CHAPMAN AND CUTLER LLP

To the Point!

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Ability to Repay and Qualified Mortgage Rule

On January 10, 2013, the Consumer Financial Protection Bureau ("CFPB") issued its final rule on ability to repay and qualified mortgage standards (the "Rule") to implement various requirements of the Dodd-Frank Act amending the Truth in Lending Act. The Rule is effective January 10, 2014 and requires mortgage lenders to a make a reasonable and good faith determination based on verified and documented information that a consumer will have the ability to repay a mortgage loan according to its terms before making the loan. The Rule also includes a definition of a qualified mortgage, which provides the lender with the presumption that the ability to repay requirements has been met. This presumption is rebuttable if the loan is a "sub-prime" loan or conclusive if the loan is a "prime" loan. However, whether a prime or sub-prime loan, the borrower can challenge the loan's status as a qualified mortgage in a direct cause of action for three years from the origination date and as a defense in a foreclosure action at any time. Substantial penalties may apply if a lender fails to meet ability to repay standards for a loan, including actual damages (which could include the borrower's down payment), statutory damages up to $4,000, all fees paid by the borrower, up to three years of finance charges paid by the borrower, and court costs and reasonable attorney's fees.

This Rule is not a disclosure rule like much of Regulation Z. It contains specific requirements and substantive limitations on mortgage banking that will require modification to operations, policies and procedures, and systems. We plan to provide more detailed analysis in future To the Point publications on the various aspects of this Rule.

Illinois Consumer Installment Loan Act and Payday Loan Reform Act Amendments

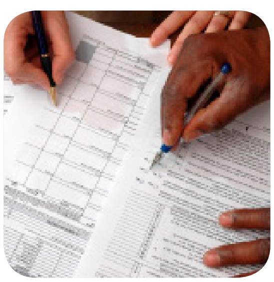
On January 1, 2013, amendments to the Consumer Installment Loan Act ("CILA") and the Payday Loan Reform Act ("PLRA") became effective and are intended to protect Illinois consumers from unlicensed lenders. On August 20, 2012, Governor Patrick Quinn approved amendments to CILA and PLRA that render the terms of loans made pursuant to either act null and void if the lender is not licensed under such act. The amendments further provide that the person who made the loan "… shall have no right to collect, receive, or retain any principal, interest, or charges related to the loan."

CFPB and Five States Bring Action Against Debt Relief Service Provider

In its first joint enforcement action with state authorities, the Consumer Financial Protection Bureau (the "CFPB") and the States of Hawaii, New Mexico, North Carolina, North Dakota, and Wisconsin brought an enforcement action against Payday Loan Debt Solution, Inc. ("PLDS"), a debt relief service provider that purports to help consumers settle their payday-loan debts. Of note, the enforcement action was brought under the Federal Trade Commission's Telemarketing Sales Rule banning advance fees (not a federal consumer financial law), state laws mandating licensing and restricting fees for debt adjustment services and the Dodd-Frank Act Consumer Financial Protection Act and state laws prohibiting unfair trade practices.

On December 21, 2012, a federal district court entered an order that enjoined PLDS from charging consumers a fee in advance of settling their debts, obtained compensation for consumers who were unlawfully charged advance fees and required PLDS to cooperate with the CFPB in any future investigations of other entities related to the transactions that are the subject of the complaint. In its press release, the CFPB noted that PLDS immediately ceased the unlawful conduct and cooperated with the investigation, which helped limit the size of the civil penalty.

Entities involved in the debt-relief industry and their "partners" should carefully review their practices and procedures to ensure these types of prohibited advance fees are not charged and should anticipate that there will be further joint federal/state enforcement actions. As the CFPB stated in its press release, its action against PLDS is part of its comprehensive effort to police the debt-relief industry. The CFPB will focus not only on debt-relief service providers, but also on their partners, including those who facilitate their unlawful conduct and who may violate federal consumer financial protection laws.



Deposit Account Disclosures

The FDIC has included an article on bank disclosure and marketing practices for consumer high-yield checking accounts in its Supervisory Insights, Winter 2012 publication. Though the article's focus is high-yield checking accounts and deficient practices identified by the FDIC that may lead to customer confusion and dissatisfaction and possible violation of laws and regulations, the article also offers useful insight into the standards the agency will apply to bank marketing and disclosure practices generally.

Banks are cautioned to provide clear and unambiguous disclosures of product terms in promotional material and account disclosures. If qualifications apply to the consumer account holder receiving a benefit, those qualifications must be completely described in a manner that is understandable so that the consumer can take the appropriate action within any required timeframe to receive the benefit. To illustrate this point, if a specific number of signature debit card transactions are required to be settled during the account statement cycle (or other qualification period) to earn the benefit, promotional material or disclosures that state the consumer is required to "use" the consumer's card a specific number of times each month are inadequate because they do not contain all the requirements that apply. Similarly the FDIC noted that if certain consumer behavior will disqualify the consumer from receiving the benefit, that behavior and its consequences must be disclosed. For example, if a consumer must maintain full-time enrollment in school to be eligible for a student account, the fact that the student account will be converted to another account type if the consumer is no longer a full-time student must be disclosed.

The FDIC outlines the following potential violations of Regulation DD that may occur if ambiguous disclosures are provided for high-yield accounts: Section 1030.1(b) requiring account disclosures that give consumers the ability to make meaningful comparisons among institutions; Section 1030.3(b) requiring that disclosures reflect the legal terms of the agreement between the consumer and the bank; Section 1030.4(b) requiring that disclosures include, as applicable, limitations on rates, compounding, crediting, balance information, fees, transaction limitations and bonuses; and Section 1030.8 requiring that advertisements include the APR and interest rate and provide other information if triggering terms are present. In addition to violations of Regulation DD, ambiguous disclosures could also be determined to be an unfair and deceptive trade practice under Section 5 the FTC Act. Failure to adequately disclose terms and conditions of any deposit account could result in the same violations.

We recommend that banks have a program in place to carefully review their promotional materials and disclosures to determine that all qualifications that apply to each of their bank products, including high-yield checking accounts, is disclosed fully in a clear and unambiguous manner as described by the FDIC.

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To the Point! is a summary of items of interest and current issues for financial institutions with primary focus on regulatory, consumer, and corporate issues. Chapman and Cutler LLP maintains a dedicated practice group with expertise to counsel on these issues and other enterprise risk management matters facing financial institutions. If you would like to discuss any of the items contained in these briefings or other legal, regulatory, or compliance issues facing your institution, please contact one of the partners in our Bank Regulatory Group:

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