;
- Carrying out the counseling organization certification program;
- Carrying out the homeownership and rental counseling assistance program;
- Carrying out any functions regarding abusive, deceptive, or unscrupulous lending practices relating to residential mortgage loans that the Secretary considers appropriate, which shall include conducting the GAO default and foreclosure study;
- Providing for operation of the advisory committee;
- Collaborating with community-based organizations with expertise in the field of housing counseling; and

- Providing for the building of capacity to provide housing counseling services in areas that lack sufficient services, including underdeveloped areas that lack basic water and sewer systems, electricity services, and safe, sanitary housing.

EPHOTCA requires:

- Only HUD-certified counselors may be used to meet any homeownership counseling or rental housing counseling required under, or provided in connection with, any program administered by HUD;
- HUD to establish and maintain a database of information on foreclosures and defaults on mortgage loans for one- to four unit residential properties and make such information publicly available;
- Modifications to the Special Information Booklet provisions under RESPA, which will now be referred to as the Home Buying Information Booklet.

EPHOTCA does not specify an effective date, so its provisions will presumably take effect (as with the rest of the Mortgage Reform Act) on the date the final regulations implementing such section or provision take effect, or on the date that is eighteen (18) months after the designated transfer date, whichever is earlier. The effective date is particularly significant with respect to the requirement to use HUD-certified counselors in connection with all programs administered by HUD and the disclosure requirements on lenders with respect to the new Home Buyers Information Booklet and the list of HUD-certified counselors.

Mortgage Information Booklet. The Mortgage Reform Act modifies the Special Information Booklet provisions under RESPA. The booklet will now be referred to as the Home Buying Information Booklet and the responsibility for preparing and distributing the booklet will move from the Secretary to the Director of the Bureau of Consumer Financial Protection. Additional changes include the requirement for the Director:

- to prepare an updated booklet at least once every five (5) years;
- to prepare the booklet in various language and cultural styles so it is understandable and accessible to homebuyers of different ethnic and cultural backgrounds; and
- to distribute to lenders a list of certified homeownership counselors, organized by location.

Additionally, the Director is specifically required to include much more information in the booklet for the consumer, including:

- Specific information about balloon payments, prepayment penalties, the advantages of prepayment and the trade-off between closing costs and the interest rate over the life of the loan;
- A list and explanation of questions a consumer should ask regarding the loan, including whether the consumer will have the ability to repay the loan, whether the consumer sufficiently Shopped for the loan, whether the loan terms include prepayment penalties or balloon payments and whether the loan will benefit the borrower;
- An explanation of the right of rescission as to certain transactions under TILA;

- A brief explanation of the nature of a variable rate mortgage and a reference to the booklet entitled "Consumer Handbook on Adjustable Rate Mortgages," published by the Director;
- Information about homeownership counseling services available, a recommendation that the consumer use such services and notification that a list of certified providers of homeownership counseling in the area, and their contact information, if available;
- An explanation of a consumer's responsibilities, liabilities and obligations in a mortgage transaction; and
- An explanation of the nature and purpose of real estate appraisals, including the difference between an appraisal and a home inspection.

A lender will be required to provide a borrower:

- The Home Buying Information Booklet in the version that is most appropriate for the person receiving it, and
- A reasonably complete or updated list of certified homeownership counselors located in the area of the lender.

Home Inspection Counseling. Each FHA-approved lender must provide prospective homebuyers, at *first contact*, *whether upon pre-qualification, pre-approval or initial application*, with the following three publications which will be published and distributed by HUD: (1) the HUD/FHA form HUD 92564–CN entitled "For Your Protection: Get a Home Inspection; (2) the HUD/FHA booklet entitled "For Your Protection: Get a Home Inspection; and (3) the HUD document entitled "Ten Important Questions To Ask Your Home Inspector."

Foreclosure Rescue Scam Warnings. EPHOTCA earmarks a portion of HUD's budget to be used for assistance to the Neighborhood Reinvestment Corporation for activities, in consultation with servicers of residential mortgage loans, to provide notice to borrowers under such loans who are delinquent with respect to payments due under such loans that makes such borrowers aware of the dangers of fraudulent activities associated with foreclosure, specifically:

(1) that the foreclosure process is complex and can be confusing;
(2) that the borrower may be approached during the foreclosure process by persons regarding saving their home, and they should use caution in any such dealings;
(3) that there are Federal Government and nonprofit agencies that may provide information about the foreclosure process, including HUD;
(4) that they should contact their lender immediately, contact HUD to find a housing counseling agency certified by HUD to assist in avoiding foreclosure, or visit HUD's website regarding tips for avoiding foreclosure; and
(5) of the telephone number of the loan servicer or successor, the telephone number of the HUD housing counseling line, and the URLs of the HUD Web sites for housing counseling and for tips for avoiding foreclosure.

Subtitle E—Mortgage Servicing

Section 1461 Escrow and Impound Accounts Relating to Certain Consumer Credit Transactions

This section amends TILA to create a new requirement for mandatory escrow accounts for taxes and insurance for certain consumer credit transaction secured by a first lien on the consumer's principal dwelling.

Loans Covered. A lender or servicer must establish an escrow account for consumer credit transactions secured by a first lien on the borrower's principal dwelling if:

- Escrow or impound accounts are required by state or federal law;
- The loan is made, guaranteed or insured by the federal government or a state government;
- The loan will not exceed the conforming loan limit and the APR on the loan will exceed the average prime offer rate for comparable transactions by 1.5 percentage points or more; or
- The loan will exceed the conforming loan limit and the APR on the loan will exceed the average prime offer rate by 2.5 percentage points or more.

The Bureau can require escrows for additional loans by regulation.

Exemptions. The requirements do not apply to open-end credit plans, reverse mortgages, and loans secured by shares in a cooperative. Insurance amounts need not be escrowed where the insurance is maintained under a master policy by a homeowners association.

The Bureau can exempt loans made by a creditor that operates predominately in a rural or underserved area and retains the loans in its portfolio. The Bureau will set total annual mortgage loan origination limits and asset size limits for these types of lenders by regulation.

Duration of Escrow Account. The borrower must maintain the escrow account for a minimum of five years, unless and until sufficient equity is reached comparable to that required under rules for cancellation of private mortgage insurance, the borrower is delinquent or otherwise fails to comply with the loan terms, or the loan is repaid.

Other Provisions Applicable to Escrow Accounts.

- Creditors shall pay interest on amounts held in escrow if prescribed by state or federal law.
- The mandatory requirements do not prevent creditors from establishing an otherwise lawful escrow account or an escrow account required by the Flood Disaster Protection Act of 1973.

- Escrow accounts must be established at a federally insured depository institution or credit union.
- Accounts must be administered in accordance with RESPA and Regulation X, flood insurance rules and state law requirements.

Disclosure Requirements for Mandatory Escrow Accounts. If a mandatory escrow account is required, the lender must also provide a disclosure to the borrower at least 3 business days prior to consummation. The disclosure must include the following:

- The fact that the account will be established at closing;
- The amount required to initially fund the account;
- The amount, in the initial year after consummation, of the estimated taxes, hazard insurance, flood insurance, and any other periodic payments that will be paid from the account. The estimated amounts must reflect the taxable assessed value of the property, including any improvements or improvements to be constructed on the property whether or not financed by the transaction or the replacement costs of the property;
- The estimated monthly amount payable to be escrowed;
- The fact that, if the consumer chooses to terminate the account in the future, the consumer will be responsible for the payment of taxes, insurance etc.; and
- Any additional information that the Bureau may require.

Section 1462 Disclosure Notice Required For Consumers Who Waive Escrow Services.

This section amends TILA to require a disclosure in connection with certain mortgage loans to consumers who do not establish escrow accounts.

This disclosure will be required in connection with any consumer credit transaction secured by real property. The statute does not state that the requirement is limited to first lien transactions or closed-end transactions. The notice must be given if the lender chooses not to require an escrow account or the consumer chooses to close an escrow account in accordance with statute, regulation or contractual agreement with the lender.

The disclosure must include the following information:

- Information regarding any fees or cost associated with not establishing the account or subsequent closing of the account;
- A clear and prominent statement that the consumer is personally responsible for directly paying the non-escrowed items and the fact that the cost of such items can be substantial;

- A clear explanation of the consequences of any failure to pay the items, including the possible requirement for the forced placement of insurance and the potential higher cost and lower coverage of such insurance; and
- Any other information the Bureau may require.

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

Introduction.

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 Act).

Section 1471 Property Appraisal Requirements.

Section 1471 modifies TILA by adding a new section 129H that regulates appraisal requirements with respect to higher risk mortgages. Specifically, the new provisions prohibit a creditor from extending credit in the form of a higher-risk mortgage to any consumer without first obtaining a written appraisal of the property to be mortgaged prepared in accordance with certain requirements. An appraisal of property to be secured by a higher-risk mortgage does not meet the requirement of this section unless it is performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the mortgaged property.

In addition, a creditor must obtain a second appraisal from a different certified or licensed appraiser if the purpose of a higher-risk mortgage is to finance the purchase or acquisition of the mortgaged property from a person within 180 days of the purchase or acquisition of such property by that person at a price that was lower than the current sale price of the property. The cost of the second appraisal must not be charged to the applicant, and the appraisal must include an analysis of the difference in sale prices, changes in market conditions and any improvements made to the property between the date of the previous sale and the current sale.

Definitions. The term "higher-risk mortgage" means a residential mortgage loan that:

- Is not a reverse mortgage loan that is a qualified mortgage;
- Is secured by a principal dwelling;
- Is not a qualified mortgage; and
- Has an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as defined in section 129C of TILA, as of the date the interest rate is set by the following specified percentage points corresponding to the loan:
    - by 1.5 or more percentage points in the case of a first lien residential mortgage loans having an original principal obligation amount that does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454(a)(2)) "(the FHLMA Limit");
    - by 2.5 or more percentage points, in the case of a first lien residential mortgage loan having an original principal obligation amount exceeding the FHLMA Limit; and
    - by 3.5 or more percentage points for a subordinate lien residential mortgage loan.

A "certified or licensed appraiser" means a person who is, at a minimum, certified or licensed by the State in which the property to be appraised is located and performs each appraisal in conformity with the Uniform Standards of Professional Appraisal Practice ("USPAP") and title XI of FIRREA, and the regulations prescribed under such title, as in effect on the date of the appraisal.

Disclosures. At the time of the initial mortgage application, the creditor must provide the applicant with a statement that any appraisal prepared for the mortgage is for the sole use of the creditor and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant. A creditor must provide a copy of each appraisal conducted in connection with a higher-risk mortgage to the applicant without charge and at least three (3) days prior to the transaction closing date.

Regulations. Regulations implementing these provisions will be prescribed jointly by the Federal Agencies and may exempt a class of loans from such requirements if the exemption would be in the public interest and promote the safety and soundness of creditors.

Liability. In addition to any other liability to any person under TILA, a creditor found to have willfully failed to obtain an appraisal as required is liable to the applicant or borrower for the sum of $2,000.

Section 1472 Appraisal Independence Requirements.

Section 1472 also modifies TILA by adding another new section 129E that sets forth appraisal independence requirements. Specifically, the new section prohibits, in extending credit or in providing any services for a consumer credit transaction secured by the principal dwelling of the consumer, engaging in any act or practice that violates appraisal independence as described in the new Section 129E or the implementing regulations.

In connection with a consumer credit transaction secured by a consumer's principal dwelling, a creditor who knows, at or before loan consummation, of a violation of the appraisal independence standards, including a conflict of interest, may not extend credit based on such appraisal unless the creditor documents that the creditor has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling.

Acts or practices that violate appraisal independence include:

(1) any appraisal of a property offered as security for repayment of the consumer credit transaction that is conducted in connection with such transaction in which a person with an interest in the underlying transaction compensates, coerces, extorts, colludes, instructs, induces, bribes or intimidates a person, appraisal management company, firm or other entity conducting or involved in an appraisal, or attempts, to compensate, coerce, extort, collude, instruct, induce, bribe or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser;

(2) mischaracterizing, or suborning any mischaracterization of, the appraised value of the property securing the extension of the credit;

(3) seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction; and

(4) withholding or threatening to withhold timely payment for an appraisal report or for appraisal services rendered when the appraisal report or services are provided for in accordance with the contract between the parties.

No certified or licensed appraiser conducting, and no appraisal management company procuring or facilitating, an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer may have a direct or indirect interest, financial or otherwise, in the property or transaction involving the appraisal.

Exceptions. Section 1472 is not to be construed as prohibiting a mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, consumer or any other person with an interest in a real estate transaction from asking an appraiser to undertake one or more of the following:

- Consider additional, appropriate property information, including the consideration of additional comparable properties to make or support an appraisal.
- Provide further detail, substantiation or explanation for the appraiser's value conclusion.
- Correct errors in the appraisal report.

Mandatory Reporting. The new provisions impose a duty on any other person involved in a real estate transaction, including mortgage lenders and brokers, real estate brokers and appraisal management company employees, involving an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer who has a reasonable basis to believe an appraiser is failing to comply with the Uniform Standards of Professional Appraisal Practice, is violating applicable laws, or is otherwise engaging in unethical or unprofessional conduct, to refer the matter to the applicable State appraiser certifying and licensing agency.

Customary and Reasonable Fee. Lenders and their agents shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised. Evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies and independent private sector surveys. Fee studies shall exclude assignments ordered by known appraisal management companies. In the case of an appraisal involving a complex assignment, the customary and reasonable fee may reflect the increased time, difficulty and scope of the work required for such an appraisal and include an amount over and above the customary and reasonable fee for non-complex assignments.

Definitions. A "fee appraiser" means a person who is not an employee of the mortgage loan originator or appraisal management company engaging the appraiser and is—

(A) a State licensed or certified appraiser who receives a fee for performing an appraisal and certifies that the appraisal has been prepared in accordance with the USPAP; or

(B) a company not subject to the requirements of section 1124 of the FIRREA that utilizes the services of State licensed or certified appraisers and receives a fee for performing appraisals in accordance with the Uniform Standards of Professional Appraisal Practice.

Regulations. The Federal Agencies may jointly issue rules, interpretive guidelines and general statements of policy with respect to 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 and mortgage brokerage services for such a transaction.

For purposes of Section 129E of TILA, the Board will prescribe interim final regulations, no later than ninety (90) days after the date of enactment of the section, 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. Such rules prescribed by the Board will be deemed to be rules prescribed by the agencies jointly.

The Federal Agencies may jointly issue regulations that address the issue of appraisal report portability, including regulations that ensure the portability of the appraisal report between lenders for a consumer credit transaction secured by a 1-4 unit single family residence that is the principal dwelling of the consumer, or mortgage brokerage services for such a transaction.

Liability. In addition to the enforcement provisions referred to in section 130, each person who violates this section shall forfeit and pay a civil penalty of not more than $10,000 for each day any such violation continues. For subsequent violations, such person shall forfeit and pay a civil penalty of not more than $20,000 with respect to all subsequent violations.

Section 1473 Amendments Relating to Appraisal Subcommittee of FFIEC, Appraiser Independence Monitoring, Approved Appraiser Education, Appraisal Management Companies, Appraiser Complaint Hotline, Automated Valuation Models, and Broker Price Opinions.

Section 1473 modifies various sections of FIRREA and one section of the Federal Financial Institutions Examination Council Act of 1978. FIRREA currently only applies to financial institutions or appraisals for federally related transactions, i.e., any real estate-related financial transaction requiring the services of an appraiser which a federal

financial institutions regulatory agency (the Board, FDIC, OCC, OTS and NCUA) or the Resolution Trust Corporation engages in, contracts for or regulates. Before the Act, non-depository institutions were generally not covered; however, specified provisions appear to go beyond federally related transactions and apply more broadly to any residential mortgage loan for purchase of a consumer's principal dwelling. Moreover, enforcement of at least one of the new sections added to FIRREA state that regulations issued under that section will be enforced by the FTC, Bureau and a State attorney general with respect to non-financial institution participants in the market for appraisals of one- to four unit single family residential real estate. Subsequently, it is not entirely clear whether non-depository institutions will now be subject to all or just select parts of FIRREA and the regulations promulgated under it.

The Mortgage Reform Act modifies various sections of FIRREA to, among other things:

- Expand the members, responsibilities and authority of the Appraisal Subcommittee;
- Add the designees of the heads of the Bureau of Consumer Financial Protection and the Federal Housing Finance Agency to the Appraisal Subcommittee;
- Require Bureau concurrence to establish threshold levels below which a certified or licensed appraiser is not required;
- Require a national registry of appraisal mortgage companies and increase annual registration fees for individual appraisers;
- Add the requirement that appraisals in connection with federally related transactions be in compliance with the USPAP;
- Add a definition for a complex single family residential appraisal.

At all times at least one member of the Appraisal Subcommittee shall have demonstrated knowledge and competence through licensure, certification or professional designation within the appraisal profession.

The Subtitle adds a requirement for the Appraisal Subcommittee to monitor the state requirements for the registration and supervision of the operations and activities of an AMC and maintain a national registry of AMCs that either are registered with and subject to supervision of a State appraiser certifying and licensing agency or are operating subsidiaries of a federally regulated financial institution.

Appraisal Management Companies ("AMCs"). The Federal Agencies must issue joint regulations to establish minimum requirements to be applied by a State in the registration of appraisal management companies ("AMCs"), which must include a requirement that AMCs:

(1) register with and be subject to supervision by a State appraiser certifying and licensing agency in each State in which such company operates;

(2) verify that only licensed or certified appraisers are used for federally related transactions;

(3) require that appraisals coordinated by an AMC comply with the USPAP; and

(4) require that appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established under section 129E of TILA (see discussion above).

An AMC that is a subsidiary owned and controlled by a financial institution and regulated by a federal financial institution regulatory agency is not required to register with a State; however such AMC must still adhere to the above requirements. States are permitted to establish additional requirements or standards for AMCs exceeding the federal requirements.

In order to be registered by a State or included on the national registry:

- an AMC may not be owned, in whole or in part, directly or indirectly, by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation or revoked in any State;
- each person that owns more than ten percent (10%) of an AMC must be of good moral character, as determined by the State appraiser certifying and licensing agency; and
- each person that owns more than ten percent (10%) of an AMC must submit to a background investigation carried out by the State appraiser certifying and licensing agency.

Effective Date. An AMC may not perform services related to a federally related transaction in a State after the date that is thirty-six (36) months after the date on which the regulations required to be prescribed under subsection (a) are prescribed in final form, unless such company is either registered with such State or subject to oversight by a federal financial institutions regulatory agency. The Appraisal Subcommittee may extend the effective date of the requirements for the registration and supervision of AMCs by up to twelve (12) months under limited circumstances.

Under FIRREA, states may establish a state appraiser certifying and licensing agency ("State Appraiser Agency"). Subtitle F provides that the duties of a State Appraiser Agency may additionally include the registration and supervision of AMCs and the addition of information about the AMC to the national registry.

Definition of Appraisal Management Company. An "appraisal management company" means, in connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor of a consumer credit transaction secured by a consumer's principal dwelling or by an underwriter of or other principal in the secondary mortgage markets,

that oversees a network or panel of more than fifteen (15) certified or licensed appraisers in a State or twenty-five (25) or more nationally within a given year (a) to recruit, select and retain appraisers; (b) to contract with licensed and certified appraisers to perform appraisal assignments; (c) to manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and reimbursing appraisers for services performed; or (d) to review and verify the work of appraisers.

Additional Requirements. Each State with a State Appraiser Agency must:

> (1) transmit reports on the issuance and renewal of licenses and certifications, sanctions, disciplinary actions, license and certification revocations, and license and certification suspensions on a timely basis to the national registry of the Appraisal Subcommittee; and
>
> (2) transmit reports on a timely basis of supervisory activities involving appraisal management companies or other third party providers of appraisals and appraisal management services, including investigations initiated and disciplinary actions taken.

Registry Fee. The Mortgage Reform Act provides for an increase the annual registry fee for individuals who perform appraisals in federally related transactions from $25 to not more than $40. It also adds a requirement for each State Appraiser Agency to collect from an AMC that either has registered with a State Appraiser Agency or operates as a subsidiary of a federally regulated financial institution, an annual registry fee that differs based upon whether the company that has been in existence for more than a year. For those AMCs that have been in existence for more than a year, the fee is $25 multiplied by the number of appraisers working for or contracting with such company in such State during the previous year. For AMCs in existence for a year or less, the fee is $25 multiplied by an appropriate number to be determined by the Appraisal Subcommittee, and where such number will be used for determining the fee of all such companies that were not in existence for more than a year.

In connection with registry fees, the Appraisal Subcommittee:

- May adjust the dollar amount of registry fees under paragraph (4)(A), up to a maximum of $80 per annum, as necessary to carry out its functions under this title.
- Must consider at least once every five (5) years whether to adjust the dollar amount of the registry fees to account for inflation.
- Must provide flexibility to the States for multi-year certifications and licenses already in place, as well as a transition period to implement the changes in registry fees.

- Has the discretion to impose a minimum annual registry fee for an AMC to protect against the under reporting of the number of appraisers working for or contracted by the AMC.

Incremental revenues collected pursuant to the required increases will be placed in a separate account at the United States Treasury, entitled the "Appraisal Subcommittee Account." In addition to the items provided under FIRREA, the funds in the Appraisal Subcommittee Account will be used to:

- Make grants to State Appraiser Agencies, in accordance with policies to be developed by the Appraisal Subcommittee, to support the efforts of such agencies to comply with this title, including:
    - the complaint process, complaint investigations, and appraiser enforcement activities of such agencies; and
    - the submission of data on State licensed and certified appraisers and AMCs to the National appraisal registry, including information affirming that the appraiser or AMC meets the required qualification criteria and formal and informal disciplinary actions.
- Report to all State Appraiser Agencies when a license or certification is surrendered, revoked or suspended.

These authorized obligations may not exceed seventy-five percent (75%) of the fiscal year total of incremental increase in fees collected and deposited in the Appraisal Subcommittee Account.

Definition of State Licensed Appraiser. Subtitle F modifies the definition of "State licensed appraiser" to mean means an individual who has satisfied the requirements for State licensing in a State or territory *whose criteria for the licensing of a real estate appraiser currently meet or exceed the minimum criteria issued by the Appraisal Qualifications Board of The Appraisal Foundation for the licensing of real estate appraisers*.

Minimum Qualification Requirements. Any requirements established for individuals in the position of "Trainee Appraiser" and "Supervisory Appraiser" must meet or exceed the minimum qualification requirements of the Appraiser Qualifications Board of The Appraisal Foundation. The Appraisal Subcommittee has the authority to enforce these requirements.

Monitoring of State Appraiser Agencies. The Appraisal Subcommittee must monitor each State appraiser certifying and licensing agency for the purposes of determining whether such agency:

(1) has policies, practices, funding, staffing and procedures that are consistent with this title;

(2) processes complaints and completes investigations in a reasonable time period;

(3) appropriately disciplines sanctioned appraisers and appraisal management companies;

(4) maintains an effective regulatory program; and

(5) reports complaints and disciplinary actions on a timely basis to the national registries on appraisers and appraisal management companies maintained by the Appraisal Subcommittee.

The Appraisal Subcommittee has the authority to:

- Remove a State licensed or certified appraiser or a registered appraisal management company from a national registry on an interim basis, not to exceed ninety (90) days, pending State agency action on licensing, certification, registration and disciplinary proceedings. The Appraisal Subcommittee and all agencies, instrumentalities, and federally recognized entities under this title shall not recognize appraiser certifications and licenses from States whose appraisal policies, practices, funding, staffing, or procedures are found to be inconsistent with this title.
- Impose sanctions against a State agency that fails to have an effective appraiser regulatory program. In determining whether such a program is effective, the Appraisal Subcommittee must include an analysis of:
    - the licensing and certification of appraisers,
    - the registration of AMCs,
    - the issuance of temporary licenses and certifications for appraisers,
    - the receiving and tracking of submitted complaints against appraisers and AMCs,
    - the investigation of complaints, and
    - enforcement actions against appraisers and AMCs.
- Impose interim actions and suspensions against a State agency as an alternative to, or in advance of, the de-recognition of a State agency.

A federally related transaction may not be appraised by a certified or licensed appraiser unless the State Appraiser Agency of the State certifying or licensing such appraiser has in place a policy of issuing a reciprocal certification or license for an individual from another State when

(1) the appraiser licensing and certification program of such other State is in compliance with the provisions of this title; and

(2) the appraiser holds a valid certification from a State whose requirements for certification or licensing meet or exceed the licensure standards established by the State where an individual seeks appraisal licensure.

Appraiser Independence Monitoring. The Appraisal Subcommittee is responsible for monitoring each State Appraiser Agency for the purpose of determining whether such agency's policies, practices and procedures are consistent with the purposes of maintaining appraiser independence and whether such State has adopted and maintains effective laws, regulations and policies aimed at maintaining appraiser independence. The Appraisal Subcommittee must encourage the States to accept courses approved by the Appraiser Qualification Board's Course Approval Program.

Appraiser Complaint Hotline. If, six (6) months after the date of the enactment of this subsection, the Appraisal Subcommittee determines that no national hotline exists to receive complaints of non-compliance with appraisal independence standards and USPAP, including complaints from appraisers, individuals or other entities concerning the improper influencing or attempted improper influencing of appraisers or the appraisal process, the Appraisal Subcommittee must establish and operate such a national hotline, which shall include a toll-free telephone number and an email address. If the Appraisal Subcommittee operates such a national hotline, the Appraisal Subcommittee will refer complaints for further action to appropriate governmental bodies, including a State Appraiser Agency, a financial institution regulator or other appropriate legal authorities. For complaints referred to State Appraiser Agencies or to Federal regulators, the Appraisal Subcommittee has the authority to follow up such complaint referrals in order to determine the status of the resolution of the complaint.

Automated Valuation Models. Automated valuation models ("AVMs") must adhere to quality control standards designed to:

- Ensure a high level of confidence in the estimates produced by automated valuation models;
- Protect against the manipulation of data;
- Seek to avoid conflicts of interest;
- Require random sample testing and reviews; and
- Account for any other such factor that the agencies determine to be appropriate.

An "automated valuation model" is any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.

The Federal Agencies, in consultation with the staff of the Appraisal Subcommittee and the Appraisal Standards Board of the Appraisal Foundation, must promulgate regulations to implement the quality control standards required. Compliance with such regulations will be enforced by:

- With respect to a financial institution, or subsidiary owned and controlled by a financial institution and regulated by a Federal financial institution regulatory agency, the Federal financial institution regulatory agency that acts as the primary Federal supervisor of such financial institution or subsidiary; and
- With respect to other participants in the market for appraisals of 1-to-4 unit single family residential real estate, the Federal Trade Commission, the Bureau and a State attorney general.

Broker Price Opinions. In conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of a loan origination of a residential mortgage loan secured by such piece of property.

The term "broker price opinion" means an estimate prepared by a real estate broker, agent or sales person that details the probable selling price of a particular piece of real estate property and provides a varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model.

Section 1474 Equal Credit Opportunity Act Amendment.

Subtitle F modifies the Equal Credit Opportunity Act to require each creditor to furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than three (3) days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

- The applicant may waive the three (3) day requirement, except where otherwise required in law.
- The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.
- The creditor must provide a copy of each written appraisal or valuation at no additional cost to the applicant.
- At the time of application, the creditor must notify an applicant in writing of the right to receive a copy of each written appraisal and valuation.

Note that a "valuation" includes any estimate of the value of a dwelling developed in connection with a creditor's decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an AVM, a broker price opinion or other methodology or mechanism.

Section 1475 RESPA Amendment Relating to Certain Appraisal Fees.

Subtitle F's amendment to RESPA provides that the Uniform Settlement Statement may include, in the case of an appraisal coordinated by an AMC (as defined under FIRREA, see above), a clear disclosure of the following:

(a) The fee paid directly to the appraiser by such company; and

(b) The administration fee charged by such company.

Subtitle G—Mortgage Resolution and Modification

Section 1481 Multifamily Mortgage Resolution Program.

Multifamily Mortgage Program. This section recognizes that foreclosure on multifamily properties can have severe impact on tenants in the property. The Secretary of HUD is directed to develop a program which will ensure the protection of current and future tenants in at-risk multifamily properties. This section provided factors that the program should include:

- Creating sustainable financing that takes rental income and the need for operating reserve into consideration;
- Maintaining the level of Federal, State and city subsidies;
- Providing funds for rehabilitation; and
- Facilitating transfer of such properties to new owners and ensuring affordability for such properties.

This section also denies assistance under the Making Home Affordable Program to those convicted of felony larceny, theft, fraud, forgery, money laundering or tax invasion in connection with a real estate transaction.

Section 1482 Home Affordable Modification Program Guidelines.

Notice to Borrowers regarding Net Present Value Analysis. This section requires the Secretary of Treasury to modify the supplemental directives and guideline for the Home Affordable Modification Program ("HAMP") and the Making Home Affordable initiative to require each mortgage servicer to give a new notice when a HAMP modification is denied.

The new notice would disclose to the borrower at the time of denial the borrower-related and mortgage related data used by the servicer in making the required net present value ("NPV") analysis required by the program.

Web-Based NPV Calculator and Application. The Secretary of Treasury is required to establish a web site that provides a NPV calculator based on the Secretary's methodology for calculating such value. The site would be for mortgagors in determining whether their mortgage might be accepted or rejected for modification. The web site must prominently disclose that servicers may use a different methodology.

The Secretary must also publish on the web, the Secretary's methodology and computer model for calculating NPV as well as all formulae used in the model and all proprietary variables used in the analysis.

The Secretary must make a reasonable effort to use the web site to provide borrowers with a means of applying for a mortgage modification under HAMP.

Section 1483 Public Availability of Information of Making Home Affordable Program.

Publicly Available Information Regarding Participating Servicers and Lenders. The Secretary of the Treasury must revise the HAMP guidelines to provide that the Secretary will make a monthly disclosure regarding each participating lender or servicer. Not more that 14 days after each monthly deadline for data submission by the lender or servicer, the Secretary must publish on a web site and submit a report to Congress that includes the following information regarding each lender or servicer:

- Number of HAMP modifications requests received;
- Number of HAMP modifications that lender or servicer has processed;
- Number of requests that have been approved; and
- Number of requests that have been denied.

The Secretary is also charged with writing regulations that provide for disclosing information "at the individual record level." The regulations must provide the procedures for disclosing this data and the deletions appropriate to protect the privacy of applicants.

Section 1484 Protecting Tenants at Foreclosure Extension and Clarification.

This section makes minor clarifying amendments to the Protecting Tenants from Foreclosure Act which requires certain notices to tenants before evicting tenants following a foreclosure and extends the expiration date of the Protecting Tenants from Foreclosure Act from December 31, 2012 to December 31, 2014.

Bureau of Consumer Financial Protection (Title X)

Title X of the 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.

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 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 SAFE 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 severely 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. Until a Director is confirmed by the Senate, the Secretary of the Treasury will exercise the Director's powers. The transfer of rulemaking, supervisory and enforcement authority will take place on a "designated transfer date," to be announced within 60 days. This designated transfer date will be at least 180 days but no more than 18 months from now. Prior to the designated transfer date, the Bureau will publish a list in the Federal Register of the rules and orders that it will be enforcing.

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 the following items:

- Study mandatory pre-dispute arbitration clauses in consumer financial contracts.
- Propose rules and a model disclosure combining TILA and RESPA sections 4 & 5 (may instead approve the joint Fed/HUD proposal).
- Study and report on the feasibility of using a consumer's remittance history in credit score calculation.
- Treasury Department to study ending the conservatorship of Fannie and Freddie, with report due end of January 2011.
- Bureau and other agencies are directed to develop and improve methods of matching addresses with census tracts to make compliance with HMDA cheaper.
- More regulation of remittance transfer providers, including required disclosures.
- Fed given authority to prescribe regulations regarding interchange transaction fees for electronic debit transactions, to cover institutions with assets over $10 billion.
- Study reverse mortgages and may issue regulations. Bureau may prescribe an integrated disclosure form, and may issue regulations before completing the study.
- Director of the Bureau (with Secretary of Education) required to submit legislative proposals regarding private education loans and lenders.
- Study exchange facilitators and report to Congress recommending legislation and new regulations.
- Sentencing Commission to study sentences for securities fraud and fraud offenses relating to financial institutions or federally related mortgage loans.
- Bureau to assist HUD in its study (under Title XIV), jointly establishing and maintaining a database of foreclosures and defaults.
- Study appraisal report portability (under Title XIV).

Transfer of Rulemaking Authority. The Bureau will take over rulemaking authority for the following 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 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.

Consumer Right to Information.

- Covered persons are required, upon request, to provide information to a consumer about that consumer's financial product or service in a timely manner and in a usable electronic format, but they are not required to maintain additional records beyond what is otherwise required.
- Financial institutions must provide consumers with the credit score that formed part of the basis for adverse action on a credit application.

Credit Agencies. The FTC is given the authority to enforce the Act against credit reporting agencies. The FTC may seek civil penalties in court, but only for violation of an order or injunction. The Bureau will enforce the rules regarding furnishing information to credit agencies, with respect to any person subject to Title X, and has the authority to prescribe regulations on credit reporting, which will apply to any covered person.

Miscellaneous Provisions in Title X.

- The TILA exemption for large non-mortgage, non-student loans and leases is increased to $50,000 (from $25,000), and is indexed to inflation going forward.
- Title X provides whistleblower protections, to be enforced by the Secretary of Labor, and prohibits the application of pre-dispute arbitration agreements to whistleblower disputes under it.
- The Act explicitly permits (but does not require) a creditor to consider seasonality or irregularity of income in underwriting residential mortgage loans.
- The statute of limitations for prosecutions for securities fraud is set at 6 years. False claims act civil suits based on retaliation may be brought within 3 years of the retaliation.

Although the Bureau replaces the FTC with respect to rulemaking under the FDCPA, any violation of the FDCPA is deemed an unfair practice under the FTCA and is subject to FTC enforcement.

If you have any questions, please call Weiner Brodsky Sidman Kider PC, at 202-628-2000.

Bruce E. Alexander	**James A. Brodsky**	**Scott D. Burke**
Brian J. Evans	**Troy W. Garris**	**David Goodfriend**
Don J. Halpern	**Michelle H. Holmes**	**Fedor Kamensky**
Mitchel H. Kider	**Michael Y. Kieval**	**Tom Lawrence III**
Aldys A. London	**Jason W. McElroy**	**James M. Milano**
Rose-Michele Nardi	**John A. O'Shaughnessy**	**Joel A. Schiffman**
Mark H. Sidman	**Jennifer E. Silversmith**	**Joseph E. Silvia**
David M. Souders	**Leslie A. Sowers**	**Vanessa L. Tran**
Sandra B. Vipond	**Melissa J. Wachtel**	**Harvey E. Weiner**

Jack V. Konyk, Executive Director, Government Affairs
Andrew E. Zirneklis, Compliance Specialist
Jacqueline L. Melone, Government Relations Specialist
Sue E. Gamboa, Licensing Specialist
Nancy L. Pickover, Licensing Specialist
Hazel Berkoh, Litigation Paralegal
Theodore B. Babcock, Paralegal
Ashley P. Grolig, Paralegal

Weiner Brodsky Sidman Kider PC
1300 19th Street NW 5th Floor
Washington DC 20036

www.wbsk.com