

WBSK MORTGAGE FINANCE NEWSLETTER

A PUBLICATION OF WEINER BRODSKY SIDMAN KIDER PC

HUD Issues Revised Mortgagee Approval Handbook

HUD published revisions to its Mortgagee Approval Handbook. Signed by the FHA Commissioner on August 14, 2006, Revision 2 of HUD Handbook 4060.1 became available to the public via the Internet (www.hudclips.org) on Monday, August 21, and was effective immediately upon publication.

Of critical importance to FHA approved mortgagees, or to those who wish to seek FHA approved status, is the HUD "clarification" in the revised handbook that all mortgagee employee compensation must be reported on

W-2 forms. HUD did not provide a transition period for the change from 1099 to W-2 reporting.

Additionally, given the expanded lending area authority HUD has extended to approved mortgage branch offices, HUD now has determined that satellite offices are no longer necessary or appropriate. As long as the mortgagee has FHA lending area authority in a given state, by virtue of an approved home or branch office, HUD will allow the mortgagee the discretion to determine where it takes the loan application. Case numbers, of course, may only be obtained through an approved main or branch office, and loan processing and servicing may be conducted only in an FHA approved office.

Additional Handbook changes include "clarification" of the principal activity test for non-supervised mortgagees and loan correspondents. A non-supervised mortgagee must spend a majority of its time and assets in the production of real estate mortgages and in the lending or investment of funds in real estate mortgages, or a directly related field. For FHA purposes, the principal activity of a non-supervised mortgagee, other than one organized as a not-for-profit entity, must contribute at least one-half of the entity's gross revenues, unless otherwise approved by FHA. The revised Handbook further removes the previous requirement for each branch office to have its own branch

Federal Reserve Board Adjusts Dollar Amount for HOEPA "Points and Fees" Test

The Home Ownership and Equity Protection Act of 1994 (HOEPA) creates a class of loans based on APR and points and fees thresholds. HOEPA imposes additional rules and disclosure requirements on lenders in connection with closed-end, non-purchase money home mortgage loans with rates or fees that exceed the thresholds. In addition to an APR threshold, the Truth in Lending Act (TILA), as amended by HOEPA, requires mortgage lenders to comply with the HOEPA rules if the total points and fees payable by the consumer at or before the consummation of the loan exceeds the greater of \$400 or 8 percent of the total loan amount. TILA requires the Federal Reserve Board (the Board) to adjust the \$400 figure annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1. The dollar amount for 2006 is \$528.

On August 14, 2006, the Board published its final rule adjusting the dollar amount contained within the "points and fees" test for loans covered under HOEPA. The adjusted dollar amount for 2007 will be \$547, effective January 1, 2007.

manager and also adds a chapter to the Handbook detailing the application, and the notification and certification requirements under different scenarios of business changes. For example, HUD now spells out the requirements governing notification and prior approval when an approved FHA mortgagee merges with an unapproved entity, or when majority ownership of an approved mortgagee changes.

HUD anticipates issuance of a Mortgagee Letter, within the next 90 days, which would further clarify various changes made in the revised Mortgagee Approval Handbook. In the meantime, mortgagees should periodically check the Frequently Asked Questions (FAQ) section of the FHA Connection, under the “Lender Approval” link. ■

Seventh Circuit Finds No Private Right of Action Under FCRA Section 1681m

And Concludes That Credit Card Offer Is a “Firm Offer” Under FCRA

The United States Circuit Court of Appeals for the Seventh Circuit recently held that Congress intended to eliminate private causes of action to enforce 15 U.S.C. § 1681m of the Fair Credit Reporting Act (“FCRA”) when it enacted the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”). In *Perry v. First National Bank*, the Seventh Circuit affirmed the district court’s finding that the FACTA eliminated the right of individuals to bring

private lawsuits for alleged violations of section 1681m. The Seventh Circuit also concluded that the credit card offer in *Perry* constituted a “firm offer of credit” under the FCRA.

Section 1681m of the FCRA imposes certain duties on users of consumer reports. Among the FACTA amendments is a new subsection, 1681m(h), which imposes requirements on users offering consumers credit terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers. Subsection 1681m(h)(8) states that there is no private right of action for failure to comply with this section. Thus, the Seventh Circuit was faced with the issue whether subsection 1681m(h)(8) was designed to preclude private enforcement of section 1681m as a whole or just subsection 1681m(h). The Seventh Circuit found that the phrase “this section” unambiguously refers to all of section 1681m and, accordingly, that there is no private right of action for the entire section. This decision, while only binding on district courts in the Seventh Circuit, confirms the near unanimous consensus of the district courts nationwide that have examined the issue.

In addition to finding that no private right of action exists under section 1681m, the Seventh Circuit also upheld the district court’s denial of the plaintiff’s motion to amend her complaint to allege that the lender’s credit solicitation was not a “firm offer of credit” under section 1681b of the FCRA. The solicitation offered a minimum credit line of \$250 with an interest rate of 18.9%. The offer was subject to a number of fees, including a \$9 processing fee, an “acceptance” fee of \$119, an annual membership fee of \$50, and a “participation” fee of \$72, which was billed at a rate of \$6 per month. A total of \$175.00 of these

fees would appear on the customer’s first bill.

Citing its prior decision in *Cole v. U.S. Capital, Inc.*, the Seventh Circuit reiterated the factors for determining whether a credit solicitation constitutes a firm offer of credit: (1) whether credit approval is guaranteed; (2) whether the precise rate of credit and other material terms are included in the solicitation; and (3) whether the offer has value to the consumer. Unlike the *Cole* solicitation where the consumer was offered a \$300 line of credit that could only be used towards the purchase of an automobile, the Seventh Circuit found that the *Perry* offer was a firm offer of credit. The offer clearly stated that the consumer was preapproved and identified an interest rate of 18.9 percent. The Court also found that the offer had value inasmuch as “the card can be used to purchase any products or services for which Visa is accepted. This is in stark contrast to the credit offered in *Cole*, which could be used only toward the purchase of a vehicle at a particular car dealership.” The Court rejected the plaintiff’s argument that, given the \$175 in fee charges on the first bill, she was only being offered “\$75 in effective credit.” According to the Court: “We recognize that First National’s credit solicitation requires card holders to pay a significant amount of money in fees, which are quite high in relation to the credit line offered. We realize that this is not an attractive deal for the great majority of consumers. However, the card is not without value. If the credit card holder paid off the card each month, the card would allow him or her to make almost \$3,000 in purchases in one year. The credit card holder would also build up a credit rating, which is useful to individuals who are trying to establish credit for the first time or to reestablish good credit.” ■

States Licensing Update

OHIO -- Issues New Mortgage Broker Act Regulations

Effective September 1, 2006, the Ohio Division of Financial Institutions ("Division") replaces its existing regulations for the Ohio Mortgage Broker Act. The revised regulations significantly update and expand upon the previous regulations, including clarifying which activities constitute licensable activity and expanding existing advertising and recordkeeping requirements. For example, the new regulations clarify that acting as a lead generator, by soliciting personal financial and mortgage information from buyers and providing that information to a mortgage broker for consideration, requires licensure.

Effective September 1, 2006, all Operations Managers of Mortgage Broker Licensees will be required to hold an active Loan Officer License. Any Operations Manager approved as of September 1, 2006 will be issued a Loan Officer License within sixty (60) days of September 1, 2006 at no cost to the Operations Manager. Those individuals will not be required to sit

for the Loan Officer examination.

The regulations also explain the categories in which the status of a license may fall, and clarify that loan officers may only originate mortgage loans for a Mortgage Broker Licensee if they: (1) hold an Active Loan Officer License; or (2) hold an Escrowed Loan Officer License (i.e., a license that has been placed on inactive status at the request of the loan officer or because the loan officer no longer is employed by a Mortgage Broker Licensee), have submitted a Transfer Application to the Division, and the Mortgage Broker Licensee to whom their employment is transferring has received written confirmation from the Superintendent of the Division. The regulations also require licensure for any location that maintains Ohio loan records that otherwise must be maintained by Mortgage Broker Licensees. In addition, the regulations expand advertising-related disclosure requirements for each advertisement distributed by a licensed Mortgage Broker.

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