R E S P A ★ N E W S
MONTHLY

Analyzing complex federal law for real estate professionals

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IN THIS ISSUE

QUOTE OF THE MONTH

"[N]o court of appeals has held that each monthly mortgage insurance payment constitutes a new and independent violation of RESPA or that RESPA's statutory limitations period is otherwise tied to the date of the most recent monthly mortgage insurance payments."

- District Court for the Western District of Pennsylvania in *Menichino v. Citibank, N.A.*

RESPA TIP

"The GSEs will require the UCD XML file and a PDF copy of the CD for all loans they acquire, regardless of whether the TRID regulation requires the CD." - Uniform Closing Dataset FAQs

Strengthen your CMS' policies and procedures

At October Research, LLC's 2017 National Settlement Services Summit, **Brian Webster**, senior vice president/strategic planning partner at Wells Fargo Home Lending; **Brian Hughes**, chief operating officer at Title Source; and **Richard Horn**, founding attorney of Richard Horn Legal PLLC, discussed how to make your company's written policies and procedures an effective component of your company's compliance management system (CMS).

"The importance of policies and procedures cannot be understated," Horn said. "They are the first thing that the Consumer Financial Protection Bureau (CFPB) will look at if they ever show up at your door."

Horn said he has seen many institutions – especially smaller firms – that either don't have any written policies and procedures at all, or that purchase general policies and procedures without tailoring them to their institutions. "That's something any regulator – not just the CFPB – will frown upon," he cautioned.

As your company sets out to develop its policies and procedures, remember that policies represent your objective (why you are doing something) and the procedures represent how you plan to achieve that objective. The CFPB expects written policies and procedures to be an important part of your company's CMS, within your CMS's compliance program. Another component of your CMS which necessitates written policies and procedures is board of director oversight, because there should be policies about the board's oversight responsibilities and functions.

The Dodd-Frank Act gives the CFPB supervisory and enforcement authority over service providers under Sections 1024(e) and 1025(d). In CFPB Supervisory Bulletin 2016-02, the bureau stated that it expects supervised entities to request and review the service provider's policies and procedures.

That is why is it also important to make sure that your service providers understand your policies and procedures and that your service providers' own policies and procedures are strong.

"Times are changing, and we will see direct supervision of service providers," Hughes said, adding that your company should conduct regular audits of your service providers' own policies and procedures. For title companies, a service-provider connection is established once the lender provides you with closing instructions.

The policies and procedures don't have to be an extensive software program. They also don't need to be as complicated as the entire CMS.

Hughes noted that not every company has the same resources as Wells Fargo and Title Source, but added that a great place to start when forming

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ABOUT US

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EDITOR'S NOTE

RESPA NEWS

We have a lot to watch out for

Dear Readers,

Last month, I attended my third National Settlement Services Summit (NS3) as an editor of October Research, LLC. This year's summit felt extra intriguing given the stronger possibility of changes at the Consumer Financial Protection Bureau.

Change is on the horizon – whether it's through the D.C. Circuit Court of Appeals finding the CFPB to be unconstitutionally structured (which this editor thinks is an issue that will likely go to the Supreme Court), or through Congress making changes with the Financial Choice Act (with healthcare and Russia shadowing the political climate, Dodd-Frank change might sneak through, but is a long-shot).

Nevertheless, if those two scenarios don't play out, there's still the pending end of CFPB Director **Richard Cordray**'s term in July 2018. I just can't imagine President **Donald Trump** re-appointing Cordray for another term, and I think it is even less likely that the Senate would re-confirm him.

So what might we expect in the realm of RESPA in the next couple months?

If I had to guess, I would say this: More enforcement actions by the CFPB entering the queue and more involvement and/or collaboration from state attorneys general and regulators in states favorable to the CFPB. I don't envision very many new major rules being proposed – perhaps the remaining mandatory Small Business Data Collections rule will be simply to troll Rep. **Jeb Hensarling** (R-Texas).

And those that do get finalized face the chance of "repeal and replace" (just look at the Affordable Care Act, and all the other major changes that have been made).

Why do I believe that the states will start picking up the RESPA-pace? Because several states have already done so – Colorado issued their marketing service agreement ban, New York recently issued an anti-inducement regulation and Minnesota has entered into major consent orders with area title companies.

Keep your eyes open, if you see something happening with your state regulators, *RESPA News* would like to hear from you.

Take care,

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OCTOBER RESEARCH LLC KNOWLEDGE... THE COMPETITIVE ADVANTAGE

Cover Feature

policies and procedures is ALTA Best Practices, and then tailoring those to fit your company's specific needs.

"It gives you a great framework to understand policies and procedures, an easier road map for you to understand what you need to accomplish," Hughes said.

Webster added that you should not approach your policies and procedures as a "system" but rather as a process.

"When regulators are talking about a compliance management system, it doesn't necessarily have to be a 'system.' It doesn't have to be a piece of software," Webster added. "It's more of a process. It's what procedural controls you have in place in managing your compliance. Policies and procedures are a start, but you have to be able to train to them, to communicate them. You have to have a feedback loop that says, 'If I find a problem somewhere, what do I then do?' "

Perhaps one of the most important aspects of maintaining written policies and procedures is to be sure to continuously update them. Regulators are going to look for a dynamic, continuous feedback loop, Webster emphasized. That means your policies and procedures cannot become static. They have to stay up-to-date with where you are in the business and the market.

What should your feedback loop look like? First, you must establish your compliance responsibilities, and then you must communicate those responsibilities to every member of your organization and to your third-party service providers and affiliates. Next, after ensuring that the compliance responsibilities are embedded into your business practice, you must review and test your procedures and controls within your operations.

Lastly, you must perform updates to all of your tools, systems and materials as needed. This, in turn, leads to re-establishing your compliance responsibilities and repeating the cycle.

Horn stated that the CFPB wants your policies and procedures to be consistent with board-approved policies and address compliance with applicable federal consumer financial laws in a manner designed to prevent violations and to detect and prevent associated risks of harm to consumers. They also should cover all of your products and services' lifecycles and be maintained and modified to remain current and to serve as a reference for employees in their day-to-day activities.

"This potentially extends to your compliance software," Horn added. "The CFPB Exam Manual mentions that your policies and procedures could include automated tools that you have. So if you have automated procedures for your staff, make sure that you review those to make sure that they're current and address applicable law."

This, Horn, emphasized, is critical to showing the CFPB that you have an active CMS. Make sure you have a qualified compliance officer or external counsel or consultant review these tools for consistency with policies and procedures.

When the CFPB reviews your policies and procedures, be mindful that it will review for potential discrimination, such as whether there are particular incentives created by employee compensation structures; discretion over product selection, underwriting or pricing; or distinctions related to geography or other prohibited bases (such as age or marital status). The CFPB also will review the policies and procedures for record retention and destruction timeframes to ensure compliance with legal requirements.

Webster stated that it is a best practice to review consent orders or enforcement actions from the CFPB, even if the consent order covers a product that your company does not offer. This is because the CFPB's consent orders generally cover multiple areas of compliance, such as marketing.

Sometimes the consent orders themselves instruct the parties involved to create plans that essentially revisit their policies and procedures. Two recent examples are the consent orders entered into with NewDay Financial LLC and Prospect Mortgage. Both consent orders required the development of a compliance plan that was "designed to ensure that respondent's relevant conduct, e.g., marketing of mortgage products, complies with all applicable federal consumer financial laws."

The CPFB has stated that industry should review their consent orders and enforcement actions as a guide to understanding where the bureau stands on certain practices. These recent consent orders, although focused on the lender, are great sources of information for any organization as it pertains to best practices when developing marketing campaigns.

All three panelists agreed that every organization needs to start somewhere. Regulators will look for your organization to be able to show good-faith efforts to comply with all applicable federal and state consumer financial laws. Developing and implementing solid policies and procedures that define a compliance framework is the best place to start.

Top Stories

CD implementation in UCD gets transition period

The Uniform Mortgage Data Program (UMDP), Fannie Mae and Freddie Mac (the GSEs) have issued a Uniform Closing Dataset (UCD) Implementation Update, announcing a six-month transition period for embedding the borrower's Closing Disclosure (PDF) within the UCD XML file.

The decision was made to address recent concerns about the previous timeline.

"As previously communicated, the GSEs will require the borrower data and Closing Disclosure within the UCD XML file (i.e., either the Model form, or if using a Split Disclosure, the Borrower-only form)," the announcement states. "However, we recognize there are industry challenges in meeting the requirement to embed the Closing Disclosure PDF in the UCD XML file. As a result of customer feedback, the GSEs are providing a six-month transition period before enforcing this requirement."

The requirement to embed the Closing Disclosure PDF in the UCD XML file will be fully enforced no earlier than April 2018.

In November 2016 the GSEs announced the integration of the seller's Closing Disclosure would not be required until at least the third quarter of 2018.

Each GSE's UCD collection system provides feedback messaging regarding whether an embedded Closing Disclosure PDF is provided; therefore, lenders are encouraged to submit the UCD XML file with the embedded PDF if you have the capability to do so.

Each GSE maintains a list of verified technology solution providers on their respective UCD web pages that can assist with the development of the UCD XML file, which includes embedding of the Closing Disclosure PDF.

Fannie Mae and Freddie Mac have implemented independent collection solutions to support UCD file deliveries. However, the GSEs have aligned on a minimum set of UCD data points that will be required in order to ensure a successful submission as of Sept. 25, 2017.

These data points include the following:
- Document Type
- Document Type Other Description
- Loan Purpose Type
- MIME Type Identifier
- Object Encoding Type

The joint GSE container includes the following:
- DOCUMENT (at least one Borrower document)

In addition to these joint requirements above, each GSE has specific data points that are required for delivery via their unique collection solutions.

Fannie Mae's specific data points include the following:
- Postal Code in SUBJECT_PROPERTY/ADDRESS
- Automated Underwriting Case Identifier (enter DU Casefile ID if underwritten by Desktop Underwriter (DU), otherwise enter the UCD Casefile ID)

Freddie Mac's specific data points include the following:
- Loan Identifier (Lender Loan ID)
- Loan Identifier Type
- Container Deal – Cardinality of 1
- Container Deal Set – Cardinality of 1
- Container Loan – Cardinality of 1
- Date Format Requirement: YYYY-MM-DD

Enterprises issue updated UCD FAQ

Shortly after announcing a six-month transition period for Closing Disclosure (CD) implementation in the Uniform Closing Dataset (UCD), Fannie Mae released an updated FAQ regarding UCD compliance. The UCD is a common industry dataset that allows information on the Consumer Financial Protection Bureau's CD to be communicated electronically.

The Federal Housing Finance Agency (FHFA) directed Fannie Mae and Freddie Mac (the GSEs) to develop the UCD as part of the Uniform Mortgage Data Program (UMDP), an ongoing initiative to enhance loan quality and consistency through uniform loan data standards for the single-family loans the GSEs purchase.

According to the FAQ, there have been updates made to the following questions:
- Will the GSEs require the UCD and CD for all loans they acquire? Even if TRID does not require the CD for that transaction (e.g., for investor properties)?

Top Stories

• If subsequent to the delivery of the loan, the lender discovers an issue that requires a new CD to be issued to the borrower (i.e., re-disclosure), will the GSEs require redelivery of the UCD and CD?
• On non-seller (e.g., refinance) transactions, do the GSEs require the use of the "Alternate" form, Form H-25(E), published by the CFPB?

Updated answers

The FAQ answered the first question in the affirmative. "The GSEs will require the UCD XML file and a PDF copy of the CD for all loans they acquire, regardless of whether the TRID regulation requires the CD," the FAQ states. "Therefore, lenders must submit the UCD and PDF of the CD for all loans, including non-owner occupied property loans (e.g., investor loans) that are sold to the GSEs.

"Freddie Mac and Fannie Mae recognize that some in the industry are facing challenges in meeting the requirement to embed the CD PDF in the UCD XML file," the FAQ continues. "Because of this, the GSEs will provide a six-month transition period before enforcing that requirement. The requirement to embed the CD PDF in the UCD XML file will be fully enforced no earlier than April 2018."

As for whether the GSEs will require redelivery of the UCD and Closing Disclosure if, subsequent to the delivery of the loan, the lender discovers an issue that requires a new CD to be issued to the borrower, the FAQ provides the following:

"The GSEs have unique requirements regarding redelivery of the UCD post-acquisition of the loan. While neither GSE will require redelivery in 2018 for any changes made to the Closing Disclosure or UCD, starting in 2019, the post-acquisition redelivery policies for each GSE are summarized below," the FAQ states.

The FAQ recommends that you refer to each GSE's respective Selling Guide for further details.

> "If the [TRID] regulation requires the CD to be re-disclosed, then the GSEs want that updated copy. If the regulation does not require re-disclosure, then the original CD is appropriate."
>
> Uniform Closing Dataset FAQs

• Fannie Mae – lenders must redeliver the UCD file within 90 days after the loan was delivered and purchased if there any changes to the UCD file.
• Freddie Mac – lenders must redeliver the UCD file only in those instances where the change to the UCD file impacts the purchase eligibility of the loan.

Lastly, the FAQ provided an update on whether the GSEs require the use of the "Alternate" form (Form H-25(E), which was published by the CFPB in Federal Register, Vol. 78, No. 251 on Page 80187) on non-seller transactions, such as refinances.

"Both GSEs require use of form H-25(E) for all refinance transactions on the loans they acquire (refer to Federal Register website for additional details on this regulation)," the FAQs state. "If a non -seller transaction is submitted on the 'Model' form, the GSE collection systems will issue warning messages at the outset of the mandate and will not prevent a submission from being considered 'successful.' However, the warnings may be changed to a hard stop at a later date. More information will be provided by the GSE regarding the timeframe for these hard stops."

New answers

The FAQ also provides new questions and answers regarding CDs for construction loans. These questions include:
• Which CD is required for a construction-to-permanent loan, the original or a new CD?
• How are construction loans classified?
• For construction loans where the subject property address does not have a street address, is the legal description acceptable?

For the first question, the FAQ state, "If the [TRID] regulation requires the CD to be re-disclosed, then the GSEs want that updated copy. If the regulation does not require re-disclosure, then the original CD is appropriate."

Also, construction loans are classified based on the following: "For properties where the borrower does not own the land prior to closing of interim construction financing, the loan is classified as a purchase transaction. If the borrower already owns the land, the loan is classified as a non-seller (refinance) transaction."

Lastly, the legal description is acceptable where the subject property does not have a street address. However, the subject property ZIP code remains a requirement.

Case Law

Court strikes down CFPB's 'continuing violations' theory

The U.S. District Court for the Western District of Pennsylvania has rejected the Consumer Financial Protection Bureau's (CFPB) "continuing violations" theory in *Menichino v. CitiBank*, a case where the plaintiffs had moved to amend their RESPA captive reinsurance and equitable tolling claims to adopt the CFPB's PHH Corp. stance that "each monthly payment constitute[d] a new, independent violation of RESPA."

The motion to amend was an attempt to keep their case alive with respect to "mortgage insurance payments made within one year of the date of the filing of their original complaint."

The court, however, held that RESPA's statute-of-limitations period runs from the date of the occurrence of the claimed violation, the date of the loan closing. In PHH Corp. the CFPB developed a new interpretation of RESPA that violations of the anti-kickback provisions occur every time a monthly payment for mortgage insurance is made and the premium is ceded to a captive reinsurer.

The court relied on its previous decision in Cunningham, in which it reaffirmed that RESPA's statute of limitations "runs from the date of the occurrence of the violation…which begins at the closing of the loan." In *Menichino*, the court established the date of the violation as the closing, and then considered whether the statute of limitations was met or could be tolled.

The court noted that U.S. District Court for the Eastern District of Pennsylvania had reached a different conclusion in two other cases – *Blake v. JPMorgan Chase Bank, N.A. (E.D. Pa. Apr. 26, 2017)* and *White v. PNC Fin. Servs. Grp., Inc. (E.D. Pa. Jan. 10, 2017).*

In those cases, the judge concluded that "it defies the plain language of [RESPA Section 8] to not consider each prohibited kickback or referral a separate violation capable of resetting the limitations period" because to find otherwise would mean that defendants "would be free to violate RESPA by accepting kickback after kickback for years on end" while plaintiffs only have one year to bring suit.

In *Menichino*, however, the court decided to follow the decision made in *Cunningham* and the overall "weight of federal authority."

"[N]o court of appeals has held that each monthly mortgage insurance payment constitutes a new and independent violation of RESPA or that RESPA's statutory limitations period is otherwise tied to the date of the most recent monthly mortgage insurance payments(s)," the court stated, citing 29 cases from various jurisdictions in unanimous support of its interpretation.

The case is *Menichino v. Citibank, N.A. (W.D. Pa. June 6, 2017).*

SCOTUS: Disgorgement must follow 5-year SOL

The U.S. Supreme Court held that any claim for disgorgement by the Securities and Exchange Commission (SEC) must be commenced within five years of the date the claim accrued. The case is *Kokesh v. SEC*.

The Supreme Court, in a unanimous 9-0 decision written by Justice **Sonia Sotomayor**, came to this conclusion by determining that disgorgement operated as a "penalty" under Section 2462.

"When an individual is made to pay a non-compensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty. SEC disgorgement thus bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate. The 5-year statute of limitations in §2462 therefore applies when the SEC seeks disgorgement," the court stated.

In 2013, the Supreme Court had held that the 5-year statute of limitations in Section 2462 applied when the SEC sought statutory monetary penalties in *Gabelli v. SEC, 568 U.S. 442 (2013).*

Here, the court was determining whether Section 2462 – which applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" – also applied when the SEC sought disgorgement.

The Tenth Circuit Court of Appeals had agreed with the district court that disgorgement was not a penalty, thus concluding that the statute of limitations did not apply to the SEC's disgorgement claims.

The Supreme Court disagreed with the lower courts, stating that the statute of limitations applied if the SEC's disgorgement qualified as either a fine, penalty or forfeiture. The Supreme Court found that the disgorgement here constituted as a penalty.

"A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws.' *Huntington v. Attrill, 146 U. S. 657, 667 (1892)*. This definition gives rise to two principles," the court stated. "First, whether a sanction represents a penalty turns in part on 'whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual.' … Second, a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner' — as opposed to compensating a victim for his loss."

The court found that applying these principles readily demonstrated that SEC disgorgement constituted a penalty within the meaning of Section 2462.

"First, SEC disgorgement is imposed by the courts as a consequence for violating what we described in Meeker as public laws. The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual — this is why, for example, a securities enforcement action may proceed even if victims do not support or are not parties to the prosecution," the court stated. "As the government concedes, '[w]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties.'

"Second, SEC disgorgement is imposed for punitive purposes. … [C]ourts have consistently held that '[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.'

"Finally, in many cases, SEC disgorgement is not compensatory. … When an individual is made to pay a non-compensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty."

DOJ reverses stance on class action waiver ban

Reversing course, the Department of Justice (DOJ) has filed an amicus brief supporting the use of class action waivers in employment agreements. The issue is before the *U.S. Supreme Court in Epic Systems Corp. v. Lewis*; *Ernst & Young LLP, et al. v. Morris, et al.* and *National Labor Relations Board v. Murphy Oil USA, Inc., et al*.

Under the Obama administration, the DOJ supported the National Labor Relations Board's (NLRB) argument that federal labor statutes prohibit employers from including such waivers in their employees' contracts.

However, in the amicus brief filed June 16, the DOJ stated that it "reconsidered the issue and has reached the opposite conclusion."

"Although the board's interpretation of ambiguous NLRA language is ordinarily entitled to judicial deference, courts do not defer to the board's conclusion as to the interplay between the NLRA and other federal statutes," the brief states. "We do not believe that the board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in Murphy Oil, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the [Federal Arbitration Act]."

A key issue before the Supreme Court is whether it should apply the test set forth in its decision in *CompuCredit Corp. v. Greenwood*.

In that case it was held that if a federal statute does not expressly prohibit arbitration, then the FAA dictates that claims can be settled through arbitration.

"*CompuCredit* demonstrates the formidable burden a party bears when seeking to show that the FAA's mandate has been 'overridden by a contrary congressional command,'" the DOJ's brief states, adding, "One feature of *CompuCredit* and other decisions is especially notable for present purposes: When examining text and legislative history, the court has looked for evidence that Congress intended to address arbitration agreements in particular. A statute's general reference to litigation rights, even when combined with a provision forbidding the waiver of statutory protections, is insufficient to overcome the FAA's presumption of enforceability."

According to **Alan Kaplinsky** and **Mark Levin**, partners at Ballard Spahr LLP, in a blog post on the firm's Consumer Finance Monitor: "The DOJ's filing coincides with the CFPB's efforts to prohibit consumer financial services companies from including class action waivers in their customer agreements. In May 2016, the CFPB issued a proposed rule finding a ban on such waivers to be in the public interest and for the protection of consumers. However, the rule has not yet been made final. While the CFPB has publically attributed this to the time needed to review the thousands of comments it received on the proposed rule, many observers speculate that the change in administrations may also be delaying issuance of a final rule."

The attorneys added that the CFPB may attempt to finalize the arbitration rule by the end of this summer; however, even if this were the case, the rule would not become effective for 210 days.

"During that grandfather period, one or more events could stop any final arbitration rule from taking effect," the attorneys added.

"For example, the Financial Choice Act could become law; Congress could disapprove the rule under the Congressional Review Act; and/or a ruling by the D.C. Circuit in *PHH v. CFPB* that the agency's structure is unconstitutional could derail the rule. "The DOJ's amicus brief is yet another event that should give the CFPB pause in considering whether and when to finalize the proposed rule as it demonstrates that the current administration strongly supports the use of class action waivers in arbitration agreements," the attorneys concluded.

Will Lucia open the door to CFPB reform?

In *PHH Corp. v. CFPB*, the mortgage company has argued that it was a violation of due process when CFPB Director **Richard Cordray** retroactively applied a new interpretation of RESPA Section 8 in his first order on an administrative appeal.

Although PHH Corp. and the industry as a whole are more concerned with Cordray's order, the use of improperly appointed administrative law judges (ALJs) is another topic that may fuel bureau reform.

The appointment of ALJs was at the center of *Lucia v. SEC*, another case argued at the D.C. Circuit Court of Appeals on May 24.

The three-judge panel in *Lucia* had determined that the SEC's ALJ was a properly appointed "employee."

When the D.C. Circuit granted the CFPB's petition for an *en banc* rehearing in *PHH Corp.*, it asked the parties to address how the court should proceed if it finds that the ALJ in Lucia was an "inferior officer" rather than an "employee" and, therefore, improperly appointed under the Constitution's Appointments Clause.

Within its opening brief, PHH Corp. argued that if the full D.C. Circuit Court found that the SEC's ALJ was improperly appointed in *Lucia*, then it should find that the ALJ in *PHH Corp.* also was improperly appointed.

The CFPB, in its response brief, argued that the D.C. Circuit instead should request supplemental briefing.

During the oral arguments, the circuit court judges questioned **Mark Perry**, a partner at Gibson Dunn who was representing **Raymond J. Lucia**, about the possible consequences for other agencies if the appointment of the SEC's ALJs was unconstitutional.

Perry tried to downplay the possible consequences by asserting that there is a big difference between ALJs who determine whether the government will give something to an individual – such as the Social Security Administration's ALJs determining whether an individual should receive Social Security – and ALJs who determine whether the government will take something away from an individual.

Lucia was an investment adviser whom the SEC alleged misled clients regarding his firm's "Buckets of Money" investment strategy.

The SEC permanently banned Lucia from the industry.

The three-judge panel cited an earlier D.C. Circuit ruling in *Landry v. FDIC*, which held that ALJs aren't "inferior officers" because they don't reach "final" decisions.

Department of Justice attorney **Mark Stern**, arguing for the SEC, asserted that the SEC ALJs were employees who don't have final decision-making authority within the meaning of Landry because their decisions were not final until the SEC commissioners signed off on them.

Shortly after the three-judge panel issued its ruling in *Lucia*, the Tenth Circuit Court of Appeals created a circuit split with its decision in *Bandimere v. SEC*, ruling that the appointment of the SEC's ALJs violated the Constitution.

This makes the issue a strong candidate for U.S. Supreme Court review.

RESPRO President and Executive Director **Ken Trepeta** told *RESPA News* that in *PHH Corp.*, the issue was not so much the use of an ALJ as it was what occurred after the ALJ issued his decision: Both the CFPB and PHH Corp. appealed that decision and the appeal went to the CFPB director.

"You're in the CFPB's system," Trepeta said. "You're not in an independent judicial system when your appeal of the ALJ decision goes to the CFPB director. It's like you are

Court criticizes CFPB's handling of Sprint redress

Judge **William H. Pauley, III** from the U.S. District Court for the Southern District of New York had some strong words for the Consumer Financial Protection Bureau's handling of the settlement funds in *CFPB v. Sprint Corp.* The issue arose after the attorneys general of Connecticut, Vermont, Indiana and Kansas moved to intervene and modify the terms of the stipulated final judgement and order entered June 30, 2015.

The court ultimately granted the motion to intervene but denied the motion to modify. The court stated that the state attorneys general's motion raised an intriguing question: Can funds left over from a settlement secured by an agency of the federal government in a federal action — and originally destined for the U.S. Treasury — go to the states?

According to the order, Sprint was prepared to transmit the funds to the U.S. Treasury pursuant to a residual clause in the redress plan. "But in December 2016, the transfer was put on hold after the CFPB informed Sprint that 'the states had a potential proposal for the use [of] the remaining funds.' Contrary to an express provision of the redress plan that required Sprint to transfer the remaining funds to the CFPB by September 2016, the unexpended funds remain in Sprint's hands to this day — their transfer stalled by the states' attempt to re-write the residual clause."

The court, "confounded by the CFPB's conspicuous silence on this issue," directed the CFPB to respond to the state attorneys general's motion in April 2017. "In May 2017, the CFPB filed a gossamer two-page memorandum, modifying its previous position of indifference to one of steadfast opposition to the state AGs' proposal," the court continued.

The court treated the state attorneys general's request for intervention as a separate issue from its application for modification. The state attorneys general argued that they were not informed of "the unexpectedly large amount of remaining funds until late November 2016," when "the CFPB notified the state AGs and Sprint." Then in December 2016, the CFPB asked Sprint to "hold off" on wiring the funds to the U.S. Treasury in view of the states' "potential proposal."

The court granted the motion to intervene as timely, after finding that the state attorneys general could not have received notice of an actual interest in the remaining settlement funds any sooner than the end of September 2016.

"That assessment appears generally consistent with Sprint's narrative, which recounts that Sprint asked the CFPB in the fall of 2016 what it should do with the remaining funds. Why Sprint would ask such a question, and why the CFPB apparently advised Sprint to hold onto the funds, is perplexing because the redress plan was crystal clear: Any remaining funds were to be wire transferred to the CFPB," the court states.

The court, however, did not grant the motion to modify, noting that the CFPB also concluded that the final judgment in Sprint should not be modified. "Of course, it bears noting that the CFPB's involvement at this juncture in the litigation has been underwhelming," the court added. "When the state AGs concocted their proposal to fund NAGTRI, the CFPB coyly took no position. This court wonders whether the CFPB did that to distance itself from a proposal at variance with the final judgment.

"So this motion, filed by non-party intervenors, comes before this court only because the CFPB failed to take a position at the outset and defend the final judgment that it negotiated and drafted," the court continued. "Had the CFPB — the sole plaintiff in this action — simply concluded then, as it does now, that there was no Rule 60 basis for modification, the monies would have been deposited with the U.S. Treasury more than six months ago."

The court also noted that the CFPB had appeared uninterested in the fate of the unexpended funds, until the court issued its April order. "That is most evident in the fact that the unexpended funds still sit in Sprint's account even though the redress plan directed Sprint to wire 'any balance remaining after nine months from the claims deadline' to the CFPB," the court added. "It leads this court to ask who will guard the guardians."

> "Of course, it bears noting that the CFPB's involvement at this juncture in the litigation has been underwhelming."
>
> Judge William H. Pauley III,
> U.S. District Court, Southern District of New York

Case Law

Lower court mandated to review FHA damages

The U.S. Supreme Court held that the city of Miami is an "aggrieved person" authorized to bring a lawsuit under the Fair Housing Act (FHA) for allegations that Bank of America and Wells Fargo engaged in discriminatory practices by issuing riskier and more costly mortgages to minority customers than they had offered to white borrowers.

The city had alleged that during the financial crisis the riskier loans led to more foreclosures, lower property values, a drop in property tax revenues and an increase in demand for city services such as police and fire protection.

The banks asked the court to dismiss the lawsuit, arguing that the city did not fall within the group of individuals or entities – known as the "zone of interests" – that Congress intended to protect when it passed the FHA.

Although the city received a partial victory, the Supreme Court remanded the case to the lower court to decide whether the harm Miami suffered is sufficiently related to a violation of the FHA that the banks should have to pay for them. The District Court dismissed the complaints on the grounds that the alleged harm fell outside the zone of interests and that the complaints failed to show a sufficient causal connection between the city's injuries and the banks' discriminatory conduct.

The Eleventh Circuit Court of Appeals reversed, ruling that Miami could make that showing because of the effects of the banks' allegedly discriminatory lending practices were foreseeable. The Supreme Court held, however, that that bar was too low.

"The Eleventh Circuit erred in concluding that the complaints met the FHA's proximate-cause requirement based solely on the finding that the city's alleged financial injuries were foreseeable results of the banks' misconduct," the Supreme Court held. "A claim for damages under the FHA is akin to a 'tort action,' and is thus subject to the common-law requirement that loss is attributable 'to the proximate cause, and not to any remote cause.'

"The proximate-cause analysis asks 'whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.' With respect to the FHA, foreseeability alone does not ensure the required close connection," the Supreme Court continued. "Nothing in the statute suggests that Congress intended to provide a remedy for any foreseeable result of an FHA violation, which may 'cause ripples of harm to flow' far beyond the defendant's misconduct, and doing so would risk 'massive and complex damages litigation.' Rather, proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.' "

Upon remand, the lower courts must define the contours of proximate cause under the FHA and decide how that standard applies to Miami's claims for lost property-tax revenue and increased municipal expenses.

The 5-3 majority included Chief Justice **John Roberts** and Justices **Ruth Bader Ginsburg**, **Sonia Sotomayor**, **Elena Kagan** and **Stephen Breyer**.

Justice **Clarence Thomas** filed an opinion concurring in part and dissenting in part, in which Justices **Anthony Kennedy** and **Samuel Alito** joined. Justice **Neil Gorsuch** did not participate in this case.

Are settlement advances extensions of credit?

In the U.S. District Court for the Southern District of New York, the Consumer Financial Protection Bureau (CFPB) has maintained its argument that its structure is constitutional. The CFPB currently is facing attacks against its constitutionality in its lawsuit against RD Legal Funding LLC.

In that complaint, filed Feb. 7, 2017, the CFPB and the New York Attorney General alleged that the New Jersey-based settlement advance firm, two related entities and **Roni Dersovitz**, the companies' founder and owner, had scammed first responders in the Sept. 11, 2001 attacks and NFL retirees with high-cost loans.

RD Legal filed a motion to dismiss the case in May, asserting that the complaint mischaracterized its sales transactions as extensions of credit.

The firm argued that instead of taking on debt, consumers sold their rights to a future receivable, which are then due to RD Legal once the funds are distributed.

RD Legal threw in the constitutionality challenge for good measure.

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The CFPB's constitutionality has been attacked both in courts and congressional hearings, with the most momentum gaining in *PHH Corp. v. CFPB*.

As for the argument that RD Legal was not extending credit, the CFPB and New York Attorney General **Eric Schneiderman** responded, "Because the assignment provisions in the RD contracts were invalid and unenforceable, the contracts are not sales or assignments, and indeed RD knows or recklessly disregards that the purported assignments are invalid. RD thus functionally offers or provides a credit transaction in which consumers incur a debt and defer the right to repay."

RESPA, detrimental reliance weighed in case

The U.S. District Court for the Northern District of Texas, Dallas Division, has granted defendants U.S. Bank and Select Portfolio Servicing, Inc.'s motion to dismiss plaintiff **Todd McEvoy**'s claims for declaratory judgment and injunctive relief to prevent the foreclosure on his home.

However, McEvoy was granted leave to submit an amended complaint.

The district court, under Judge **Jane J. Boyle**, dismissed McEvoy's claims under RESPA after finding that he failed to allege actual damages or a pattern of noncompliance for statutory damages.

The case is *McEvoy v. Select Portfolio Servicing, Inc., et al (Case No. 3:16-CV-2296).*

The facts

After purchasing his property, McEvoy executed a promissory note in favor of Concord Mortgage Co. and a purchase money deed of trust (PMDT) that encumbered the property in favor of Concord.

The PMDT later was assigned to U.S. Bank. Select Portfolio was the loan servicer.

To avoid foreclosure, McEvoy listed the house for sale with Texas Premier Realtors, which is owned by **Shirley Simmons**.

According to McEvoy, Simmons entered into negotiations with U.S. Bank and Select Portfolio to short sell the property.

In January 2015, the defendants allegedly agreed to a short sale in January 2015, but conditioned their agreement on Simmons satisfying two liens.

McEvoy asserted that Simmons satisfied the two liens, and in August 2015, the defendants released the liens.

However, when Simmons tried to move forward on the short sale, "the bank" allegedly cancelled the agreement to the short sale without any explanation and initiated foreclosure proceedings instead.

On July 11, 2016, U.S. Bank and Select Portfolio notified McEvoy that the property would be sold at a successor trustee's sale Aug. 2, 2016.

McEvoy subsequently filed his lawsuit, alleging violations of the Texas Property Code and asserting claims for detrimental reliance, declaratory judgment, injunctive relief and damages.

The court's decision

For his detrimental reliance claim, McEvoy asserted he and the defendants entered into an agreement for a short sale of the property that was conditioned on the removal of two liens. McEvoy added that he relied on this agreement and arranged for the liens' removal, and that he was harmed when the defendants cancelled the short sale.

The defendants argued that McEvoy failed to state a claim for relief under his detrimental reliance theory because detrimental reliance is not recognized as a separate tort claim under Texas law.

The defendants added that detrimental reliance is synonymous with a contractual promissory estoppel claim, and that McEvoy failed to allege a promissory estoppel claim because he failed to allege the existence of a written contract.

"Here, the supposed agreement between [the] parties is not entirely clear from the complaint because plaintiff gives few details," the court wrote. "Regardless of how the court construes the agreement, though, it appears that it is subject to the statute of frauds and thus must have been in writing. The agreement could conceivably be construed as one for a short sale of the property, and any promise relating to the sale of real estate must be in writing. But it could also conceivably be construed as a loan modification, which also must be in writing."

Promissory estoppel is a potential

way to overcome the statute of frauds requirement in Texas, the court noted. The court, however, found that McEvoy failed to allege a promissory estoppel claim.

"Specifically, plaintiff failed to allege facts from which the court could infer plaintiff detrimentally relied on any promise made by defendants," the court stated.

"Plaintiff's conclusory statement that Simmons arranging for the removal of liens from the property was to his detriment is insufficient. It is unclear how Simmons' actions materially changed plaintiff's position because it is not clear how this would have harmed him at all. Without more facts, the court cannot infer that plaintiff can recover under a promissory estoppel claim."

McEvoy alleged that U.S. Bank and Select Portfolio violated the Texas Property Code because he never received notice that his loan was transferred to U.S. Bank or that Select Portfolio would be servicing the loan on U.S. Bank's behalf.

In return, the defendants argued that there is no obligation under Texas Property Code § 51.0025 for a mortgage servicer to provide notice of service-transfer or transfer of assignment.

Even if there was an obligation, defendants added, McEvoy was judicially estopped from taking the position that he was unaware of Select Portfolio's authority because he argued elsewhere in his original petition that he detrimentally relied on an agreement with defendants, thereby recognizing defendants' authority to conduct a sale.

The defendants also challenged McEvoy's original petition as if he had alleged a claim under RESPA, arguing that McEvoy failed to state a claim under RESPA because his allegations failed to show that he was damaged by any lack of notice.

Under RESPA, "[e]ach servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale or transfer of the servicing of the loan to any other person," and "[e]ach transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold or transferred shall notify the borrower of any such assignment, sale or transfer."

Plaintiffs must allege actual damages resulting from the alleged RESPA violation; however, a court may award statutory damages for a violation of RESPA "in the case of a pattern or practice of noncompliance."

The court found that McEvoy failed to allege actual damages or a pattern of noncompliance.

McEvoy sought a declaration that the defendants did not have the authority to conduct a foreclosure sale.

In response, the defendants argued that McEvoy failed to allege an underlying claim to support his request for declaratory judgment or injunctive relief. Because a declaratory judgment and injunctive relief are procedural devices and do not create substantive rights, the defendants argued, McEvoy's requests could not stand alone.

The court found that McEvoy's request for injunctive relief failed because he failed to demonstrate a substantial likelihood of success on the merits.

"The declaration plaintiff seeks — that U.S. Bank lacks authority to conduct a foreclosure sale — appears derived from its Texas Property Code claim," the court reasoned.

"Because the court has already found that plaintiff failed to state a claim under the Texas Property Code or RESPA, there is no longer a 'substantial controversy ... of sufficient immediacy' to warrant a declaratory judgment based on the same arguments. So regardless of what plaintiff bases his request on, there does not appear to be a 'substantial controversy.' "

McEvoy was represented by **Sharon Easley** of Law Office of Sharon Easley in Plano, Texas.

The defendants were represented by **R. Dwayne Danner** and **Barry Arthur McCain** from McGlinchey Stafford PLLC in Dallas.

Do plaintiffs' RESPA, ECOA claims overcome dismissal?

The U.S. District Court for the District of New Hampshire has denied plaintiff **Fairon** and **Donna Brown**'s motion to stay pending the outcome of their interlocutory appeal in an earlier-filed action, and granted defendants Wells Fargo and Federal National Mortgage Association's motion to dismiss.

The case is *Brown v. Wells Fargo Home Mortgage, et al., (Case No. 16-cv-530).*

The facts

On Nov. 5, 2015, after receiving an eviction notice at their foreclosed-upon home, the Browns filed a lawsuit in Hillsborough County Superior Court, alleging that the defendants violated RESPA, the Equal Credit Opportunity Act (ECOA) and the state's Unfair, Deceptive, or Unreasonable Collection Practices Act (UDUCPA). The Browns also alleged that the defendants breached the duty of good faith and fair dealing.

The defendants removed this first case to the district court and moved to dismiss. The court granted the motion to dismiss June 20, 2016. The Browns' claims for damages under RESPA and the ECOA remained in play. They filed an interlocutory appeal challenging the court's dismissal of their claims for injunctive relief.

On April 28, 2017, the Court of Appeals dismissed their appeal for lack or jurisdiction.

While the Browns' appeal was pending, the defendants initiated eviction proceedings, of which they notified the Brown in November 2015. The Browns countered by disputing the defendants' title to the property, filing the present action in the Hillsborough County Superior Court.

In their second complaint, the Browns challenged the validity of the foreclosure sale, asserting violations of the same statutes against the same defendants.

The only substantive difference between the present complaint and the previous complaint was the replacement of the Browns' dismissed claim for violation of the duty of good faith and fair dealing with a claim for breach of fiduciary duty based on the foreclosure sale, which had already occurred when the Browns filed their first complaint

The court's decision

The district court, under Judge **Joseph N. Laplante**, agreed with the defendants that issue preclusion barred the Brown's claims challenging the foreclosure. A previous adjudication estops the litigation of an issue if the following criteria are established: An identity of issues, actuality of litigation, finality of the earlier resolution and the centrality of the adjudication.

Laplante found that these elements were easily satisfied.

"First, the issues are identical. [T]he plaintiffs' claims challenging the foreclosure and the facts underlying them are substantially identical – indeed, in significant part, word-for-word identical – in both complaints," Laplante wrote. "Second, those issues were actually litigated in the previous proceeding. The defendants moved to dismiss all claims.

"Third, that litigation resulted in an order that was 'final' for purposes of issue preclusion. That is, the 'parties had a full and fair opportunity to litigate [the] matter,' and the court's order dismissing those claims was unequivocal, not tentative, and issued after full briefing and a hearing," Laplante added.

"Finally, the adjudication of the issues was central to court's order. The court addressed the plaintiffs' post-foreclosure sale attempt to challenge the foreclosure's validity and concluded that New Hampshire law barred the plaintiffs from doing so. That determination was essential to the court's order dismissing plaintiffs' claims and request for injunctive relief."

As for the Browns' claim for breach of fiduciary duty, the court found that it should be dismissed because the Browns failed to state a claim.

Laplante wrote that it was unclear from the Browns' pleading whether they intended to assert a claim against Wells Fargo.

"Even if they did, that claim must be dismissed because the obligation to conduct a foreclosure in good faith and with due diligence 'do[es] not extend to parties other than the foreclosing mortgagee,' such as the loan servicer," Laplante wrote, adding that their claim against Federal National Mortgage Association did not fare any better, being time-barred by the relevant statute of repose.

Federal National Mortgage submitted, and the Browns did not dispute, that it recorded the foreclosure deed in question Oct. 21, 2015, over one year and one day before the Browns filed their complaint Nov. 28, 2016.

Court upholds CID against public records website

The U.S. District Court for the Northern District of Texas, under U.S. Magistrate Judge **David L. Horan**, found that the CFPB's jurisdiction was not "plainly lacking" and that there was "some plausible ground for jurisdiction." The case is *CFPB v. The Source for Public Data LP (Case No. 3:17-mc-00016).*

The facts

The CFPB issued the CID to Public Data on Jan. 5, 2017. Public Data is a company that purchases or obtains public records from governmental entities and provides its users with access to these records through its website for a fee.

Within its CID's notification of purpose, the CFPB stated that the purpose of the investigation was "to determine whether consumer reporting agencies, persons using consumer reports, or other persons have engaged or are engaging in unlawful acts and practices in connection with the provision or use of public records information in violation of the Fair Credit Reporting Act."

Public Data filed a petition to set aside the CID, asserting that the CID was grossly overbroad.

Public Data also inquired into the factual basis of the CFPB's investigation, stating that it had not received any client or employment complaints and was unaware of any other grounds for the CFPB's investigation.

On Feb. 14, 2017, the CFPB denied the petition to set aside.

Public Data refused to comply, and the CFPB brought this lawsuit.

The court's decision

Public Data argued against the CID on four grounds: That the CID exceeded the CFPB's statutory authority, that the CFPB lacked jurisdiction, that the CID failed to identify the nature of the conduct under investigation and that the CID was grossly overbroad. Public Data relied on the recent setback in *CFPB v. ACICS* in the D.C. Circuit.

In that case, the CFPB issued a CID that was identical to the one at issue here except, the court noted, for the fact that it was directed to "any entity or person ... engaged ... or engaging in unlawful acts and practices in connection with accrediting for-profit colleges" in violation of the Consumer Financial Protection Act.

"The bureau responds that the CID here does not present the same issue as in *ACICS*, where the notification of purpose in the CID to Public Data identifies specific persons and specific conduct under specific statutes and laws. The bureau argues that the notification of purpose in *ACICS*, in contrast, did not provide notice of the nature of the investigation and conduct at issue," Horan wrote.

Horan added that the CID to Public Data presented a closer case than the one in *ACICS*. The CID's notification of purpose states: "The purpose of this investigation is to determine whether consumer reporting agencies, persons using consumer reports, or other persons have engaged or are engaging in unlawful acts and practices in connection with the provision or use of public records information in violation of the Fair Credit Reporting Act or any other federal consumer financial law. The purpose of this investigation is also to determine whether bureau action to obtain legal or equitable relief would be in the public interest."

In *ACICS*, the D.C. Circuit noted the CFPB's "recognition that it lacks statutory authority over the accreditation process of for-profit colleges." Here, however, the CFPB has broad statutory authority to investigate consumer reporting agencies.

"Public Data's counsel may believe that the statutory definition of a 'consumer reporting agency' is a mess and a lawyer's dream, but the bureau's reference to it in context, along with the persons and specific laws at issue and other details identified in the notification of purpose, provides fair notice of an investigation with generally defined boundaries and a purpose articulated in broad terms and complies with the requirements that the bureau adequately inform Public Data of the link between the relevant conduct and the alleged violation. The notification of purpose in the CID to Public Data therefore meets Section 5562(c)(2)'s statutory requirements," the court held.

The court found that the CFPB's jurisdiction here was not "plainly lacking."

"Here, the bureau's jurisdiction for issuing the CID is not plainly lacking because there are plausible grounds to believe that Public Data may have information related to a violation of the FCRA. Public Data may have information that is relevant to a violation of federal consumer financial law, and the bureau 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,'" the court concluded.

CFPB News

SCOTUS opinion bodes well for RESPA, attorney says

For RESPA attorneys who believe in taking a strictly statutory language approach to interpreting the law – such that, "Nothing means nothing" – the U.S. Supreme Court's June 12 opinion in *Henson v. Santander Consumer USA INC*. may provide a glimmer of hope.

"There is a new sheriff in town, and thankfully this time it is not the CFPB," **Joseph Lynyak III**, a partner at Dorsey & Whitney LLC said in a written statement. "The Supreme Court indicated that words count, grammar and syntax count – importantly, clearly stated statutory language should not be negated by contrary policy not reflected in the statute."

In Henson, it was alleged that CitiFinancial Auto loaned money to petitioners to buy cars, that petitioners defaulted on those loans and that respondent Santander then purchased the defaulted loans from CitiFinancial and sought to collect in ways petitioners believe violated the Fair Debt Collection Practices Act (FDCPA).

The district court and the Fourth Circuit Court of Appeals held that Santander didn't qualify as a debt collector because it did not regularly seek to collect debts "owed … another" but sought instead only to collect debts that it purchased and owned.

In the 9-0 ruling, with newly appointed Justice **Neil Gorsuch** writing the opinion, the court held that a company may collect debts that it purchased for its own account, like Santander did here, without triggering the statutory definition ("debt collector") in dispute.

"By defining debt collectors to include those who regularly seek to collect debts 'owed … another,' the statute's plain language seems to focus on third party collection agents regularly collecting for a debt owner — not on a debt owner seeking to collect debts for itself," the court found.

Key words: The statute's plain language.

The petitioners tried to argue that their interpretation furthered the FDCPA's perceived purpose, asserting that if Congress "had been aware of defaulted debt purchasers like Santander it would have treated them like traditional debt collectors because they pose similar risks of abusive collection practices."

In response, however, the Supreme Court concluded that it was not its job to "rewrite a constitutionally valid text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced. … [T]hese are matters for Congress, not this court, to resolve."

CFPB to assess ATR/QM rule

The Consumer Financial Protection Bureau is conducting an assessment of the Ability to Repay rule and Qualified Mortgage rule (ATR/QM) under the Truth in Lending Act (TILA), according to a recent notice of assessment. Assessments pursuant to Section 1022(d) of the Dodd-Frank Act are for informational purposes only and are not part of any formal or informal rulemaking proceedings under the Administrative Procedure Act.

Instead, the CFPB is seeking comments on the impact of major provisions of the rule on a set of consumer outcomes, including mortgage cost, origination volumes, approval rates and subsequent loan performance.

The CFPB also will consider changes in creditors' underwriting policies and procedures that were made in connection with the rule and which might affect consumer outcomes. Here, the major provisions to be examined will be:

- The ATR requirements, including the eight underwriting factors a creditor must consider;
- The QM provisions, with a focus on the debt-to-income threshold, the points and fees threshold, the small creditor threshold and the Appendix Q requirements; and
- The applicable verification and third-party documentation requirements.

Certain categories of borrowers are of special interest for this assessment.

These borrower categories include borrowers generating income from self-employment; borrowers anticipated to rely on income from assets to repay the loan; borrowers who rely on intermittent, supplemental, part-time, seasonal, bonus or overtime income; borrowers seeking smaller-than-average loan amounts; borrowers with a debt-to-income ratio exceeding 43 percent; low and moderate income borrowers; minority borrowers and rural borrowers.

Industry News

TRID, loan package documentation lead defects

ACES Risk Management (ARMCO) has released the ARMCO Mortgage QC Industry Trends Report for the fourth quarter of 2016 and calendar year 2016, finding that more than 68 percent of defects reported in 2016 involved TRID-related and/or loan package documentation issues.

The report also concluded that the benchmark "Critical Defect Rate" increased slightly, from 1.27 percent in the third quarter of 2016 to 1.50 percent in the fourth quarter of 2016. Also, in the fourth quarter of 2016, purchase transactions among the subject group comprised 51 percent of the benchmark data, up from 48 percent in the previous quarter.

"The data suggests lenders are getting more adept at complying with critical TRID-related issues. However, new areas of concern are beginning to spring up and an early correlation can be linked to a more purchase-focused market," ARMCO Chief Operating Officer **Phil McCall** said in a news release. "Lenders need to learn from their own defects if they want to protect themselves against compliance-related issues, but they also need to stay apprised of changing trends if they want to mitigate the increased risk of fraudulent activity that is inherent with a purchase-driven market."

The ARMCO Mortgage QC Industry Trends Report is released each quarter and is based on post-closing quality control loan data captured by the company's ACES Analytics benchmarking software. The ACES Analytics benchmarking dataset includes post-closing quality control data from more than 65 lenders, comprising more than 75,000 unique loans selected for random full-file reviews.

Defects are categorized using the Fannie Mae loan defect taxonomy. The company issues a one-year analysis for the calendar year with each fourth quarter Mortgage QC Industry Trends Report.

Lenders continue to loosen credit requirements

The STRATMOR Group has determined within its latest Insights report that lenders are continuing to loosen credit requirements in order to expand the pool of potential home-buying borrowers.

After significant increases from 2009 to 2012, average mortgage FICO scores declined from 2013 through 2016; for instance, the overall borrower FICO scores averaged 729 in 2016, the lowest since 2008.

Bank-originated loans saw average credit scores of 743, as opposed to a score of 719 from loans originated by independent lenders.

STRATMOR Senior Advisor **Rob Chrisman** explained that, after possibly overcorrecting in the wake of the 2008 financial crisis, underwriting standards are beginning to loosen once again in an attempt to broaden the reach of the mortgage market to more borrowers.

"STRATMOR data shows that after the financial crisis in 2008, borrowers' average credit scores rose significantly," Chrisman said. "It also shows a material decline in those scores, beginning in 2013, driven primarily by non-bank lenders. A diminishing pool of higher credit borrowers, who had been fueling the majority of purchase and refinance lending, has shifted market activity to lower credit groups.

"More generally, the mortgage industry is dealing with slower growth, due to a variety of factors, including demographic and lifestyle changes and home affordability," Chrisman added. "Looser underwriting standards – with risk-based pricing – are a way for lenders to counter those headwinds."

Chrisman said that the industry already is seeing lenders adjust guidelines to suit borrowers with higher loan-to-value.

"Likewise, lenders – and investors – are advertising programs aimed at opening up credit to borrowers previously unable to access the mortgage market," Chrisman said. "At the same time, forthcoming reporting changes by credit bureaus are expected to improve the credit scores of tens of millions of borrowers, bringing them into acceptable ranges."

These developments may unleash first-time homebuyer demand. The question remains: Will this be enough to boost mortgage originations? According to Chrisman, probably not – at least in the near-to-mid-term. Originators have told STRATMOR that housing constraints are a bigger impediment to volumes than a lack of borrowers.

Incorrect policies, procedures lead to RESPA violations

The Consumer Financial Protection Bureau (CFPB) has entered into a consent order with Fay Servicing, LLC, after concluding that the mortgage servicer's handling of loss mitigation applications led to violations of RESPA and the Consumer Financial Protection Act (CFPA).

Specifically, the CFPB stated that the mortgage servicer did the following:

• Took prohibited foreclosure actions against certain borrowers (in violation of 12 C.F.R. § 1024.41(f)(2) and (g));
• Failed to have policies and procedures reasonably designed to provide required foreclosure protections in compliance with applicable law (in violation of 12 C.F.R § 1024.38(a) and (b)(1)(v));
• Failed to send or timely send acknowledgement notices to numerous borrowers (in violation of 12 C.F.R. § 1024(b)(2)(i)(B));
• Failed to state in the acknowledgment notices the additional documents and information needed from borrowers to make their loss mitigation applications complete (in violation of 12 C.F.R. § 1024(b)(2)(i)(B));
• Failed to have policies and procedures reasonably designed to facilitate compliance with the acknowledgment notice requirement under 12 C.F.R. § 1024.41(b)(2)(i)(B) (in violation of 12 C.F.R. § 1024.38(a) and (b)(2)(iv));
• Failed to send or timely send evaluation notices to numerous borrowers (in violation of 12 C.F.R. § 1024.41(c)(1));
• Failed to correctly advise numerous borrowers of their appeal rights in evaluation notices (in violation of 12 C.F.R. § 1024.41(c)(1)); and
• Failed to have policies and procedures reasonably designed to properly evaluate borrowers for loss mitigation options in accordance with 12 C.F.R § 1024.41 (in violation of 12 C.F.R. § 1024.38(a) and (b)(2)(v)).

Fay Servicing neither admitted nor denied any of the findings of fact or conclusion of law, but under the consent order agreed to pay up to $1.15 million to harmed consumers and offer borrowers opportunities to pursue foreclosure relief.

Fay Servicing's statement

Following the CFPB's announcement of the consent order, Fay Servicing released the following statement:

"Fay Servicing, LLC has reached an agreement with the Consumer Financial Protection Bureau (CFPB) regarding allegations that it failed to comply with rules governing the loss mitigation process for borrowers who were in default on their mortgages. Fay has agreed to pay $1.15 million in redress to the affected borrowers. No penalty was assessed and no monitor is required going forward.

"Fay has always been committed to delivering a high-quality customer service experience to borrowers while complying with all applicable legal and regulatory requirements. The isolated claims concern a small fraction of the more than 85,000 borrowers whose mortgages Fay Servicing has serviced since it was founded in 2008. While Fay regrets any instance in which it did not comply with a regulatory requirement, we believe the affected borrowers were well-served during the loss mitigation process using Fay's high-touch and borrower-centric approach to servicing severely delinquent loans. The company reached this agreement with the CFPB in the interest of putting this matter behind it and focusing on the needs of its clients, employees, and borrowers.

"Fay Servicing is an independently-owned mortgage servicer that specializes in managing at-risk residential mortgage loans. Fay plays a crucial role in America's housing finance system by helping severely delinquent borrowers avoid foreclosure. Although the delinquent mortgages Fay boards are on average more than 700 days past due, 70 percent of these borrowers have successfully completed the loss mitigation process or are currently in loss mitigation. This exemplary track record demonstrates Fay's commitment to serving borrowers as well as its ability to have a positive impact on their lives. Fay continues to be at the forefront of the customer service industry and looks to build upon its strong record of responsible mortgage servicing going forward."

The consent order

Under the mortgage servicing rules, a servicer is required to send two different written notices to a borrower engaged in the loss mitigation process. These notices include an acknowledgment notice that, among other things, advises the borrower of the additional information that the servicer still needs from the borrower to make the loss mitigation application complete.

Servicers also are required to send an evaluation notice that advises the borrower of the loss mitigation option, if any, that is being offered, the deadline by which the borrower must accept or reject the offer, the borrower's rights to appeal the servicer's evaluation and the reason the borrower is denied for any available loan modification option.

The CFPB determined that since Jan. 10, 2014, Fay Servicing did not adequately and promptly respond to borrowers engaged in the loss mitigation process. This was the result of Fay Servicing's policies and procedures, which did not provide any guidance or incorrectly instructed personnel about how to handle loss mitigation applications.

"In certain instances, these failures were the result of respondent not having any policies and procedures in place to ensure compliance with the mortgage servicing rules. In other instances, these failures were the results of its mistaken understanding that Regulation X only applies to retention applications and not to non-retention applications. The mortgage servicing rules do not distinguish between retention applications and non-retention applications," the consent order states.

It was not until March 10, 2014, that Fay Servicing started to send acknowledgment notices in response to retention applications. From Jan. 10 to March 10, 2014, Fay Servicing had been using the Home Affordable Modification Program's notice of incompleteness to notify borrowers of missing documents, but only in response to retention applications.

Even after Fay Servicing implemented policies related to acknowledgment notices and began sending notices, the mortgage servicer still routinely failed to send or timely send such notices in response to retention applications.

The CFPB found that the acknowledgment notices were insufficient because of the labeling of certain categories of documents or information needed to complete a loss mitigation application.

For example, one of the categories in the acknowledgment notice – "Income Documentation (e.g., two most recent pay stubs)" – was a mere broad description that may refer to several different types of documents.

The CFPB found that this category description did not identify the actual additional documents or information the borrowers must submit to make their loss mitigation applications complete.

"Respondent needed borrowers to submit documents establishing certain types of income as part of their loss mitigation applications in order to evaluate their loss mitigation applications. The documents necessary vary depending on the source of the borrower's income," the consent order stated. "Respondent's acknowledgment notices does not, however, identify required income documents by name.

"Instead, where respondents had determined that borrowers needed to submit, for example, profit and loss statements as proof of self-employment income, or award or benefit letters as proof of benefit income, respondent's acknowledgment notices simply contained an 'X' next to the general category 'Income Documentation (e.g., two most recent pay stubs).' Therefore, respondent failed to state the actual documents needed from the borrower to complete his or her loss mitigation application."

The CFPB also determined that since Jan. 10, 2014, Fay Servicing made first filings, moved for foreclosure judgment or an order of sale and conducted foreclosure sales in certain instances where the borrower was entitled to protection from these actions under Regulation X.

The CFPB found that no policies and procedures were in place to ensure compliance with the mortgage servicing rules. When Fay Servicing did put policies and procedures into place, they incorrectly instructed its personnel about when to provide foreclosure protections.

For retention applications, Fay Servicing's policies instructed personnel to place a foreclosure hold only if a complete loss mitigation application was received 42 days or more before a scheduled foreclosure sale, instead of complying with the mortgage servicing rules' mandate of providing foreclosure protection if a first filing had not yet occurred or if the complete loss mitigation application was received more than 37 days before a scheduled foreclosure sale.

"If after evaluating a complete retention application respondent determined that a borrower only qualified for a non-retention option or denied the borrower all available options, respondent's policies instructed personnel to lift any foreclosure holds that were in place," the consent order stated. "But the mortgage servicing rules mandate that the servicer continue to afford the borrower foreclosure protections until the appeal period or process ends, if applicable, all offered loss mitigation options are rejected, or the borrower fails to perform under the accepted loss mitigation option agreement.

"After the respondent implemented foreclosure policies and procedures that were supposed to address compliance with the mortgage servicing rules, those policies and procedures addressed only complete retention applications; they did not address foreclosure protections for borrowers who submitted complete non-retention applications," the

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consent order continued.

For borrowers who submitted complete non-retention applications, Fay Servicing's policies left foreclosure protections to the discretion of its personnel and its foreclosure review committee.

The CFPB pointed out that the review committee typically reviewed loans seven days before a scheduled foreclosure sale to determine whether the sale should be conducted or postponed. So even if Fay Servicing's committee determined that a foreclosure sale should be postponed, that determined generally would be made seven days or less before a foreclosure sale.

And it would not address foreclosure protections borrowers were entitled to earlier in the process.

Prepaid account proposal includes TILA changes

The Consumer Financial Protection Bureau (CFPB) has issued a request for public comment regarding its proposed amendments regarding prepaid accounts under Regulation E, which implements the Electronic Fund Transfer Act (EFTA), and Regulation Z, which implements the Truth in Lending Act (TILA).

"This proposal requests comment on potential modifications to several aspects of that rule, including error resolution and limitations on liability for prepaid accounts where the financial institution has not completed its consumer identification and verification process; application of the rule's credit-related provisions to digital wallets that are capable of storing funds; certain other clarifications and minor adjustments; and two issues relating to the effective date of the rule," the request for comment states.

The CFPB had released a final rule to create consumer protections for prepaid accounts Oct. 5, 2016. However, the CFPB stated that in recent months the bureau has learned that some industry participants would have difficulty complying with certain provisions of the 2016 final rule that would have gone into effect Oct. 1, 2017.

"These proposed revisions address, in part, certain issues that were unanticipated by commenters on the notice of proposed rulemaking that led to the 2016 final rule (2014 proposal), and are intended to facilitate compliance and relieve burden on those issues," the request states.

Specific to the Regulation Z and TILA proposals, the CFPB stated that it is proposing the following:

"Create a limited exception to the credit-related provisions of the prepaid accounts rule in Regulation Z for certain business arrangements between prepaid account issuers and credit card issuers that offer traditional credit card products. This exception is designed to address certain complications in applying the credit provisions of the prepaid accounts rule to credit card accounts linked to digital wallets that can store funds where the credit card accounts are already subject to Regulation Z's open-end credit card rules in circumstances that appear to pose lower risks to consumers."

The CFPB is proposing to amend the definition of "business partner" in § 1026.61(a)(5)(iii) and related commentary to exclude business arrangements between prepaid account issuers and issuers of traditional credit cards from coverage under the prepaid accounts rule's tailored provisions applicable to hybrid prepaid-credit cards if certain conditions are satisfied.

The exclusion would apply only to traditional credit card accounts that are linked to a prepaid account.

Also, the conditions would include that the parties could not allow the prepaid card to access credit from the credit card account in the course of a transaction with the prepaid card unless the consumer has submitted a written request to authorize linking the two accounts. The authorization would be separately signed or initialized.

Additionally, the exception would only apply where the parties do not vary certain terms and conditions based on whether the two accounts are linked.

"Under this proposed exception, the linked credit card account would still receive the protections in Regulation Z that generally apply to a credit card account under an open-end (not home-secured) consumer credit plan, but the tailored provisions in the prepaid accounts rule for hybrid prepaid-credit cards would not apply," the request states.

The CFPB also is proposing to:

• Revise the error resolution and limited liability provisions of the prepaid accounts rule in Regulation E to provide that financial institutions would not be required to resolve

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CFPB withdraws CID request

The Consumer Financial Protection Bureau (CFPB) has withdrawn its civil investigative demand (CID) against financial services company J.G. Wentworth.

The CFPB had sent its CID in September 2015 and had sued the company in the Philadelphia federal district court after it refused to comply.

The CFPB wanted to investigate the company's practice of paying consumers for the rights to future income from annuities and legal settlements.

According to filings in the U.S. District Court for the Eastern District of Pennsylvania, the CID (or administrative subpoena) was withdrawn June 1.

"This action is therefore moot, and the court must dismiss it for lack of subject-matter jurisdiction," the CFPB stated within its filings.

It is possible, however, that the CFPB will issue a new CID against J.G. Wentworth.

Wentworth had argued that the CFPB lacked jurisdiction to issue the CID, asserting that its services did not constitute providing financial products or services.

The U.S. Chamber of Commerce had filed an amicus brief in Wentworth's defense, arguing that there were no reasonable grounds to conclude that Wentworth was engaged in the business of providing financial advice.

The Chamber added that such a conclusion would create a slippery slope in which any sort of selling practices – such as giving advice on the most efficient washing machines – would be considered a financial product or service.

"This action is therefore moot, and the court must dismiss it for lack of subject-matter jurisdiction."

Consumer Financial Protection Bureau, in filing to District Court for Eastern District of Pennsylvania

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errors or limit consumers' liability on unverified prepaid accounts. However, for accounts where the consumer's identity is later verified, financial institutions would be required to limit liability and resolve errors with regard to disputed transactions that occurred prior to verification, consistent with the timing requirements of the prepaid accounts rule.
• Make clarifications or minor adjustments to provisions of the prepaid accounts rule related to an exclusion from the definition of "prepaid account," unsolicited issuance of access devices, several aspects of the rule's pre-acquisition disclosure requirements and submission of prepaid account agreements to the CFPB.
• Further delay the prepaid accounts rule's effective date as necessary and appropriate in light of the other amendments proposed.

For the latter proposal, the CFPB wants to know whether a specific provision addressing early compliance would be necessary and appropriate for compliance with the prepaid accounts rule prior to its effective date.

Comments are due 45 days after the request is published in the *Federal Register*.

You may submit comments, identified by Docket No. CFPB-2017-0015 or RIN 3170-AA72, by any of the following methods:
• Email: FederalRegisterComments@cfpb.gov. Include Docket No. CFPB-2017-0015 or RIN 3170-AA72 in the subject line of the email.
• Electronic: http://www.regulations.gov. Follow the instructions for submitting comments.
• Mail: **Monica Jackson**, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street, NW., Washington, DC 20552.