

# LENDERS UPDATE™

A MONTHLY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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This month we report on major new OCC guidelines for national banks establishing standards for residential mortgage lending practices. We also summarize the Federal Trade Commission's new rules concerning Pre-screen Opt-Out Disclosures.

Our licensing column by Jennifer Dewberry discusses the new **Tennessee** loan originator registration requirements.

We also offer some often repeated warnings about improper faxes or e-mails.

Finally, we report on two developments in **Montana** and **Ohio**.

*The purpose of the Lenders Update is to provide a "heads-up" of new legislation and regulations affecting the mortgage lending industry. We try to provide brief summaries of new matters so our readers can judge whether the subject impacts their operations. We recommend that our readers review the entire new material in detail where relevant. For your convenience, the applicable statute, regulation or cases can be easily identified in the summary. Our Update includes changes in legislation available to Alt & Associates by February 15, 2005*

## FEDERAL ISSUES

### **OCC GUIDELINES FOR RESIDENTIAL MORTGAGE LENDING PRACTICES.**

On February 7, 2005, the Office of the Comptroller of the Currency published in the Federal Register at Vol. 70, No. 024, new guidelines to establish uniform standards for residential mortgage lending. The OCC's stated purpose is to protect against National Banks' involvement in predatory, abusive, unfair or deceptive residential mortgage lending practices. The new standards describe practices inconsistent with sound lending practices as well as other practices which may be conducive to abuse or which require a more heightened degree of care by lenders.

The Guidelines set forth additional steps that banks should take to mitigate risks associated with the purchase of residential mortgage loans and particularly those risks associated with the use of mortgage brokers.

These standards set forth two objectives. First, a bank must be able to effectively manage various risks, including credit, legal, compliance and reputation risks associated with these

activities. Second, the bank must not become involved in abusive, unfair, predatory or deceptive practices, through its own actions, those of mortgage brokers, or other third parties.

Six general principles are listed as guides to achieve the implementation of these objectives:

- Certain practices, such as equity stripping, fee packing, loan flipping and other practices, are recognized as abusive.
- Loan terms, conditions and features, such as financing single premium insurance, negative amortization or mandatory arbitration, may be susceptible to abuse.
- Banks that offer loan programs which may contain some of the above terms or features should take particular account of the circumstances of the consumers to whom the loans are offered.
- Banks should provide timely, sufficient and accurate information to consumers concerning the terms and relative costs, risks and benefits of the loan.
- When a bank deals with consumer residential mortgage loans through purchase or when it makes these loans through a mortgage broker or other intermediary, the bank should take appropriate steps to mitigate its risks. These steps may include establishing criteria for entering into and continuing relationships, setting appropriate controls over mortgage origination functions, and developing and implementing criteria and procedures to take appropriate corrective action if necessary.
- Finally, it is the bank's responsibility to assure that these practices are ongoing. The bank must monitor its compliance with applicable law and with its policies.

The Guidelines will take effect on **April 8, 2005**.

#### **FEDERAL PRESCREEN OPT-OUT DISCLOSURE.**

The Fair and Accurate Credit Transactions Act of 2003, known as FACT, directs the Federal Trade Commission to adopt rules to improve the required notice to consumers regarding their right to opt out of prescreened credit solicitations. This new rule was published on January 31, 2005 in the Federal Register Vol. 70, No. 019. The rule is effective **August 1, 2005**.

Prior to this new regulation, the Fair Credit Reporting Act known as FCRA requires that any person who uses a consumer report in order to make an unsolicited firm offer of credit to the consumer (known as a "prescreened offer"), shall provide with each written solicitation a clear and conspicuous statement that:

- Information contained in the consumer's consumer report was used in connection with the transaction.
- The consumer received the offer of credit because the consumer satisfied the criteria.
- The credit may not be extended if, after the consumer responds, the consumer no longer meets the criteria.
- The consumer has a right to prohibit information contained in the consumer's file from being used in connection with any credit transaction that is not initiated by the consumer.
- The consumer may exercise this last right by utilizing an appropriate notification system.

Now, the new regulation establishes the format, type size and manner of notices to consumers required by the FCRA. The notice must be simple and easy to understand and presented in a

“double layered” format with plain language and the use of clear and concise sentences, paragraphs and sections.

The Prescreen Opt-Out Notice must be included with each written solicitation made to the consumer, providing the consumer with a statement consisting of a short portion and a long portion (the “double layer”) in the format set forth in the regulation which also governs content of the notices, form and type size. We recommend careful review of the new requirements for those using this marketing technique.

### **ANTI-E-MAIL AND ANTI-FAX LAWS**

Perhaps one of the most frequent issues we have dealt with over the last several years is the inappropriate use of facsimile and e-mail solicitations.

Once again, please remember that unsolicited faxes can be extremely dangerous. Federal law prohibits them except in some limited circumstances where there are ongoing business relationships. As we have reported, effective **June 1, 2005**, a new regulation, if it is implemented, will be even more onerous and require a written consent to send faxes. Penalties are severe, up to \$1,500 per fax plus attorney’s fees and costs. There are also risks of class actions. In addition to these provisions, many states have similar laws prohibiting unsolicited faxes. The ramification of violations of federal and/or state law can be severe.

Anti-fax laws seem to be often unknown or ignored. However, perhaps even more unknown, is the fact that many states have anti-spam laws and/or regulations. In California for example, California Business and Professions Code §17529.2 prohibits unsolicited commercial e-mail. “Commercial E-mail” is defined as advertising or promoting a lease, sale, rental or other disposition of property, goods, services, or extensions of credit. An e-mail is unsolicited if it meets two criteria, i) there is no direct consent and ii) there is no current business relationship.

Please be aware of these prohibitions. We believe it is a wise idea to carefully review with competent counsel or compliance officer, any marketing piece whether via facsimile, electronic, telephone, mail or other media to ensure compliance with state and federal law.

## **STATE ISSUES**

### **MONTANA CONSUMER LOAN FEES**

On **December 30, 2004**, the Montana Supreme Court in the case of *Wombold v. Associates Financial Services Company*, 2004 MT 397., held that prepaid finance charges, loan fees and discount points paid on the origination of real estate loans by Consumer Loan Licensees are prohibited by the Montana Consumer Loan Act.

The Plaintiffs argued that points charged by the lender violated the Consumer Loan Act. The Supreme Court upheld the trial court decision that prohibited a licensee, such as Associates Financial, from charging the borrower any cost not specifically authorized by the statute. Associates was authorized to charge any rate of interest the market would bear. However, the Court reasoned that points are not interest. Therefore charging points violated the Consumer Loan Act.

## **OHIO BENEFITS FOR ACTIVE DUTY MILITARY**

On **February 15, 2005** the Governor of Ohio signed HB 426 which had been pending in the Ohio legislature for almost a year.

The statute prohibits a seller in a retail installment contract from charging more than 6% interest annually on contracts with retail buyers who are on active duty. The law also will prohibit the eviction of a tenant who is deployed on active duty. It permits the child of an active duty person to continue to attend school in the district in which the child's parent lived before being called to active military duty, and to permit a child living with an agent of the child's parent, appointed under military power of attorney or comparable document, to attend school in the school district in which the agent resides.

Further, members of the armed forces of the United States will be exempted from any recording fees associated with filing a military power of attorney with the county recorder. Under certain circumstances a tenant or resident who is deployed on active duty or a member of his or her immediate family may receive a stay of proceedings or an adjustment of their rental obligation in any eviction action.

Individual life insurance policies must be continued in force despite non payment of premiums during the insured's period of active duty. Gas or electric companies may not disconnect service to the residential premises of any active duty consumer. Public and private institutions of higher education must grant a military leave of absence to students who are deployed and reinstate those students to the same educational status as before active duty. They must partially refund paid tuition or credit paid tuition to a future academic term.

Finally, a person deployed on active duty may terminate a motor vehicle lease or cellular phone contract under certain circumstances.

## **STATE LICENSING**

### **Licensing Issues by Jennifer Dewberry:**

#### **TENNESSEE LOAN ORIGINATOR REGISTRATION REQUIREMENTS**

Beginning **January 1, 2005**, all mortgage loan originators must be registered by the licensee, or registrant for whom they work, before working in that capacity. Any licensee or registrant ("Licensee") who was licensed before January 1, 2005 and who retained the services of a mortgage loan originator before January 1, 2005 can continue to use the loan originator's services until the Commissioner has acted on the loan originator registration submitted by the Licensee, so long as the loan originator registration form is submitted no later than March 31, 2005.

#### **Definition of a Mortgage Loan Originator**

A mortgage loan originator is defined as an individual who works for one Licensee and is subject to the direct supervision and control of that Licensee and who, in exchange for compensation from that Licensee, performs one or more of the following acts:

- Solicits or offers to solicit mortgage loans for others,
- processes or offers to process mortgage loans for others,
- places or offers to place mortgage loans for others,
- negotiates or offers to negotiate mortgage loans for others,
- originates or offers to originate mortgage loans for others,

OR

- who closes mortgage loans which may be in the mortgage broker's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of such loans,

AND

- who performs any of these acts through contact with the borrower or potential borrower.

Employees of a Licensee whose job responsibilities are limited to clerical tasks or to “back office” tasks engaging solely in underwriting tasks do NOT need to be registered as loan originators.

### **Registration Process**

The registration form is to be completed by the Licensee who uses the loan originator's services and signed by the managing principal of the Licensee. The fee is \$100 per loan originator. Each form has space for up to six loan originators and the forms can be copied as needed. The form requests the loan originator's address, date of birth and social security number and the address of the branch office. The Licensee must designate a Managing Principal for the business and a Branch Manager for each **Tennessee** branch location and must submit Designation forms for each along with the loan originator registration.

Licensees needing to register a large number of originators may do so by submitting an electronic file via disk, in Excel format. Instructions for submitting the information in this way are available on the Tennessee Department of Financial Institutions' website at [www.state.tn.us/financialinst/](http://www.state.tn.us/financialinst/).

Upon approval, a registration certificate will be issued and it must be displayed in the loan originator's office or work station or it can be maintained in a binder so long as there is a sign posted in the office or work station indicating the registration certificates are available for public inspection upon request.

A loan originator **cannot** do business while waiting for a registration certificate to be issued if, the loan originator was retained by a Licensee on or after January 1, 2005. However, if the Licensee was licensed before January 1, 2005 and retained the loan originator before January 1, 2005 and the Licensee submits the registration form within 3 months after January 1, 2005, the loan originator **can** continue to work while the registration is pending.

The registration certificate expires at the same time as the Licensee's license or registrant's certificate of registration expires unless it is renewed. The Licensee must submit the required renewal forms and fee of \$100 per loan originator by December 1 of each year.

### **Additional Requirements**

Loan originators can work for only one Licensee at a time. A loan originator can be paid either as a 1099 employee or a W-2 employee, subject to IRS regulations

When a loan originator changes employers, the Licensee for whom the loan originator has been working, must return the original registration certificate and a completed "Notification of Change of Status" form within fourteen (14) business days after the loan originator stops working for the Licensee. The new Licensee employing the loan originator must apply for a new registration certificate.

There are currently no specific education, experience or continuing education requirements associated with the loan originator registration.

Additional information regarding these new requirements as well as the text of Public Chapter 747 are available on the state's website at <http://www.state.tn.us/financialinst/LOInfo.html>.

## **LEGISLATION EFFECTIVE DATES**

California	AB 2693	November 30, 2004	January 1, 2005	Real Estate Brokers
California	AB 1979	November 30, 2004	January 1, 2005	Variable Interest Rates
California	§10131.8	January 30, 2005	January 1, 2005	Real Estate Brokers
Ohio	HB 426	February 28, 2005	February 15, 2005	Active Duty Benefits
California	AB 2693	November 30, 2004	January 1, 2005	Real Estate Brokers

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**ALT & ASSOCIATES provides regulatory compliance and licensing services, operational advice and transactional assistance as well as litigation representation to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations.**

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