

Clients & Friends Memo

Interim Final Rule Interpreting The Helping Families Save Their Homes Act of 2009 Takes Effect

March 5, 2010

Introduction

The Helping Families Save Their Homes Act of 2009 (the “Act”)¹ became effective immediately upon its enactment on May 20, 2009. Section 404(a) of the Act amends the Truth in Lending Act (“TILA”) by adding a new subsection (g) to Section 131 of TILA.² This new subsection requires purchasers or assignees of mortgage loans secured by a mortgagor’s principal dwelling to mail or deliver notice of such sale, transfer or assignment to the mortgagor no later than 30 days after such sale, transfer or assignment.³

The Board of Governors of the Federal Reserve System (the “Board”) promulgated an interim final rule (the “Interim Final Rule”)⁴, effective as of November 20, 2009, to provide interpretive guidance on which purchasers and assignees are covered by the Act, and specifying what disclosures are required to be included in the notices. Although purchasers and assignees of covered mortgage loans have been required to comply with the provisions of the Act since its enactment, compliance with the Interim Final Rule was optional until January 19, 2009. The Interim Final Rule provides helpful interpretive guidance to purchasers and assignees of mortgage loans on complying with the new subsection of TILA. The Board solicited comments on the Interim Final Rule, but there is no assurance that a final rule will ever be promulgated.

¹ Public Law 111-22, 123 Stat. 1632, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ022.111.pdf.

² The new subsection 131(g) of TILA is codified at 15 U.S.C. 1641(g).

³ The definition of “mortgage loan” in Section 404(b) of the Act encompasses both closed-end and open-ended mortgage loans, regardless of lien position.

⁴ The Interim Final Rule amends Regulation Z by implementing Section 131(g) of the Truth in Lending Act. See “Truth in Lending: Interim final rule; request for public comment,” Federal Register 74 (November 20, 2009): 60143 – 60153, available at http://www.federalreserve.gov/reportforms/formsreview/RegZ_20091120_ifr.pdf.

Legislative Intent

TILA protects consumers by requiring creditors to provide certain disclosures about the costs and terms of consumer credit products, including residential mortgage loans. In certain instances, mortgagors are permitted to rescind certain financial transactions related to their principal dwelling. Mortgagors may exercise the right of rescission against assignees and subsequent purchasers of their mortgage loans; however, many mortgagors have been unable to identify or contact the current owner of their mortgage loan. The intent of the amendment to TILA is to facilitate mortgagors' ability to exercise their rescission rights by providing them with the identity of the owner of their mortgage loan and contact information for the owner or their agent.

Notice Required by the Act

The new subsection (g) added to Section 131 of TILA by Section 404(a) of the Act states:

- "(g) NOTICE OF NEW CREDITOR-
- (1) IN GENERAL. –In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including-
- "(A) the identity, address, telephone number of the new creditor;
- "(B) the date of transfer;
- "(C) how to reach an agent or party having authority to act on behalf of the new creditor;
- "(D) the location of the place where transfer of ownership of the debt is recorded; and
- "(E) any other relevant information regarding the new creditor."

Failure to comply with the requirements of this new subsection 131(g) of TILA may result in civil liability for actual damages, legal fees and statutory damages under Section 130(a) of TILA. Class action lawsuits may also result in instances of programmatic failure to comply. TILA imposes caps on class action recoveries and statutory damages, but not actual damages.

The Interim Final Rule Clarifies Notification Requirements

The Interim Final Rule was promulgated in part in response to inquiries from covered persons⁵ seeking interpretative guidance on the Act. With respect to the content of the notices, the Interim Final Rules clarified that:

- the party identified as the owner of a mortgage loan must be the actual owner, regardless of whether another person has been appointed as agent or servicer of the owner;
- if there are multiple covered persons with respect to a mortgage loan, identifying information must be provided for each covered person; however, only one notice is to be given, and the covered persons must determine among themselves which one of them will deliver the notices;
- notices may, but are not required to, include electronic mail addresses and internet website addresses;
- the date of acquisition of a mortgage loan is the date of acquisition recognized in the books and records of the covered person;
- the notice must identify the persons who are authorized to receive legal notices on behalf of the covered person and to resolve issues concerning the mortgagor's payments on the mortgage loan; if there are multiple agents performing these functions, the scope of authority for each agent must be specified;
- contact information is not required to be provided for each agent in the notice itself if the mortgagor can obtain such information by contacting the covered person using the covered person contract information provided; this permits covered persons to use a single form of notice for all mortgage loans they acquire even if they engage different agents or have agents in different regional offices;
- it is sufficient if the covered person provides only a telephone number for agents, if the mortgagor can use the telephone number to obtain the address for the agent;
- in recognition of the fact that transfers of mortgage loans are typically not recorded in public real property records, a covered person may comply with the notice requirements by stating that the transfer is or may be recorded in the office of public land records or the recorder of deeds office for the county or local jurisdiction where the mortgaged property is located; this enables covered

⁵ Covered persons is the term used in the Interim Final Rule to refer to purchasers or assignees of mortgage loans subject to the Act. See below under "Definition of 'Creditor' for the Purposes of the Act."

persons to avoid having to maintain databases of each recording jurisdiction, and assumes that mortgagors can easily identify the recording jurisdiction in which their property is located; and

- covered persons are not required to disclose the location where the covered persons' security interest in the mortgaged property is or may be recorded.

The Interim Final Rule interprets clause (E) of subsection 131(g) of TILA to permit the Board to mandate additional disclosures be included in the notices, but the Board has to date, declined to do so. The Board indicated that it would mandate additional disclosures only after notice and comment. Some covered persons have opted to include in the notices a directive to mortgagors that they should continue paying their mortgage loan at their current address, to avoid mortgagor confusion about where payments should be directed.

Fannie Mae has prepared a template notice⁶ that covered persons may refer to. Other template notices are available from commercial vendors.

Definition of “Creditor” for the Purposes of the Act

The Interim Final Rule clarifies that for the purposes of Section 404(a) of the Act, the term “creditor” refers to the owner of the debt following the sale, transfer or assignment of the debt, without regard to whether that person would be a creditor for other purposes under TILA or Regulation Z.⁷ This means that secondary market investors who acquire mortgage loans are subject to Section 404(a), even if they are not originators of mortgage loans or do not extend consumer credit. Conversely, merely acquiring a mortgage loan triggers the notice requirements of the Act, but does not render the acquirer a “creditor” subject to the other provisions of TILA.

The Interim Final Rule also clarifies that Section 404(a) applies only to persons that acquire more than one consumer mortgage in any 12-month period. This exempts seller financing arrangements and intra-family loans and estate plans from the notice requirements. However, the notice requirements apply to every sale, transfer or assignment from one entity to a separate legal entity, even if they are affiliated entities.

⁶ Available at <https://www.efanniemae.com/sf/guides/ssg/relatedservicinginfo/pdf/sampleownershipnotice.pdf>.

⁷ To avoid confusion between the usage of the definition of creditor generally within TILA, and the Board's interpretation of its intended use in the Act, the Board uses the defined term “covered person” in place of “creditor” in the Interim Final Rule. This memorandum follows that convention, using the term “covered person” to refer to “creditors” as that term is used in Section 404(a) of the Act.

Other Covered Persons Not Required to Give Notice

The Interim Final Rule clarifies that persons who acquire only a beneficial interest in a mortgage loan, or a security interest in a mortgage loan, are not subject to Section 404(a). This exemption excludes warehouse lenders and repurchase financiers, who might otherwise be required to deliver notices. Also exempted are persons who assume credit risk without acquiring legal title to the mortgage loans, which includes investors in pools of mortgage loans and residential mortgaged-backed securities.

In connection with repurchase agreements, where the original creditor or owner of a mortgage loan may sell or transfer legal title to secure financing, and where the creditor is obligated to repurchase the mortgage loan within a short period of time, the acquiring party is obligated to make the required disclosures within 30 days of the date the acquiring party recognizes the acquisition of such mortgage loan on its books and records, which would occur only if the transferor does not repurchase the mortgage loan in accordance with the repurchase agreement and the acquiring party exercises remedies to take ownership of the mortgage loan on its books and records.

The Interim Final Rule also exempts a person servicing a mortgage loan if the obligation was assigned to the servicer solely for the administrative convenience of the servicing in the servicing obligation. This exemption permits servicers to take title to a mortgage loan to facilitate foreclosure or other realization upon the mortgaged property without being subject to the notice requirements.

The Interim Final Rule provides that if a covered person transfers or assigns a mortgage loan to another person on or before the 30th day following the date on which such covered person acquired the mortgage loan, the covered person is exempt from Section 404(a). This exemption is significant for investors in the secondary market, as it permits them to buy and sell mortgage loans on a short-term basis without the added burden of delivering the notices otherwise required by Section 404(a). If more than one covered person owned a mortgage loan in a 30 day period, the Interim Final Rule provides that only one notice may be given, and the covered persons may determine among themselves which one will provide the disclosure. Notices required by successive covered persons may be combined into a single notice, subject to the 30 day requirement. For example, a covered person acquiring a mortgage loan on January 2nd, knowing that it will sell that mortgage loan on February 27th, might deliver the required notice to the mortgagor on January 31st, providing the required information for both persons, and indicating when the subsequent transfer will take place.⁸ These interpretations are designed to alleviate mortgagor confusion that might otherwise result from mortgagors receiving multiple required

⁸ It should be noted that delivering prospective notice of the second transfer can be problematic if the second transfer subsequently fails to occur.

notices within a short period of time, some of which would reference persons that no longer have an ownership interest in their mortgage loan.

Although the Interim Final Rule was effective as of its date of promulgation, to allow covered persons to make any necessary operational changes, compliance was not mandatory until January 19, 2010. The Board sought comment on all aspects of the Interim Final Rule, and specifically invited input on the following topics:⁹

- the appropriateness and scope of the exemption from the notification requirement of a covered persons who transfer or assign their ownership interest in a mortgage loan on or before the date they would have been required to deliver notice;
- the appropriateness and scope of the exemption from the notification requirement by covered persons who are secured parties in financing arrangements or transferees in under repurchase agreements;
- whether limitations should be imposed upon the number of covered persons identified in the notices, and if such limitations would be appropriate and consistent with legislative intent;
- if notices should be required to include both the telephone numbers and addresses of agents of the covered persons;
- if notices should be required to disclose the location where the covered persons record a security interest, if any, and the costs and benefits of requiring such disclosure; and
- if the Board should mandate any additional disclosures.

⁹ The comment period expired on January 19, 2010.

If you have any questions regarding this memo, please contact any Partner in the Capital Markets Department.

Charles E. Bryan	+1 202 862 2212	charlie.bryan@cwt.com
Angus Duncan	+44 (0) 20 7170 8640	angus.duncan@cwt.com
Michael S. Gambro	+1 212 504 6825	michael.gambro@cwt.com
Karen B. Gelernt	+1 212 504 6911	karen.gelernt@cwt.com
Anna H. Glick	+1 212 504 6309	anna.glick@cwt.com
Stuart N. Goldstein	+1 704 348 5258	stuart.goldstein@cwt.com
Gregg S. Jubin	+1 202 862 2485	gregg.jubin@cwt.com
Henry A. LaBrun	+1 704 348 5149	henry.labrun@cwt.com
Robert O. Link	+1 212 504 6172	robert.link@cwt.com
Lisa J. Pauquette	+1 212 504 6298	lisa.pauquette@cwt.com
Frank Polverino	+1 212 504 6820	frank.polverino@cwt.com
Patrick T. Quinn	+1 212 504 6067	pat.quinn@cwt.com
Jeffrey Rotblat	+1 212 504 6401	jeffrey.rotblat@cwt.com
Jordan M. Schwartz	+1 212 504 6136	jordan.schwartz@cwt.com
Robert L. Ughetta	+1 704 348 5141	robert.ughetta@cwt.com
Neil Weidner	+1 212 504 6065	neil.weidner@cwt.com