LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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QMs, FAIR LENDING VIOLATIONS?

On October 22, 2013 the CFPB, OCC, FDIC, NCUA and the Federal Reserve, together known as the Joint Agencies, released an "Interagency Statement on Fair Lending Compliance and the Ability-to-Repay and Qualified Mortgage Standards Rule". The press release concerning this statement and the statement in full can be found on all of the websites for these agencies, but perhaps more easily on the CFPB site under News Reports.

As we know, the Ability-To Repay Rule (Rule)requires creditors to make a reasonable, good-faith determination that the consumer has the ability to repay a mortgage loan before extending the consumer any credit. Further, a presumption of compliance with this rule exists for certain mortgages, known as Qualified Mortgages, which are subject to certain restrictions on risky features, upfront points and fees and other factors. However, as the Statement points out there are other ways to satisfy the Rule, including making responsibly underwritten loans that do not meet the criteria of a Qualified Mortgages.

The question addressed is whether a lender, by originating only Qualified Mortgages under the CFPB's Ability-to-Repay and Qualified Mortgage Standards

Rule, violates the Equal Credit Opportunity Act and its implementing regulation, Regulation B under the "disparate impact" doctrine. Generally, this doctrine prohibits not only intentional discrimination, but also extends to the discriminatory effects of conduct by a mortgage lender, even though the lender has no intent to discriminate. The Statement expresses the Agency's position that a creditor's decision to offer only Qualified Mortgages would, absent other factors, not "elevate" an institution's fair lending risk.

The Statement does not set out hard and fast standards which a creditor can follow, but it recognizes that some creditor's existing business models are such that *"...all of the loans they originate will already satisfy the requirements for Qualified Mortgages. For instance, a creditor that has decided to restrict its mortgage lending only to loans that are purchasable on the secondary market might find that-in the current market-its loans are Qualified Mortgages under the transition provision that gives Qualified Mortgage status to most loans that are eligible for purchase, guarantee, or insurance"* by federal agencies. This is not dissimilar to creditors who decided not to offer "higher-priced mortgage loans" after the adoption of various rules for those loans in 2008. No Fair Lending violations generally exist in either case.

Finally, the Statement advises, as we do from our more distant seat, to continue to evaluate fair lending risk. This includes careful monitoring of policies, practices and systems to ensure Fair Lending compliance. We believe, and most would concur, that this should be a regular part of your policies and procedures.

As an aside, the concept of "disparate impact" and whether it applies to mortgage lending, as many appellate courts have found, is currently on the docket of the US Supreme Court in the case known as Township of Mount Holly v. Mt. Holly Garden Citizens Action, Inc. If this case is heard and decided (there is a possibility it may settle first), conservative justices on the court may point us in a whole new direction by saying that the "disparate impact" doctrine does not apply to mortgage lenders.

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