Aldrich & Bonnefin, PLC

CONSUMER LENDING UPDATE

MAY 2016

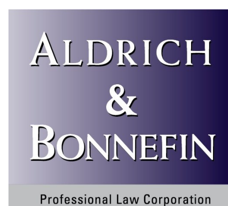
SCRA Foreclosure Protections Extended Once Again

The phrase "better late than never" sometimes seems to be the motto for Congress and the President. Recently, President Obama signed into law Senate Bill S. 2393, the Foreclosure Relief and Extension for Servicemembers Act of 2015 (P.L. 114-142), that revives the one year foreclosure protection provisions under the Servicemembers Civil Relief Act (50 USC 3901 *et seq.*). Under the measure, the 12-month provision is in effect until December 31, 2017.

The SCRA provides certain protections to servicemembers and their dependents. Among other things, Section 3953 addresses obligations that are secured by a mortgage or trust deed on a servicemember's real property. The statute, as originally enacted, permits a court to either stay a proceeding or adjust the obligation to preserve the interests of the parties in an action filed during, or within 90 days following, a servicemember's period of military service. Note that the court's authority is limited to actions pertaining to obligations that were originated before the start of the servicemember's period of military service.

Recall that Congress amended the 90-day period a few times. First, the Housing and Economic Recovery Act of 2008 extend the timeframe from 90 days to nine months following a servicemember's period of military service. Then came the Honoring America's Veterans Act of 2012, which increased the timeframe to 12 months. That 12-month period originally expired in December 2014, but was extended to December 31, 2015 with the enactment of the Foreclosure Relief and Extension for Servicemembers Act of 2014 (not to be confused with the recently enacted 2015 Act of the same name). Thus, on December 31, 2015 the 12-month foreclosure protection period ended and, as a result, beginning in January 2016 the protections from foreclosure, sale or seizure reverted back to apply for a period of only 90 days after the end of the servicemember's military service.

However, the recently enacted Foreclosure Relief and Extension for Servicemembers Act of 2015 (FRESA 2015), has once again reinstated the 12-month provision. Specifically, as a result of the enactment of FRESA 2015, in an action secured by a mortgage, trust deed or other security in the nature of a mortgage on a servicemember's real or personal property, a court may either stay a proceeding or adjust the obligation to preserve the interests of the parties in an action filed during, or within one year after, the servicemember's period of military service. Again, this 12-month foreclosure protection period remains in effect until December 31, 2017. At that point, whether Congress will act to extend the provision or maybe even make it permanent is anyone's guess.



The Banking and Business Law Firm
www.ablawyers.com ■ 949.474.1944
18500 Von Karman Ave., Suite 300, Irvine, California 92612

Authors: Janet M. Bonnefin, Esq. and Robert K. Olsen, Esq.

Follow-up Questions Regarding the Closing Disclosure & Transactions Involving a Seller

We dedicated the April 2016 BCG Monthly Telephone Briefing to frequently asked questions about the TILA-RESPA Integrated Disclosure (TRID) rule. Here are two follow-up questions we promised to address following the Briefing.

Question #1: On April 12, 2016, the CFPB presented an Outlook Live Webinar titled "Know Before You Owe Mortgage Disclosure Rule: Post-Effective Date Questions & Guidance." During that webinar, the CFPB answered the following question: "When a separate disclosure is provided to the seller, is the settlement agent required to provide the creditor with a copy of the seller's Closing Disclosure?" (Emphasis in original.)

The CFPB responded "Yes." First, the CFPB referred to Section 1026.19(f)(4)(iv), which provides that if the creditor and settlement agent provide the consumer's and seller's Closing Disclosures as separate documents, the settlement agent must provide to the creditor a copy of the seller's Closing Disclosure. Thereafter, the CFPB stated that "[t]his also facilitates the creditor's compliance with its record retention requirements under Section 1026.25(c)(1)(ii), which, among other things, requires the creditor to maintain a copy of the seller's Closing Disclosure for five years after consummation and, in the event the mortgage loan is sold or transferred, to include the seller's Closing Disclosure as part of the loan file to the new owner or servicer."

Question #2: Please confirm the CFPB's response to the following question during the same Outlook Live Webinar: "When separate disclosures are provided to the consumer and the seller, must seller-paid real estate commissions be included on page 2 of the consumer's Closing Disclosure?"

The CFPB also responded "Yes" to this question. We would summarize the CFPB's rationale as follows. Even if the Closing Disclosure to the seller and borrower will be separate disclosures, "loan costs and other costs paid by the seller may not be omitted from the consumer's Closing Disclosure and, therefore, must be included." (Emphasis added.) This includes seller-paid real estate commissions, which must be disclosed in Section H.–Other (in the Other Costs table). Comment 38(g)(4)-1.

Clarification Regarding HMDA-Covered Transactions

Question: Under the amendments to Regulation C (HMDA) that become effective on January 1, 2018, is the following loan reportable: a closed-end mortgage secured by a dwelling the borrower owns free and clear to provide cash out for non-specific purposes?

Answer: Yes, unless the institution could demonstrate that the non-specific purposes were a primarily business or commercial purpose. Under the Regulation C amendments, assuming the lender is a HMDA-covered institution, it generally must report all "covered loans." A "covered loan" means a closed-end mortgage loan or open-end line of credit, unless excluded by Section 1003.3(c) of the regulation. The term "closed-end mortgage" means an extension of credit that is secured by a dwelling, but not including open-end (revolving) credit. There is no longer any "purpose" test in the definition of a covered loan. Thus, effective January 1, 2018, almost any loan that is secured by a dwelling is potentially HMDA reportable unless expressly excepted. There are a number of exceptions in Section 1003.3(c) of the regulation but none for the type of loan asked about an equity loan.

Only if the loan was for a primarily business purpose would it be excepted. New Section 1003.3(c)(10) excludes a loan made primarily for a business or commercial purpose from HMDA reporting, unless the loan meets the definition of a "home purchase loan," "home improvement loan" or "refinancing" under Regulation C. If a business-purpose loan qualifies as a home purchase, home improvement or refinancing, then the loan will be reportable come January 1, 2018. On the facts given, the loan did not refinance another loan (the definition of a refinancing is a loan that satisfies and replaces an existing dwelling-secured loan by the same borrower), nor is it for the purpose of purchasing or improving a dwelling (the stated purpose of the loan was non-specific). Thus, if the loan was for a primarily business purpose (but not for home purchase or home improvement), it would not be reportable.

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