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Mortgage Reform and Anti-Predatory Lending Act of 2009

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This memorandum summarizes noteworthy provisions of HR 1728, the "Mortgage Reform and Anti-Predatory Lending Act", which was introduced by Representatives Brad Miller, Mel Watt, and Barney Frank on March 26, 2009. HR 1728 is a revival of a previous bill, HR 3915, that was introduced and passed in the House of Representatives in the last Congress by a large margin, but which was never taken up by the Senate. HR 1728 continues to include many provisions that have been sought by consumer activists, including repayment ability and borrower benefit standards and restrictions on prepayment penalties and yield spread premiums. HR 1728 also imposes responsibilities on secondary market participants that were included in HR 3915. Unlike HR 3915 however, HR 1728 imposes on loan originators a requirement that a portion of any mortgage be retained by each originator as a means of sharing credit risk with any subsequent purchaser/securitizer.[1]

Like HR 3915, HR 1728 addresses concerns over the mortgage origination process by: (i) establishing a federal "duty of care" for mortgage originators; (ii) prohibiting originators from "steering" borrowers to products that are not in the borrower's "interest"; and (iii) requiring licensing and registration of mortgage originators pursuant to a qualifying state law or equivalent federal banking regulatory regime. This minimum standard includes, among other things, standards regarding the determination of a borrower's repayment ability and, in the case of refinances, the determination of a net tangible benefit. Further, this section of the legislation sets forth safe harbors from these standards for so-called "qualified mortgages" that meet certain stringent requirements. This "qualified safe harbor" is notably narrower than its counterpart provision. HR 1728 also amends the federal Home Ownership and Equity Protection Act ("HOEPA")[2] by significantly amending the definition of a "high-cost mortgage" under that Act and by expanding consumer protections for such loans.

Importantly, the great majority of the new requirements imposed by the legislation are ***not*** self-executing and must be implemented by the promulgation of regulations by various federal agencies, including the United State Department of Housing and Urban Development ("HUD"), the Office of the Comptroller of the Currency ("OCC"), the Office of Thrift Supervision ("OTS"), the Federal Deposit Insurance Corporation ("FDIC") and the Federal Trade Commission ("FTC").

In addition, HR 1728 includes provisions to create new safeguards for borrowers with respect to escrow accounts and force-placed insurance and amends the federal Real Estate Settlement Procedures Act ("RESPA") to mandate faster responses to consumer inquiries, increasing penalties and requiring the prompt crediting of payments. Finally, HR 1728 strengthens appraiser requirements by establishing stronger federal appraiser independence standards that are backed by tough enforcement provisions as well as by establishing more stringent appraiser licensing and education standards and providing a federal grant program to assist states in their regulation of appraisers.

Critics have expressed concern that if HR 1728 were enacted in its current form or an even vaguely similar draft, it would quell the credit markets at a time when liquidity is desperately needed. It is unclear, at best, whether originators would make and whether the key current secondary market players such as Fannie Mae and Freddie Mac will buy non "qualified safe harbor mortgages," and even if they did, whether depository institutions and private mortgage companies alike will be able to retain the requisite recourse when selling or securitizing the loans.

I. New Mortgage Originator Requirements

A. "Duty of Care"

HR 1728 creates a federal "duty of care" that requires each mortgage originator to:

1. Be qualified and, when required, registered and licensed as a mortgage originator in accordance with applicable state or federal law;

2. With respect to each consumer seeking or inquiring about a residential mortgage loan, diligently work to present the consumer with a range of residential mortgage loan products for which the consumer is qualified and which are appropriate to the consumer's existing circumstances, based on information known by, or obtained in good faith by, the originator;

3. Make full, complete, and timely disclosure to each consumer of (i) the comparative costs and benefits of each residential mortgage loan product offered, discussed, or referred to by the originator; (ii) the nature of the originator's relationship to the consumer (including the costs of the services to be provided by the originator and a statement that the mortgage originator is or is not acting as an agent for the consumer, depending on the circumstances); and (iii) any conflicts of interest;

4. Certify to the creditor, with respect to any transaction involving a residential mortgage loan, that the mortgage originator has fulfilled all the above requirements applicable to the originator with respect to the transaction; and

5. Include the unique identifier of the originator provided by a qualified nationwide registration regime on all loan documents.

HR 1728 directs the federal agencies to prescribe regulations to further define this federal duty of care.

B. Anti-Steering Provision

HR 1728 amends TILA so that no mortgage originator may receive from any person, and no person may pay to any mortgage originator, directly or indirectly, any incentive compensation (including a yield spread premium) that is based on, or varies with, the terms of any residential mortgage loan. The enactment of this provision would dramatically alter the way that subprime lenders compensate mortgage brokers. The federal agencies are directed to prescribe regulations which prohibit steering of borrowers into loans that are not in the consumer's interest (such as loans with predatory characteristics). However, HR 1728 notes that the foregoing will not be construed to limit or affect the ability of a mortgage originator to sell loans to subsequent purchasers or to restrict a consumer's ability to finance origination fees as long as they were disclosed and do not vary based on the consumer's decision about whether to finance such fees.

C. Liability

HR 1728 states that Sections 130(a) and (b) of TILA (TILA civil liability and correction of errors provisions)will apply to a violation of these "duty of care" standards by a mortgage originator. The maximum amount of any liability of a mortgage originator to a consumer for any violation of the foregoing provisions is capped at an amount equal to (i) the greater of actual damages or (ii) three times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus the costs to the consumer of the action, including a reasonable attorney's fee.

D. Regulations

HR 1728 also provides the federal banking agencies with rule-making authority to issue regulations to prohibit or condition terms, acts or practices relating to residential mortgage loans that the agencies find to be abusive, unfair, deceptive, predatory, inconsistent with reasonable underwriting standards, necessary or proper to effectuate the purposes of the duty of care and anti-steering provisions, to prevent circumvention or evasion of those provisions, or to facilitate compliance or which are not in the interest of the borrower.

II. Minimum Standards for Mortgages

HR 1728 establishes a number of minimum federal standards which are applicable to ***all*** residential mortgage loans, and which are not limited to the principal residence of the borrower.

A. Ability to Repay

HR 1728 provides that no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, including all applicable taxes, insurance, and assessments.

The determination of a consumer's ability to repay a residential mortgage loan must be based on consideration of: (a) the consumer's credit history; (b) the consumer's current income; (c) the expected income the consumer is reasonably assured of receiving; current obligations; (d) the consumer's debt-to-income ratio; (e) the consumer's employment status; and (f) other financial resources besides the consumer's equity in the real property that secures repayment of the loan. HR 1728 also lists specific repayment calculation rules for non-standard loan products (e.g., products with interest-only or negative amortization features) and provides that the fully indexed rate must be utilized for the repayment analyses on all products.

Please note that this is not a self-executing provision and the OCC, OTS, and FDIC, in consultation with the FTC must jointly prescribe regulations to implement this provision.

Note that this provision essentially prohibits underwriting loans to less than the full income and asset verification standard.

B. "Net Tangible Benefit" Analysis

No creditor may extend credit in connection with any residential mortgage loan that involves a refinancing of a prior existing residential mortgage loan unless the creditor reasonably and in good faith determines, at the time the loan is consummated and on the basis of information known by or obtained in good faith by the creditor, that the refinance loan will provide a net tangible benefit to the consumer. A loan will not be considered to provide a "net tangible benefit" if the costs of the refinanced loan exceed the amount of any newly advance principal. HR 1728 directs the OCC, OTS and FDIC to prescribe implementing regulations defining the term "net tangible benefit."

C. Safe Harbor

Any creditor and any assignee of a residential mortgage loan, may presume that the loan meets the repayment ability and net tangible benefit requirements set forth above if the loan is a "qualified mortgage ." However, ***unlike HR 3915 where this presumption was only rebuttable against the original creditor of the loan, HR 1728 extends this rebuttable presumption to any assignee or securitizer.***

HR 1728 defines a "qualified mortgage" as a residential mortgage loan that constitutes a first lien or subordinate lien on the real property securing the loan and:

1. Has an annual percentage rate ("APR")[3] that does not exceed the average prime offer rate[4] for a comparable transaction by 1.5% or more for first liens or by more than 3.5% or more for subordinate liens;
2. For which income and financial resources of the consumer are verified and documented;
3. For which the underwriting process is based on the fully-indexed rate, and which takes into account taxes and insurance;
4. For which the back-end debt-to-income ratio does not exceed some maximum percentage of the consumer's monthly gross income as is prescribed by regulation; and
5. For which the term of the loan is fixed for a period of not less than or more than 30 years.

Significantly, this is a narrower definition of "qualified mortgage" than that set forth in HR 3915. Notably, only 30-year fixed mortgage loans underwritten on a full documentation basis would qualify under the safe harbor. By contrast, option ARM products which were very popular until recently or even 15-year fixed rate loans would never qualify as a "qualified mortgage" because of the APR and loan term caps. Significantly, note that HR 1728 permits the Federal Banking agencies to prescribe regulations that can revise or modify the criteria to be considered a "qualified mortgage" as necessary or appropriate. Some industry participants have noted that fixing the term of a qualified mortgage to 30 years would run in contrast to loans modified under the U.S. government's Home Owner's Affordability and Stability Plan which calls for modifications of certain loans to 40 year repayment periods.[5]

D. Credit Retention Risk

Significantly, in arguably the most contentious provision in the legislation, HR 1728 requires that creditors, with respect to loans ***other than qualified mortgages***, would be required to retain an economic interest in a material portion (at least 5 percent) of the credit risk of each such loan that the creditor transfers, sells, or conveys to a third party. Under regulations to be promulgated by the appropriate federal banking agencies, a creditor would also not be able to directly or indirectly hedge or otherwise transfer the credit risk it retains. The consequent of this provision is that non-qualified mortgages will not likely be made, and even if they are originated, it will be exceedingly difficult for originators to sell them in the secondary market.

E. Liability Provisions

1. Limited Assignee Liability

Significantly, HR 1728 provides that in additional to any other remedies a consumer may have against the creditor under TILA, a civil action which may be maintained against a creditor with respect to any residential mortgage loan for a violation of the repayment ability and net tangible benefit requirements for: (a) rescission of the loan; and (b) any additional costs incurred as a result of the violation, unless the creditor provides a cure within 90 days after the receipt of notification of the violation from the consumer. ***Further, HR 1728 provides that no civil action may be brought against any assignee or securitizer who has acted in good faith, except for rescission and costs. Assignees and securitizers will not be liable if they provide a cure[6] within 90 days after the receipt of notification from the consumer, so that the loan satisfies the requirements on repayment ability or net tangible benefit.***

HR 1728 deletes the "due diligence" defense that was contained in HR 3915 which had permitted an assignee, including a securitizer, to demonstrate that the assignee had a policy against buying residential mortgage loans other than qualified mortgages and exercised reasonable due diligence to adhere to that policy through adequate, thorough, and consistently applied sampling procedures established in accordance with regulations to be jointly prescribed by the federal banking agencies. The elimination of this defense significantly undermines an assignee's ability to defend against an unknowing purchase of a non-qualified mortgage which would have a chilling effect on future securitizations.

HR 1728 also permits a consumer to maintain a civil action against an assignee or securitizer if the original creditor that violated these regulations and ceases to exist or becomes bankrupt.

2. Class Actions Prohibited

As in HR 3915, HR 1728 states that only individual actions may be brought against an assignee, including a securitizer, of a residential mortgage loan for a violation of the repayment ability or net tangible benefit provisions. ***Thus, an assignee will not face class action lawsuits for purchasing loans that violate the repayment ability and net tangible benefit provisions.***

3. Statute of Limitations

On a fixed rate mortgage loan, HR 1728 creates a 3-year statute of limitations period with respect to a claim against an assignee or securitizer alleging violations of the repayment ability or net tangible benefit provisions. For an adjustable rate loan, there is a floating statute of limitations period determined at the earlier of: (i) the period ending 1-year after the date of the first reset or adjustment on the mortgage loan or (ii) 6 years after the mortgage loan was originally consummated.

4. Exclusion for Pools and Investors in Pools

HR 1728 makes it clear that liability will not be extended to bondholders or other investors in mortgage-backed securities.

F. Defense to Foreclosure

HR 1728 includes the section previously contained in HR 3915 that allows rescission as a defense to foreclosure with regard to the violation of the repayment ability or net tangible benefit provisions. If the rescission period has expired, the consumer may seek actual damages incurred in connection with the violation including reasonable attorney's fees.

G. Additional Restrictions on Mortgage Loan Products

1. Prohibition on Certain Prepayment Penalties

A residential mortgage loan that is ***not*** a qualified mortgage may ***not*** contain a prepayment penalty. A residential mortgage loan that is a qualified mortgage may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal in excess of the following:

> (a) a prepayment penalty not to exceed 3% of the outstanding balance of the loan during the first year immediately following the consummation of the loan;
> (b) a prepayment penalty not to exceed 2% of the outstanding balance of the loan during the second year immediately following the consummation of the loan; and
> (c) a prepayment penalty not to exceed 1% of the outstanding balance of the loan during the third year immediately following the consummation of the loan;

The mortgage originator is also required to offer the consumer a qualified mortgage loan that contains no prepayment penalty.

Further, a residential mortgage loan with an introductory fixed interest rate that adjusts or resets to a variable interest rate after the period may ***not*** contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal after the beginning of the 3-month period ending on the date of the adjustment or reset.

2. Prohibition against Financing Credit Insurance Premiums

Similar to many state anti-predatory mortgage laws, HR 1728 prohibits any creditor from financing (except in connection with a reverse mortgage), any credit life, credit disability, credit unemployment or credit property insurance premiums ***except*** where such premiums are calculated and paid in full on a monthly basis ***and*** are reasonable, at no "additional" cost to the consumer and neither the creditor nor any of its affiliates receives any compensation, directly or indirectly, in connection with such premiums.

3. No Mandatory Arbitration Provision/No Waiver of Statutory Causes of Action

HR 1728 prohibits the inclusion of a mandatory arbitration clause for any residential mortgage (except for reverse mortgages) in connection with resolving or settling any claims arising out of the transaction. This restriction, however, does not appear to apply to any creditor, assignee or securitizer that agrees to arbitrate after the dispute or claims under the transaction arises.

HR 1728 also prohibits the inclusion of any waiver of the consumer's right to bring a cause of action into federal court for damages or relief for any violation of Title II of HR 1728.

4. Duty of Securitizer to Retain Access to Loans

Any securitizer must reserve the right and preserve an ability, in any document or contract establishing any pool of assets that includes any residential mortgage loan to identify and obtain access to any loan in the pool and to provide for and obtain a remedy for any obligor alleging a violation of the repayment ability or net tangible benefit provisions.

5. Mortgages with Negative Amortization

HR 1728 discourages loan products with negative amortization by requiring additional disclosures and counseling when these products are made to first time home buyers.

6. Annual Contact Information

HR 1728 provides that at least once annually and whenever there is a change in ownership of a residential mortgage loan, the servicer must provide a written notice to the consumer identifying the name of the creditor or any assignee or securitizer who should be contacted concerning the loan.

7. Tenant Protection

HR 1728 augments substantially the tenant protections that were set forth in HR 3915 for tenants that rent homes that go into foreclosure. For foreclosures that occur after the date of enactment of HR 1728, HR 1728 provides:

(a) Tenants may remain in the premises until the end of the lease period;

(b) Tenants without a lease or with a lease terminable at will must receive a 90 day notice to vacate;

(c) If the purchaser will occupy the unit as a primary residence, the purchase may terminate the lease but must give a 90 day notice to vacate.

With respect to foreclosures for Section 8 housing tenancies:

(a) Immediate successors are subject to pre-existing lease and housing assistance payments for Section 8 tenants;

(b) Foreclosure will not constitute good cause for termination during the initial term of the tenant's lease. However, in subsequent lease terms, if the property is unmarketable while occupied or if the owner will occupy the unit as a primary residence, it may constitute good cause;

(c) Public housing agencies may pay utilities that are the responsibility of the owner as well as reasonable moving costs for Section 8 tenants, if the agency is unable to making housing assistance payments to the immediate successors after a foreclosure.

8. Notices Before Reset of Hybrid Adjustable Rate Mortgages

HR 1728 provides that in the case of a "hybrid adjustable rate mortgage," the creditor or servicer must provide a written notice, separate and distinct from all other correspondence which includes certain disclosures such as the index and how the new interest rate and payment are determined. A "hybrid adjustable rate mortgage" is defined as a consumer credit transaction secured by a consumer's principal residence with a fixed interest rate for an introductory rate that adjusts or resets to a variable interest rate after such period.

9. Additional Disclosures

HR 1728 also provides for a number of additional disclosures, such as disclosures for variable rate residential mortgage loans which state the amount of the initial monthly payment as well as the fully indexed payment, the aggregate amount of settlement charges in connection with the loan, the aggregate amount paid to the originator, ***including any additional amounts received by the originator from the creditor based on the interest rate of the loan***, as well as certain disclosures in monthly statements.

H. Various Amendments to Liability Provisions

1. Right of Rescission

HR 1728 amends Section 130(e) of TILA by stating that in an action to collect the debt, or as a defense to judicial or non-judicial foreclosure, a consumer can assert a right of rescission even after the expiration of the time periods for affirmative actions set forth in Section 130(e) and Section 125.

2. Civil Liability Provisions

HR 1728 amends Section 130(a) of TILA to double the existing available amount of civil monetary penalties. HR 1728 also amends Section 130(e) to allow any violation of Section 129 to be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the three year period beginning on the date of the occurrence of the violation. Currently, TILA only permits such actions for a period of one year in an affirmative claim.

3. Creditor/Assignee Defense for Borrower's Fraud

No creditor or assignee (including a securitizer) will be liable for any violation of the consumer's ability to repay or the net tangible benefit standard for refinancing where the borrower knowingly, willfully, and with actual knowledge furnished false information to the creditor or mortgage originator in order to obtain the mortgage loan. Please note that this is a very narrow defense and that it would not be available in stances when the broker or originator persuaded the borrower to falsify information on an application.

III. High Cost Home Mortgages

HR 1728 also significantly amends the definition of a "high cost mortgage" under HOEPA and models the amendments after the North Carolina high-cost law that originally went into effect in 2000.

A. High Cost Threshold

1. Definition of High Cost Mortgage

HR 1728 alters the existing high cost thresholds under HOEPA by defining a "high cost mortgage" as a consumer credit transaction that is secured by the consumer's principal dwelling, other than a reverse mortgage transaction, that meets one of the following thresholds:

a. With respect to first lien and subordinate lien loans, the APR at consummation of the transaction will exceed by more than 8% and 10% respectively, the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor. This provision codifies the APR thresholds currently set forth in Regulation Z, which promulgates TILA; or

b. With respect to a loan of $20,000 or more, the total points and fees payable in connection with the loan exceed 5% of the total loan amount. Note that this is a reduction from the current 8% points and fees threshold. With respect to a loan of less than $20,000, the total points and fees payable in connection with the loan exceed the lesser of 8% of the total loan amount or $1,000; or

c. With respect to a loan in which the loan documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the loan closing or the fees or penalties exceed, in the aggregate, more than 2% of the amount prepaid. ***Note that this is a new, additional "high-cost" threshold.***

2. Treatment of Introductory Rates

For purposes of calculating whether a mortgage exceeds the thresholds set forth above, the APR must be determined based on the following interest rates:

a. In the case of a fixed-rate loan in which the APR will not vary during the term of the loan, the interest rate in effect on the date of consummation;

b. In the case of a loan in which the rate of interest varies solely in accordance with an index, the interest rate determined by adding the index rate in effect on the date of consummation to the maximum margin permitted at any time during the loan agreement; or

c. In the case of any other loan in which the rate may vary at any time during the term of the loan for any reason, the interest charged on the loan at the maximum rate that may be charged during the term of the loan.

3. Definition of Points and Fees

HR 1728 amends the current definition of points and fees to ***include yield spread premiums in the calculation of points and fees.*** HR 1728 also includes the following items:

1. Premiums or other charges payable at or before closing for any credit life, or similar insurance;

2. The maximum prepayment fees and penalties which may be charged or collected under the terms of the loan documents; and

3. All prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor.

HR 1728 also allows for the exclusion of up to two bona fide discount points or certain prepayment penalties from the definition of "points and fees."

Finally, note that originators may not finance any points and fees, effectively making it impossible to originate a high cost loan.

B. Prohibited Practices

HR 1728 amends and make additions to the prohibited practices on high cost mortgages. For example, HR 1728 expands the prohibition on balloon payments, and reworks the lending without due regard to repayment ability on high cost mortgages. HR 1728 also adds prohibitions against recommending default, imposing excessive late payment charges, accelerating the debt, financing excessive points and fees, evading HR 1728, charging modification or deferral fees, and charging for payoff statements.

HR 1728 also adds a counseling requirement for all high cost mortgages. A creditor may not extend credit to a consumer under a high cost mortgage without first receiving certification from a counselor that is approved by HUD, or at HUD's discretion, a state housing finance authority, that the consumer has received counseling on the advisability of the loan transaction.

IV. Mortgage Servicing

HR 1728 also enhances consumer protections in connection with certain mortgage servicing practices

A. Required Establishment of Escrow or Impound Accounts

HR 1728 provides that with respect to first lien loans secured by the principal dwelling of a consumer (other than an open end credit plan or reverse mortgage) a creditor must establish an escrow or impound account for the payment of taxes and insurance and any other required payments at consummation of the loan. However, no such account can be required as a condition of a real property sale except in the following specified instances:

1. Any such account is required by federal or state law;
2. The loan is made, guaranteed or insured by a state or federal government lending or insuring agency;
3. The consumer's debt-to-income ratio exceeds 50%;
4. The transaction is secured by a first mortgage and the APR exceeds by more than 3% the yield on comparable Treasuries as of the 15th day of the month immediately preceding the month in which the application for credit is received by the creditor;
5. The consumer obtains a loan subject to HOEPA;
6. The original principal amount of the loan is (a) 90% or more of the sale price; or (b) 90% or more of the appraised value of the property;
7. The combined principal amount of all loans secured by the property exceeds 90% of the appraised

value;

8. The consumer was subject to a bankruptcy proceeding during the 7 year period preceding the date of the transaction; or

9. As otherwise required by regulation.

Any account established pursuant to the foregoing must remain in existence for a minimum of 5 years and until the borrower has sufficient equity in the dwelling so as to no longer be required to maintain private mortgage insurance or as otherwise provided by regulation. In the case of any account subject to the foregoing, the creditor must give certain written disclosures to the consumer at least 3 business days prior to consummation.

Disclosures must also be given to consumers who waive escrow services that inform consumers of their responsibilities and the implications of not having such an account. The disclosures must include:

1. Information concerning any applicable fees associated with either the nonestablishment of such account at the time of the transaction or any subsequent closure of any such account;

2. A clear and prominent notice that the consumer is responsible for personally and directly paying the non-escrowed items, in addition to paying the mortgage loan payment, in the absence of any such account and the fact that the costs for taxes, insurance and related fees can be substantial;

3. A clear explanation of the consequences of any failure to pay non-escrowed items, including the possible forced placement of insurance by the creditor or servicer and the potentially higher cost (including any potential commission payments to the servicer) or reduced coverage for the consumer in the event of any such creditor-placed insurance.

In addition, HR 1728 requires the inclusion of escrow payments in any repayment analysis that is provided to consumers in order to ensure that lenders inform borrowers of all of the costs involved in owning a home.

B. Amendments to RESPA

Further, HR 1728 amends the federal Real Estate Settlement Procedures Act to impose additional prohibitions of mortgage servicers of federally-related mortgage loans. Specifically, HR 1728 prohibits servicers from:

1. Obtaining force-placed hazard insurance unless there is a reasonable basis to believe the borrower has failed to comply with the loan contract's requirements to maintain property insurance;

2. Charging fees for responding to valid qualified written requests;

3. Failing to take timely action to respond to a borrower's requests to correct errors related to allocation of payments, final balances for purposes of paying off the loan or avoiding foreclosure or other standard servicer's duties;

4. Failing to respond within 10 business days to a request from a borrower to provide the identity, address and other relevant contact information about the owner assignee of the loan; or

5. Failing to comply with any other obligation required to carry out the consumer protection purposes of RESPA.

HR 1728 also sets forth a number of requirements that servicers must fulfill in order to be considered to have had a reasonable basis for force-placed insurance. In addition, HR 1728 requires the prompt crediting of payments by servicers, as well as prompt sending of payoff amounts and refunds of escrow accounts upon payoff. Finally, HR 1728 increases penalty amounts under RESPA.

V. Appraisal Activities

HR 1728 also includes a number of provisions in order to strengthen appraiser independence.

A. Property Appraisal Requirements

1. HOEPA Mortgages

HR 1728 requires creditors who extend mortgages subject to HOEPA to obtain a written appraisal which meets certain requirements, such as physical property visits, second appraisals under certain conditions without cost to the consumer and giving a free copy of the appraisal to the consumer without charge at least 3 days prior to consummation.

2. Unfair and Deceptive Practices Acts and Appraiser Independence

HR 1728 states that it will be unlawful, in providing any services for a mortgage loan secured by the principal dwelling or a consumer, to engage in any unfair or deceptive acts or practices that are described by regulations.

Further, HR 1728 provides for a number of specific acts and practices related to appraiser independence that will be considered unfair or deceptive pursuant to the foregoing prohibition. HR 1728 provides for significant penalties, starting at $10,000 per day, for violations.

B. Appraisal Subcommittee of the FFIEC

HR 1728 amends the Financial Institutions Reform, Recovery and Enforcement Act to provide the Appraisal subcommittee of the federal Financial Institutions Examination Council ("FFIEC") with a consumer protection mandate to protect the consumer from improper appraisal practices and predations of unlicensed appraisers. HR 1728 also strengthens the oversight and monitoring ability of the FFIEC over state appraisal certifying and licensing agencies. Finally, HR 1728 strengthens appraiser licensing and education standards and establishes a federal grant program to assist state agencies in their regulatory activities with respect to appraisers.

C. Equal Credit Opportunity Act Amendment

HR 1728 amends the federal Equal Credit Opportunity Act to require creditors to furnish applicants with a copy of all appraisal reports and valuations developed in connection with a residential mortgage loan and to notify consumers of their right to receive same.

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Please contact Stephen Ornstein, Matthew Yoon, John Holahan, or Roy G. Locke, Jr. at (202) 408-6400 if you have any questions regarding this memorandum.

1 The term "securitizer" means any person that transfers, conveys, or assigns, or causes the transfer, conveyance, or assignment of residential mortgage loans, including through a special purpose vehicle, to any securitization vehicle, excluding any trustee that holds such loans solely for the benefit of the securitization vehicle.

2 15 USC § 1641, *et seq*. HOEPA amended and became part of the TILA on October 1, 1995.

3 The determination of the APR must be based on the fully indexed rate of interest for mortgages containing introductory rates. Accordingly, the fully indexed rate will be applied in determining the APR threshold.

4 The term "average prime offer rate" means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low risk pricing characteristics. Under HR 1728, such average prime offer rates must be published at least weekly.

5 See Sonnenschein Nath & Rosenthal LLP memorandum entitled, "Updated Overview of the Homeowner Affordability and Stability Plan Including Treasury Guidelines", March 3, 2009 at www.sonnenschein.com/practice_areas/financial_crisis/pub_detail.aspx?id=50161&type=E-Alerts.

6 The term "cure" means the modification or refinancing, at no cost to the consumer, of the loan to provide terms that would have satisfied the requirements of the repayment ability or net tangible benefit provisions if the loan had contained the terms at the time of origination of the loan.

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