A New Era of Mortgage Reform

Part II: Legislation—Reactive or Proactive

By Jonathan Foxx

"This great Nation will endure as it has endured, will revive and will prosper. So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance. In every dark hour of our national life a leadership of frankness and vigor has met with that understanding and support of the people themselves which is essential to victory."
—Franklin D. Roosevelt, First Inaugural Address (1933)[1]

We are now living in a time when fear stalks the land. It's impossible not to notice its insidious maneuverings in many areas of everyday life. Fear of losing a job. Fear of losing a home. Fear of losing a pension. Fear of losing stock equity value. Fear of devalued or depleted savings. Fear of losing health insurance. Fear of inflation and fear of deflation. Fear of certain religions. Fear of a terrorist attack. Fear of rising education costs and tuition. Fear of continued political gridlock. Fear of disintermediation. Fear of a continuing credit freeze. Fear of reduced Social Security and Medicare benefits. Fear of the impact of climate change. Fear of decaying infrastructure. Fear of socialism, as well as crony capitalism. Fear of more wars. Fear of jobs being sent overseas. Fear of another financial meltdown. Fear of government intervention and fear of government non-intervention. Fear of burdensome federal regulations. And fear of bedrock industries and whole company towns becoming permanently decimated by recessionary pressures.

In such a political and economic environment, our politicians seek to calm our fears by providing salvific ways and means, promising various kinds of safety, certainty and stability. The way of the politician is the way of legislating laws and their implementing regulations—through more regulation or, occasionally, less regulation. Politicians rarely get involved in politics to preserve the status quo. They seek public office in order to bring about change. We hope for prescience from our politicians. Voters are rarely interested in keeping things just the way they are; most of the time, voters represent special interests that compete with one another for access to the levers of political power.

But groups weakened in the midst of a fearful polity are also weakened at the ballot box and have less clout with lobbyists. Industry associations that may have once been able in a strong economy to support bold lobbying initiatives, expecting politicians to respond to their interests, lose membership in a declining economy, where fear often gains traction; and, because of that reduced membership, the money needed to protect the group through mounting political campaigns and successful lobbying efforts is drastically reduced.

Our industry, the mortgage industry, has been weakened. Mortgage originators are not exempt from the impact of huge political forces that either foster or succumb to fear. In the wake of the recent financial collapse, the mortgage industry finds itself today faced with a blizzard of new regulations. There are reformist politicians who advocate for these new regulations, giving forth apologies that rival the reasoning of the most eloquent, ancient rhetoricians; and, there are politicians who condemn these same, new regulations, proclaiming that the prior existing regulations should have been (but were not) enforced, and that interposing new regulations in a deteriorating economy only adds to the industry's already hefty and costly regulatory burden. Both sides have had their say and their vote; and, this time, the reformists have made the law, consisting of 2,319 pages, covering a vast stretch of financial regulatory requirements.

The "Wall Street Reform and Consumer Protection Act," known as the "Dodd-Frank Act" (Act), is the federal government's response to the financial collapse, offering financial reform of the financial system in general, and to the mortgage industry in particular.[2] It has been legislated into law at a time when fear pervades politics and the economic climate continues to worsen, with high unemployment, an eroding tax base, a swelling budget deficit, trillions of dollars in debt, and increasingly compressed corporate profit margins. The Act hopes to provide that salvific safety, certainty and stability that will calm our fears. But it is legislation that reacts to events past, and it is not necessarily proactive about possible events that may yet transpire. Financial bubbles, after all, exist due to the blindness of market participants, not their foresight.

The Act, signed into law by President Barack Obama on July 21, 2010, is a federal statute that principally intends to legislate the presumed ways to avoid future systemic failures in the country's financial infrastructure. Importantly, it seeks to provide new regulations that will protect consumers in the financial marketplace—and especially the mortgage marketplace—through the creation of a new bureaucracy within the Treasury, to be called the Bureau of Consumer Financial Protection (Bureau).[3] At least 16 consumer protection laws will be affected or transferred to the Bureau, including the Alternative Mortgage Transaction Parity Act (AMTPA), Community Reinvestment Act (CRA), Consumer Leasing Act (CLA), Electronic Funds Transfer Act (EFTA), Equal Credit Opportunity Act (ECOA), Fair Credit Billing Act (FCBA), Fair Credit Reporting Act (except with respect to sections 615(e), 624 and 628) (FCRA), Fair Debt Collection Practices Act (FDCPA), Federal Deposit Insurance Act, subsections 43(c) through 43(f)(12) (FDIA) Gramm-Leach-Bliley Act, sections 502 through 509 (GLBA), Home Mortgage Disclosure Act (HMDA), Home Ownership and Equity Protection Act (HOEPA), Real Estate Settlement Procedures Act (RESPA), SAFE Mortgage Licensing Act (SAFE Act), Truth-in-Lending Act (TILA), and Truth-in-Savings Act (TISA).[4]

In the previous article in this three-part series, I outlined the mortgage loan regulatory provisions of the Act.[5] As I wrote in that article, this series on the Dodd-Frank Act is meant to provide an overview. However, the legislation is extremely detailed and extensive. Therefore, for guidance and risk management support, I strongly recommend that you consult a residential mortgage compliance professional or regulatory counsel to develop policies and procedures to implement the Act's requirements.

In this article, I will summarize certain salient aspects of the Mortgage Reform and Predatory Lending Act (Mortgage Reform Act).[6] It is a primary component of the Act and requires careful review and analysis in order to implement properly. And, in the third and final article we'll consider the new Bureau of Consumer Financial Protection and offer some observations on how the many features of the Act may affect the mortgage industry's prospects.

Mortgage Reform and Predatory Lending Act

"Restoration calls, however, not for changes in ethics alone. This Nation asks for action, and action now."
—Franklin D. Roosevelt, First Inaugural Address (1933)[7]

The following matrix provides a brief overview of the Mortgage Reform and Predatory Lending Act, with respect to the minimum standards for mortgages.[8]

Mortgage Reform and Predatory Lending Act
Title XIV of the Dodd-Frank Act
Minimum Standards for Mortgages

- Ability to Repay
- Safe Harbor and Rebuttable Presumption
- Defense to Foreclosure
- Prepayment Penalties
- Single Payment Credit Insurance
- Arbitration Agreements
- Negative Amortization Loans
- Anti-Deficiency Protections
- Partial Payments
- Increase to Civil Liability Provisions
- Lender Rights for Borrower Deception
- Hybrid Adjustable Rate Mortgages
- Required Disclosures at Consummation
- Required Monthly Statements
- Government Accounting Office Report

There has been some concern relating to the effective compliance date of the Mortgage Reform Act's requirements. The Bureau will be implementing the Mortgage Reform Act and receiving the authorities from the Truth-in-Lending Act and other statutes (see above). The Bureau will be charged with finalizing the provisions of the Mortgage Reform Act within 18 months of the designated date of transfer of authorities of the enumerated laws (see above). The regulatory implementation, once promulgated in final form, will become effective within 12 months.

Because the Mortgage Reform Act does not have an effective date, the Act itself becomes the operative date for certain provisions that will not be included in the above-described rulemaking process and timeframe. This means that certain provisions are effective one day after July 21, 2010—the advent date of the law.[9] Amongst those affected provisions are the implementation of revisions to a mortgage originator's compensation, limits to prepayment penalties, HOEPA's high cost triggers, required disclosures at consummation and single-payment credit insurance.[10]

Mortgage Reform Act—Certain provisions

Ability to repay

With the exception of reverse mortgages or temporary or bridge loans with 12 months or less remaining in amortization—including any loan to purchase a new dwelling where the consumer plans to sell a different dwelling within 12 months—certain requirements will be implemented on residential mortgage loans (on an amortized basis). Borrower payment ability is derived through a "reasonable and good faith determination, based on verified and documented information."

Basis for Determination

Lenders must consider the following criteria in determining payment ability:

- Credit history
- Current income[11]
- Expected income the consumer is reasonably assured of receiving
- Current obligations
- Debt to income ratio or residual income the consumer will have after paying non-mortgage debit and mortgage-related obligations
- Employment status
- Other financial resource other than the consumer's equity in the dwelling or real property that secures payment of the loan

If the creditor plans on making more than one loan secured by the same residence, then payment ability must be made using the combined payments of all such loans, utilizing a "reasonable and good faith determination."

Verification of income

Income verification is based on:

- Internal Revenue Service Form W-2
- Tax returns
- Payroll receipts
- Financial institution records, or
- Other third-party documents that provide reasonably reliable evidence of the consumer's income or assets

Exemption

There is an exemption for a streamlined refinance made, guaranteed or insured by federal departments or agencies from the income verification requirement, provided:

1. The consumer is not more than 30 days past due on the prior existing loan.
2. The refinancing does not increase the balance of the prior existing loan, other than permissible fees and charges related to the loan product itself.
3. Total points and fees do not exceed three percent of the total new loan amount, other than bona fide third-party fees not retained by the mortgage originator.
4. The interest rate on the refinanced loan is lower than the interest rate of the original loan, unless the borrower is refinancing from an adjustable rate to a fixed-rate loan, under guidelines that the department or agency shall establish for loans they make, guarantee or issue.
5. The mortgage is fully amortizing.
6. Loan terms do not permit a balloon payment.
7. Both the loan being refinanced and the refinancing satisfy all requirements of the department or agency making, guaranteeing, or insuring the refinancing.

Non-standard loans

Repayment determination for a category called Non-Standard Loans. The following are the grouped into this category along with their respective amortizing and schedule parameters:

- **Variable Rate Loans** that defer repayment of any principal or interest:
  - Repayment Ability: Based on a fully amortizing repayment schedule.
- **Interest-Only Loans**
  - Repayment Ability: Based on the payment amount required to amortize the loan by its final maturity.
- **Negative Amortization—Calculation**
  - Repayment Ability: Based on any balance increase that may accrue from any negative amortization provision.
- **Calculating Payment of Principal and Interest—Assumptions**
  - Proceeds are fully disbursed on the date of the consummation of the loan.
  - The loan is to be repaid in substantially equal monthly amortizing payments for principal and interest over the entire term of the loan with no balloon payment, unless the loan contract requires more rapid repayment (including balloon payment), in which case the calculation must be made in accordance with prescribed regulations.[12]
  - The interest rate over the life of the loan is a fixed rate equal to the fully indexed rate at the time of the loan closing, without considering the introductory rate.[13]
- **Hybrid Loans Refinanced With Current Lender**
  - Converting a hybrid loan into to a standard loan to be made by the same creditor in any case in which there would be the (a) reduction in monthly payment and (b) the mortgagor has not been delinquent on any payment on the existing hybrid loan:
    - Repayment Ability based on:
      a) Mortgagor's good standing on the existing mortgage.
      b) If the extension of new credit would prevent a likely default should the original mortgage reset and give such concerns a higher priority as an acceptable underwriting practice.
      c) Offer rate discounts and other favorable terms to such mortgagor that would be available to new customers with high credit ratings based on such underwriting practice.

Safe harbor and rebuttable presumption

Lenders may presume to have a "safe harbor" where such loans have satisfied the ability to repay criteria summarized above. These loans are called "qualified mortgages" and meet specific requirements. The ability to repay presumption is based on using certain, defined parameters. The "safe harbor" provisions may change from time to time for qualified mortgages if the Federal Reserve Board (Board) finds that such revised regulations are "necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers."[14]

Qualified mortgages

The following criteria define the "qualified mortgage," as a residential mortgage loan for which:

- The regular periodic payments for the loan may not result in an increase of the principal balance or allow the consumer to defer repayment of principal.[15]
- The terms do not result in a balloon payment, where a "balloon payment" is a scheduled payment that is more than twice as large as the average of earlier scheduled payments.[16]
- The income and financial resources relied upon to qualify the obligors on the loan are verified and documented.
- In the case of a fixed rate loan, the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments.
- In the case of an adjustable rate loan, the underwriting is based on the maximum rate permitted under the loan during the first five years, and a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments.
- Compliance with any guidelines or regulations is required by the Federal Reserve Board relating to ratios (i.e., debt-to-income), other ability to repay standards.
- The total points and fees payable in connection with the loan do not exceed three percent of the total loan amount.[17]

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- The term of the loan does not exceed 30 years, except as such term may be extended by the guaranteeing or insuring federal departments or agencies (i.e., high-cost areas), and

- In the case of a reverse mortgage (except where an exemption applies, as indicated above), a reverse mortgage which meets the standards for a qualified mortgage.

Points and fees
Other than bona-fide third-party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, total points and fees are those points and fees payable in connection with the loan.

- **Calculation:** Points and fees exclude either of the amounts described in the following scenarios, but not both:
  - **Scenario # 1:** Up to and including two bona-fide discount points payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than one percentage point the average prime offer rate.[18]
  - **Scenario # 2:** Unless two bona-fide discount points have been excluded under Scenario # 1, up to and including one bona-fide discount point payable by the consumer in connection with the mortgage, but only if the interest rate from which the mortgage's interest rate will be discounted does not exceed by more than two percentage points the average prime offer rate.

- **Bona Fide Discount Points:** Loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.

- **Interest Rate Reduction:** Scenario # 1 and Scenario # 2 (see above) do not apply to discount points used to purchase an interest rate reduction, unless the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary mortgage market transactions.

- **Smaller Loans:** For lenders that extend smaller loans to meet the requirements of the presumption, the Board will consider the potential impact of such rules on rural areas and other areas where home values are lower.

- **Balloon Loans:** The term "qualified mortgage" includes a balloon loan:
  - Meeting all of the criteria for a qualified mortgage (see above);
  - For which the lender makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral;
  - For which the underwriting is based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance, and assessments; and
  - That is extended by a lender which:
    - Operates predominantly in rural or underserved areas;
    - Together with all affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Board;
    - Retains the balloon loans in portfolio; and
    - Meets any asset size threshold and any other criteria as the Board may establish, consistent with the purposes of this subtitle.

Defense to foreclosure

The Mortgage Reform Act amends the Truth-in-Lending Act (TILA)[19] by adding a new section entitled "Defense of Foreclosure." Pursuant to this section of TILA, a consumer now may assert a defense of recoupment[20] claim for violations when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or non-judicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan. Areas that provide additional protection to consumers include "steering" violations and the failure to properly determine the borrower's ability to repay. Also, a set off is now provided without regard for the time limit on a private action for damages.[21]

The amount of recoupment or set off is equal to the amount which the consumer would be entitled for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.[22]

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Prepayment penalties

A lender may not charge a prepayment penalty for a residential mortgage loan, if it meets any one of the following criteria:

- ❖ Has an adjustable rate; or
- ❖ Has an annual percentage rate (APR) that exceeds the average prime offer rate (APOR) for a comparable transaction, as of the date the interest rate is set:
  - First lien loans (1) with principal amounts at or below limits set by Freddie Mac, the APR is more than 1.5 points above the APOR for comparable transactions, as published by the Board; (2) with principal amounts above limits set by Freddie Mac, the APR is more than 2.5 points above the APOR.
  - Second lien loans the APR is more than 3.5 points above the APOR.

Restrictions

❖ During the first year period beginning on the date the loan is consummated, the prepayment penalty may not exceed an amount equal to three percent of the outstanding balance on the loan.

❖ In the second year from the date the loan is consummated, the prepayment penalty may not exceed an amount equal to two percent of the outstanding balance on the loan.

❖ In the third year from the date the loan is consummated, the prepayment penalty may not exceed an amount equal to one percent of the outstanding balance on the loan.

❖ After the end of the three-year period beginning on the date the loan is consummated, no prepayment penalty may be imposed on a qualified mortgage.

Required to provide alternative financing

❖ A lender may not offer a consumer a residential mortgage loan product that has a prepayment penalty without offering the consumer a residential mortgage loan product that does not have a prepayment penalty as a term of the loan.

Single payment credit insurance

Prohibition and exceptions

Prohibition: Lenders may not finance,[23] directly or indirectly, any credit life, credit disability, credit unemployment, or credit property insurance, or any other accident, loss-of-income, life or health insurance, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract.

Exceptions: (1) Insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis that are not considered financed by the creditor; and,
(2) Credit unemployment insurance for which the unemployment insurance premiums are reasonable, the lender receives no direct or indirect compensation in connection with the unemployment insurance premiums, and the unemployment insurance premiums are paid pursuant to another insurance contract (i.e., third-party) and not paid to an affiliate of the creditor.

Arbitration agreements

Prohibition: Lenders are not permitted to have arbitration provisions or any other non-judicial procedure in mortgage contracts as the method for resolving any controversy or settling any claims arising out of the mortgage transaction.[24] At any time after a dispute or claim has arisen under the transaction arises, however, the consumer and the creditor or any assignee may agree to arbitration or any other non-judicial procedure as the method for resolving any controversy.

Statutory Cause of Action—No Wavier: Lenders are not permitted to have provisions in mortgage contracts that may apply to or be interpreted so as to bar a consumer from bringing an action in an appropriate district court (i.e., federal court) of the United States, or any other court of competent jurisdiction, for damages or other relief in connection with any alleged violation of the Mortgage Reform Act or any other federal law.

Negative amortization loans

Lenders may not offer negative amortization loans on residential mortgages and HELOCs, excluding reverse mortgages, unless prior to the consummation the lender provides the consumer with a statement that:

- ❖ The pending transaction will or may, as the case may be, result in negative amortization;
- ❖ Describes negative amortization in the manner required by the Board;
- ❖ Negative amortization increases the outstanding principal balance of the account; and
- ❖ Negative amortization reduces the consumer's equity in the dwelling or real property.

Counseling

If the transaction is not a "qualified mortgage" (see Safe Harbor and Rebuttable Presumption section for definition) and the consumer is a first-time borrower, the consumer must provide the lender with "sufficient documentation" to demonstrate that homeownership counseling was completed by the consumer.[25]

Anti-deficiency protections

An "anti-deficiency law" is a state law which provides that, in the event of foreclosure the consumer is not liable, in accordance with the terms and limitations of that state's law, for any deficiency between the sale price obtained through foreclosure and the outstanding balance of the mortgage. The Mortgage Reform Act provides protection to the consumer with respect to actions taken by the lender that are subject to anti-deficiency laws. In this regards, the creditor or mortgage originator must provide a written notice to the consumer describing the protection provided by the anti-deficiency law and the "significance for the consumer of the loss of such protection" before the loan is consummated. Therefore, prior to consummating a refinance, notification to the consumer that refinancing would cause loss of protection must be provided.

Partial payments

TILA has been further amended[26] to require a creditor or an entity "becoming a creditor" to notify the consumer about the creditor's policy regarding the acceptance of partial payments, and, if partial payments are accepted, how such payments (1) will be applied to the mortgage, and (2) if such payments will be placed in escrow.

Increase to civil liability provisions

Private rights of action brought under TILA have been extended with respect to statutory damages, as follows:

- Transaction: not less than $200 or more than $2,000
- Class Action: the lesser of $1 million or one percent of the creditor's net worth. Claims may be brought in any United States district court (i.e., federal court), or in any other court of competent jurisdiction, before the end of the three-year period beginning on the date of the occurrence of the violation.[27]

Lender rights for borrower deception

There is now an exemption from liability and rescission where borrower fraud or deception has taken place in the transaction: No creditor or assignee will be liable to an obligor, if such obligor or co-obligor has been convicted of obtaining the mortgage through actual fraud. Of course, the lender may have additional remedies available by law or contract.

Hybrid adjustable-rate mortgages

A hybrid adjustable-rate mortgage (H-ARM) has a fixed interest rate for an introductory period that adjusts or resets to a variable interest rate after such period. The Board reserves the right to issue additional disclosure regulations for adjustable rate mortgages other than H-ARMs.

New consumer notification requirements must be provided that state the reset terms and alternatives, as follows:

- **Reset:** During the one-month period that ends six months before the date on which the interest rate in effect during the introductory period of the H-ARM adjusts or resets to a variable interest rate or, in the case of such an adjustment or resetting that occurs within the first six months after consummation, at the consummation the creditor or servicer of the H-ARM must provide a written notice, separate and distinct from all other correspondence to the consumer, with this information:
  - **Index:** The index or formula used in making adjustments to or resetting the interest rate and a source of information about the index or formula.
  - **Calculation:** An explanation of how the new interest rate and payment would be determined, including an explanation of how the index was adjusted, such as by the addition of a margin.
  - **Good Faith Estimate (GFE):** A GFE based on accepted industry standards, provided by the creditor or servicer, which states the amount of the monthly payment to be applied after the date of the adjustment or reset, and the assumptions on which this estimate is based.

- **Alternatives:** A list of alternatives consumers may pursue before the date of adjustment or reset, and descriptions of the actions available to consumers, including:
  - Refinancing
  - Renegotiation of loan terms
  - Payment forbearances
  - Pre-foreclosure sales

- **Contact Information:** Counseling agencies or programs, and state housing finance authority.

Required disclosures at consummation

Prior to consummation, new disclosures are required.

- **Variable (Adjustable) Rate—Disclosure:**
  - The amount of the initial monthly payment of principal and interest, and the amount of such initial monthly payment including the escrows.[28] Also, the amount of the fully indexed monthly payment of principal and interest, and the amount of such fully indexed monthly payment including the escrows.

- **Settlement Charges:** The aggregate amount of settlement charges, the amount of charges included in the loan, the amount of such charges the borrower must pay at closing, the approximate amount of the wholesale rate of funds in connection with the loan, and the aggregate amount of other fees or required payments in connection with the loan.

- **Fees Paid:** The aggregate amount of fees paid to the mortgage originator in connection with the loan, the amount of such fees paid directly by the consumer, and any additional amount received by the originator from the creditor.

- **Total Interest:** The total amount of interest that the consumer will pay over the life of the loan as a percentage of the principal of the loan.

Required monthly statements

There has been an amendment to TILA regarding monthly billing statements.[29] The Board reserves the right to issue additional disclosure regulations. For each billing cycle, a statement must be provided to the borrower that provides the following:

- Amount of the principal obligation under the mortgage.
- Current interest rate in effect for the loan.
- Date on which the interest rate may next reset or adjust.
- Amount of any prepayment fee to be charged, if any.
- Description of any late payment fees.
- Telephone number and electronic mail address that may be used by the obligor to obtain information regarding the mortgage.
- Contact Information: counseling agencies or programs, and state housing finance authority.

Exception: A fixed-rate residential mortgage loan where the creditor, assignee or servicer issues a coupon book to the obligor that contains substantially the same information as indicated above.

Report to the GAO

Before the end of the one-year period beginning on the date of the enactment, the Comptroller General of the United States will conduct a study to determine the effects of the Mortgage Reform Act on the availability and affordability of credit for consumers. The report will produce findings for the mortgage market for mortgages that are not within the safe harbor (discussed above); on the ability of prospective homebuyers to obtain financing; on the ability of homeowners facing resets or adjustments to refinance; on minorities' ability to access affordable credit compared with other prospective borrowers; and, on home sales and construction. The report will also contain findings and conclusions regarding the extending of the rescission right, if any, on adjustable rate loans and its impact on litigation; state foreclosure laws and, if any, an investor's ability to transfer a property after foreclosure; expanding the existing provisions of the Home Ownership and Equity Protection Act of 1994 (HOEPA); prohibiting prepayment penalties on high-cost mortgages; and, establishing counseling services under the Department of Housing and Urban Development and offered through the Office of Housing Counseling.

Meeting the challenge

"Finally, in our progress toward a resumption of work we require two safeguards against a return of the evils of the old order; there must be a strict supervision of all banking and credits and investments; there must be an end to speculation with other people's money, and there must be provision for an adequate but sound currency."

—Franklin D. Roosevelt, First Inaugural Address (1933)[30]

We have now come to the end of the second part in this three-part series about mortgage reform. Due to this financial reform legislation, over the next few years (and beyond) the way we will originate mortgages will markedly change, our assumptions will be challenged, and the financial considerations we bring to our work will be transformed.

Many new guidelines yet to be promulgated await future interpretation and implementation. Litigation will inevitably ensue, individual and class action, come what may.

A new Bureau of Consumer Financial Protection will soon become the center of our focus; its leadership, structure, and rulemaking will determine our mortgage origination processes and market actions.[31] In the next and final article, I will summarize the features of this Bureau and discuss how the fulfilling of its legislated purpose will change and inform the mortgage industry. The country's economic stability is inherently linked to the health of the mortgage industry. In due course, we will know if this mortgage reform contributes to its long term well-being.

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Footnotes

1—Franklin D. Roosevelt, Inaugural Address, March 4, 1933, as published in Samuel Rosenman, ed., The Public Papers of Franklin D. Roosevelt, Volume Two: The Year of Crisis, 1933 (New York: Random House, 1938), 11–16.

2—HR 4173: Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Congress (2009-2010): "A bill to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to

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fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." Sponsored by Representative Barney Frank (D-MA) and Senator Christopher Dodd (D-CT).

3—Foxx, Jonathan, "The Birth of an Agency," *National Mortgage Professional Magazine*, September 2009, Volume 1, Issue 5, pp. 4-27. This article provides a chart that outlines the Bureau's structure and authorities.

4—Foxx, Jonathan, "he CFPA Controversy: Asking the Tough Questions," *National Mortgage Professional Magazine*, October 2009, Volume 1, Issue 6, pp.22-25.

5—Foxx, Jonathan, "Landmark Financial Legislation: New Rules for Mortgage Originators—Part I: Reformation and Regulations," *National Mortgage Professional Magazine*, August 2010, Volume 2, Issue 8, pp. 28-42.

6—My analysis will not address the Act's new regime for national bank federal preemption in the area of state consumer financial laws, or, for that matter, the new framework for determining the states' enforcement powers against financial services companies.

7—Op. cit 1.

8—Op. cit. 2, the matrix and subsequent outline of the Mortgage Reform Act—Certain Provisions are based on Title XIV, Subtitle B (Minimum Standards for Mortgages), Subsections 1411-1422.

9—Op. cit. 2, Section 4: Effective Date, states: "Except as specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect one day after the date of enactment of this Act."

10—Op. cit. 5.

11—Seasonal income may be used, including income from a small business, considering the seasonality and irregularity of such income in the underwriting and the scheduling of payments.

12—Accordingly, with respect to any loan which has an annual percentage rate (APR) that does not exceed the average prime offer rate (APOR) for a comparable transaction, as of the date the interest rate is set, by 1.5 or more percentage points for a first loan; and by 3.5 or more percentage points for a subordinate loan; or, using the contract's repayment schedule, with respect to a loan which has an APR, as of the date the interest rate is set, at least 1.5 percentage points above the APOR for a first lien residential mortgage loan; and 3.5 percentage points above the APOR for a subordinate loan.

13—The term "fully-indexed rate" means the index rate prevailing on a residential mortgage loan at the time the loan is made plus the margin that will apply after the expiration of any introductory interest rates.

14—Op. cit. 2, Title XIV, Subtitle B (Minimum Standards for Mortgages), Subsections 1412 (3)(B)(i).

15—Except as provided by the Mortgage Reform Act's requirements for balloon mortgages.

16—Except as provided by the Mortgage Reform Act's requirements for balloon mortgages.

17—Other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator, total points and fees payable in connection with the refinancing may not exceed three percent of the total new loan amount.

18—The term "average prime offer rate" (APOR) means the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Federal Reserve Board.

19—Section 130 of the Truth in Lending Act (15 U.S.C. 1640).

20—The term "recoupment" generally refers to an affirmative defense that may be asserted by a defendant whose claim is based upon the same transaction that is the subject of the plaintiff's suit.

21—The term "set off" has been judicially defined as "a claim arising out of a completely independent and unrelated transaction," which is asserted to offset liability for another claim [Atlantic City Hasp. v. Finkle, 110 N.J., 1970].

22—The statute of limitations for private right of action for such violations of TILA does not apply to such recoupment defenses.

23—The prohibition applies to any residential mortgage loan or with any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer (i.e., HELOC).

24—The prohibition applies to any residential mortgage loan or with any extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer (i.e., HELOC).

25—Homeownership counseling is acceptable from organizations or counselors certified by the Secretary of U.S. Department of Housing & Urban Development (HUD) as competent to provide such counseling.

26—Section 129C of the Truth-in-Lending Act.

27—The statute of limitations extension is provided for any violation of 15 U.S.C. § 1639 or the newly created Section 129B and 129C of TILA.

28—All applicable taxes, insurance, and assessments.

29—Section 128 of the Truth in Lending Act (15 U.S.C. 1638).

30—Op. cit 1.

31—For more information about the Bureau of Consumer Financial Protection, please see my articles, referenced above: The Birth of an Agency; The CFPA Controversy: Asking the Tough Questions; and, Landmark Financial Legislation: New Rules for Mortgage Originators—Part I: Reformation and Regulations (Op. cit 3, 4, 5).