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## HELPING FAMILIES SAVE THEIR HOMES ACT OF 2009 IMPOSES NEW AND UNCERTAIN DISCLOSURE REQUIREMENTS ON BUYERS AND ASSIGNEES OF HOME LOANS

On May 20, 2009, President Obama signed into law the Helping Families Save Their Homes Act of 2009. While the primary purposes of the new law include revamping the FHA's Hope for Homeowners program, providing a safe harbor for servicers who modify home loans and giving the Federal Deposit Insurance Corporation and the National Credit Union Association an expanded credit line with the U.S. Treasury, it also imposes a new disclosure obligation under the Truth in Lending Act upon purchasers and assignees of certain home loans *that is effective immediately*.

Section 404 of the new law amends TILA to require a "creditor" that purchases or takes by assignment a mortgage loan that is secured by the principal dwelling of the consumer to provide the consumer within 30 days after the date on which the sale or assignment occurs a written disclosure notifying the consumer of:

- (i) the identity, address and telephone number of the new creditor;
- (ii) the date of transfer;
- (iii) how to reach an agent or party having authority to act on behalf of the new creditor;
- (iv) the location of the place where transfer of ownership of the debt is recorded; and
- (v) any other relevant information regarding the new creditor.

There are certain aspects of this new disclosure requirement that are unclear or confusing. First, there is no reasonable way for the purchaser or assignee to determine what "other relevant information" regarding the purchaser or assignee needs to be disclosed. Second, "creditor" is defined in Regulation Z to mean a person that regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments and to whom the obligation is initially payable. Since the purchaser or assignee of the home loan will not be the person to whom the obligation is initially payable, it appears that the use of the term "creditor" in Section 404 is misplaced, and it is also unclear whether the "creditor" is intended to be any purchaser or assignee, or only a purchaser or assignee that regularly extends consumer credit that is subject to a finance charge or payable by written agreement in more than four installments.

While Section 404 does not by its terms require new regulations, the Federal Reserve Board has general rulemaking authority under TILA, and a Federal Reserve spokesperson has indicated that the Fed staff will examine the provision and determine whether rules are needed. Rulemaking will likely be necessary to clear up the ambiguities in the new provision, because TILA imposes civil liability on creditors who fail to make the required disclosures. Consumers could also claim that a failure to properly provide the disclosure violates state unfair and deceptive practices laws such as California's, which does not require proof of actual damages in order for injunctive relief or civil penalties to be imposed, but also imposes treble damages in the event that a plaintiff (who could be representing a class) suffers actual damages, potentially subjecting purchasers or assignees of home loans to significant liability.

Since it is unclear when or if the Fed staff will propose rules interpreting the new law, it would seem prudent for all purchasers or assignees of home loans secured by a borrower's principal dwelling to provide the disclosure. While the disclosure is generally simple, the wild card is the requirement that the purchaser or assignee provide "any other relevant information." What might this be? The size of the portfolio of home loans owned by the purchaser or assignee? How likely the purchaser or assignee is to retain ownership of the home loan? Details on litigation to which the purchaser or assignee is subject? There is no way to know, and the relevant information could easily differ from purchaser to purchaser. It would probably be best for each purchaser to discuss this with its counsel.

The Real Estate Settlement Procedures Act and Regulation X have for a number of years required a notice to be provided by both the transferor and transferee servicer when a loan's servicing is transferred. The RESPA disclosure applies to all federally related mortgage loans, not merely loans secured by a borrower's principal dwelling. This means that if servicing is transferred in connection with the purchase or assignment of a home loan secured by the borrower's principal dwelling, both the RESPA disclosure and the new TILA disclosure will be required. If, however, there is no servicing transfer associated with the purchase or assignment of the loan secured by the borrower's principal dwelling, then only the TILA disclosure will be required.

If both the RESPA disclosure and the TILA disclosure are required in connection with a purchase or assignment of a home loan, the purchaser/assignee should consider whether the disclosures should be provided separately or consolidated. The RESPA disclosure must typically be provided within fifteen days after the effective date of the servicing transfer, whereas the TILA disclosure must be provided within thirty days following the sale or assignment; the sale of the loan and the servicing transfer may or may not be concurrent, depending upon the transaction. If the loan sale and servicing transfer are concurrent, and the purchaser/assignee and the new servicer are the same party or affiliated, it would be consumer friendly to consolidate the disclosures. Consolidation can be considered, but may not be practical if the purchaser/assignee and the new servicer are not affiliated.

Finally, in situations where the home loan is being purchased/assigned but servicing is not being transferred, we suggest that the TILA notice state something along the lines of "your loan has been purchased by or assigned to XYZ Corp, but your loan will continue to be serviced by ABC Servicing Company."

If you have questions about any of the foregoing, please call [David Sands](#) at (213) 617-5536 or [Sherwin Root](#) at (213) 617-5465.