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Financial Services & Products ADVISORY ■

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These Developments Will Change How Lenders and Servicers Do Business

Over the past two weeks, we have taken note of a few announcements of interest to our lender and servicer clients. We wanted to bring these to your attention, and would be happy to discuss any questions that you may have.

Potential Changes to Federal Appraisal Rules

On December 7, the Office of the Comptroller of the Currency, Federal Reserve System, and Federal Deposit Insurance Corporation published a proposed rule in the *Federal Register* that would increase the threshold level at or below which a residential real-estate-related transaction is not subject to the requirement for the lender to obtain an appraisal of the property to support its decision to enter into a credit transaction.

Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), a federally regulated lending institution must obtain an appraisal for any "real estate-related financial transaction" unless the transaction is one for which the agencies have by rule created an exemption. A real-estate-related financial transaction is:

Any transaction involving –

a. The sale, lease, purchase, investment in or exchange of real property, including interests in real property, or the financing thereof;

b. The refinancing of real property or interests in real property; and

c. The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

The agencies have defined by rule, and set forth in the Interagency Appraisal and Evaluation Guidelines, 12 categories of transactions for which an appraisal is not required, including transactions below a threshold of $250,000 for residential transactions or $400,000 for commercial transactions. For certain exempt transactions, including those below the threshold amount, the lender must obtain an evaluation of the real property collateral that is consistent with safe and sound banking practices to support its decision to enter into the transaction. The agencies' proposal would make the threshold $400,000 for residential transactions, creating consistency.

In addition to increasing the exemption threshold, in the same proposal the agencies also address two related topics: appraisals for rural properties and appraisal reviews. The inclusion of the first topic related to the Regulatory Relief Act, enacted in May, which created an exemption from appraisal requirements for certain transactions involving rural properties; the agencies' proposal would require lenders to obtain evaluations for such transactions. The inclusion of the second topic dates back to the enactment of the Dodd–Frank Act, which mandated the agencies' appraisal regulations to require regulated lenders to ensure that appraisals for federally related transactions are "subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice." Since regulated lending institutions are providing such review pursuant to FIRREA (as amended by the Dodd–Frank Act), the effect of the agencies' proposal would be to further implement this requirement.

Comments on the proposal are due by February 5, 2019.

FDCPA

Last year in *Henson v. Santander Consumer USA Inc.*, the Supreme Court held that defendants seeking to collect debts that they own are not subject to liability under the federal Fair Debt Collection Practices Act (FDCPA). The Court's analysis focused on whether the defendant regularly attempted to collect debts owed or due another. However, under the FDCPA, "any person who uses any instrumentality of interstate commerce or the mails in any ***business the principal purpose of which is the collection of any debts***" is also a debt collector. Unfortunately, the *Henson* Court declined to address the scope of this second prong of the definition of "debt collector."

Recently, however, the Third Circuit became the first court of appeals to address this issue since *Henson*. In *Tepper v. Amos Financial LLC*, the Third Circuit held that "an entity whose principal purpose of business is the collection of any debts is a debt collector regardless whether the entity owns the debts it collects." The *Tepper* Court acknowledged that *Henson*'s repeal of the default test affected the determination of who fits the principal business purpose definition, but found it to be irrelevant if the entity that acquired the debt after default satisfies the plain language of the statute. Because the defendant was solely engaged in the business of collecting debts it had purchased, the court held that the defendant fell squarely within the definition of a "debt collector." Notably, *Tepper* did not address when "some debt collection" becomes the "principal business purpose." Accordingly, a servicer relying on *Henson*—in support of an argument that their activities on loans it owns are not subject to the FDCPA—must now reassess its FDCPA risk in light of the uncertainty created by *Tepper*.

New Washington State Rules for Student Loan Servicers

The Washington Department of Financial Institutions has recently finalized rule amendments to the Washington Consumer Loan Act (CLA), which go into effect on January 1, 2019. The rule amends the CLA (WAC 208-620) to add numerous consumer protections for Washington student education loan borrowers and provides the department with the ability to monitor the activities of the student education loan servicers. In addition to meeting licensing requirements, student loan servicers will be required to, among other things, provide certain information in response to a borrower's request for information and provide notices to borrowers regarding fees and the consequences of refinancing. Student loan servicers will also need to abide by new requirements pertaining to the acquisition, transfer, or sale of servicing rights, in a manner similar to mortgage servicers, with a notice to borrowers before the effective date of the transfer, continuation of the processing of loan modification requests during the transfer process, and retention of records to ensure uninterrupted servicing of repayment plans. Servicers of student loans will need to carefully review all the new requirements, have policies and procedures in place, and be prepared to implement the changes in just three weeks.

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