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## Consumers Clog Courts with Codified Care Claims

The title of this Alert is a prediction of what might come to pass if Congress enacts recently proposed legislation that seeks to expand and codify the common-law concepts of negligence and duty of care and apply them to mortgage lenders and mortgage brokers. Imagine a world where borrowers could seek to rescind a loan and obtain substantial money damages merely because in retrospect they thought they deserved a better deal or felt they were disrespected in the loan-origination process. That is the very real fear of lenders and the capital markets who have read closely the proposed federal legislation and regulations.

Responding to the subprime mortgage crisis and a perceived increase in predatory lending, Congress is considering legislation, and the Federal Reserve Board (the “Board”) has proposed amendments to Regulation Z, that would impose new duties on mortgage lenders.<sup>1</sup> Under the common law, courts have been reluctant to impose a duty of care or fiduciary duty on mortgage lenders beyond the duty to make the appropriate disclosures to borrowers as required by statute or regulation. The proposed federal legislation and regulations, however, may significantly alter the lender-borrower relationship, threatening to turn the common law governing that relationship on its head. While the common law has traditionally viewed the lender-borrower relationship as an arm’s-length endeavor, the proposed laws may transform lenders into quasi-fiduciaries. Parts of the proposed laws would also impose fiduciary duties on mortgage brokers.

### A. The Common Law

#### 1. Mortgage Lenders

##### *a. Typically No Common Law Duty of Care or Fiduciary Duty*

Courts generally have been unwilling to impose a duty of care or fiduciary duty on mortgage lenders absent special circumstances.<sup>2</sup> By way of example, in *Ruiz v. Decision One Mortgage Company*, the Northern District of California held that the plaintiffs’ claims for professional negligence failed as a matter of law because the mortgage lender owed the plaintiffs no duty of care.<sup>3</sup> The Ruiz plaintiffs accused Decision One Mortgage of “abusive and predatory lending practices,” including alleged misrepresentations of key loan terms and failure to investigate the plaintiffs’ ability to repay the loans.<sup>4</sup> The court rejected the plaintiffs’ claims, finding that “liability to a borrower for negligence arises only when the lender ‘actively participates’ in the financed enterprise ‘beyond the domain of usual money lender.’”<sup>5</sup> Furthermore, the Ruiz court held that extensive state and federal regulation of consumer mortgages did not give rise to a duty of care to a borrower on the part of a lender.<sup>6</sup> That the underlying loan was for residential rather than commercial purposes was irrelevant as to whether a duty of care could be imposed.<sup>7</sup>

Special circumstances sufficient to impose a duty of care on a mortgage lender generally arise only when the lender acts beyond the scope of a traditional money lender such that the loan transaction evidences more than a mere arm’s-length business transaction.<sup>8</sup> Yet, the standard for demonstrating the existence of a fiduciary relationship between a mortgage lender and borrower is difficult to meet. The creation of a fiduciary relationship requires that the lender knowingly and voluntarily accept its heightened responsibility to the borrower.<sup>9</sup>

The unilateral repossession of trust by the borrower in the lender cannot alone establish a fiduciary duty. Nor are extensive prior dealings between the lender and borrower sufficient to find that a duty of care exists.<sup>10</sup> In the rare circumstance that a lender is found to owe a fiduciary duty to a borrower and is found to have breached that duty, the remedies available are generally confined to compensatory damages and disgorgement.<sup>11</sup> Punitive damages, litigation costs, and attorney's fees are typically not permitted.<sup>12</sup>

#### *b. Implied Covenant of Good Faith and Fair Dealing*

The duty of good faith and fair dealing is a covenant often implied to exist in contracts.<sup>13</sup> Where courts have implied the existence of the duty in contracts between lenders and borrowers, courts have found that the duty requires lenders to "be honest in ... dealings with a borrower and not purposefully injure a borrower's right to obtain the benefits of the contractual relationship."<sup>14</sup> Yet, the duty of good faith does not prevent a mortgagee from enforcing the express terms of a mortgage or note, however harsh they may be.<sup>15</sup> Furthermore, as an implied contractual covenant, the duty of good faith only arises on formation of a valid contract,<sup>16</sup> and does not apply to precontractual negotiations or interactions.<sup>17</sup> Thus, the duty is inapplicable in a matter alleging that a mortgage lender failed to properly investigate a borrower's ability to repay a loan or the benefit that a borrower would derive from entering into the loan transaction. Those types of actions, by their nature, occur prior to contract formation. Furthermore, remedies for breach of the duty of good faith are generally limited to breach of contract damages,<sup>18</sup> measured based on the value of the benefit of the bargain.<sup>19</sup> Punitive damages, litigation costs, and attorney's fees are typically not permitted.<sup>20</sup>

## **2. Mortgage Brokers**

Some courts refuse to impose a fiduciary duty on mortgage brokers simply because a broker-borrower relationship exists.<sup>21</sup> Those courts require a "special" or "confidential" relationship beyond that of a mere broker-borrower relationship to establish a fiduciary duty on the part of the broker.<sup>22</sup> Some courts, however, have taken a different approach to mortgage brokers, imposing a fiduciary duty on brokers under agency principles.<sup>23</sup> In such cases, courts have reasoned that because a broker is retained by a borrower to act as

the borrower's agent in obtaining a favorable loan, the broker is required to "make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost faith toward [the borrower]."<sup>24</sup>

## **B. Proposed Federal Legislation and Regulations**

Where courts have been reluctant to find that more than an arm's-length relationship exists between mortgage lenders and borrowers, the recently proposed federal legislation would impose duties on lenders purportedly aimed at saving borrowers from themselves.

### **1. The Proposed Home Ownership Preservation and Protection Act of 2007, S. 2452**

Senator Christopher Dodd (D-Conn.), Chairman of the Senate Banking Committee, has introduced a bill that, if enacted, would be known as The Home Ownership Preservation and Protection Act of 2007 ("S. 2452"). The bill seeks to amend the Truth in Lending Act ("TILA") to provide increased protections for borrowers from perceived predatory lending practices.<sup>25</sup> S. 2452 would impose several express duties on mortgage "originators" and brokers.<sup>26</sup> In relation to all "home mortgage loans,"<sup>27</sup> S. 2452 would require mortgage originators to:

- (i) Safeguard and account for any money handled for the borrower;
- (ii) Follow reasonable and lawful instructions from the borrower;
- (iii) Act with reasonable skill, care, and diligence;
- (iv) Act in good faith and with fair dealing in any transaction, practice, or course of business in connection with the origination of any home mortgage loan; and
- (v) Make reasonable efforts to secure a home mortgage loan that is appropriately advantageous to the borrower, considering all the circumstances.<sup>28</sup>

S. 2452's duty to "act with reasonable skill, care, and diligence" may transform the lender-borrower relationship from one governed primarily by contract to one that is susceptible to myriad negligence-based tort claims. As discussed above, courts typically dismiss negligence-based claims arising from the

mortgage lending process because lenders generally do not owe borrowers a duty of care absent special circumstances.<sup>29</sup> But by imposing a duty of care on lenders, S. 2452 may provide the critical link that courts previously have found missing from common-law negligence claims. If S. 2452 is enacted, claims, such as those brought in *Ruiz* where the plaintiffs accused Decision One Mortgage of failing to “act with that degree of skill, prudence and diligence” of a lender “of ordinary skill,”<sup>30</sup> may find more traction in court. The bill would also impose a damages framework (including, among other things, statutory damages, enhanced damages, costs, rescission, assignee liability, and attorney’s fees) that bears no relationship to the damages available at common law.<sup>31</sup>

S. 2452 may also expand the common-law duty of good faith and fair dealing. While, under the common law, that duty only applies to post-contractual conduct,<sup>32</sup> S. 2452 would require good faith and fair dealing in “any transaction, practice, or course of business in connection with the origination of any home mortgage loan.” Precontractual representations and conduct may be susceptible to suit under the expanded duty. This would amount to a significant departure from decisions like *Birt v. Wells Fargo Home Mortgage, Inc.*, where the plaintiffs accused their potential lender of advising them to move forward with their home construction plans notwithstanding the potential lender’s alleged knowledge that the plaintiffs’ credit rating had slipped and that the loan would not issue as previously represented.<sup>33</sup> The court dismissed the plaintiffs’ claims for breach of the duty of good faith and fair dealing, holding the duty does not apply to precontractual conduct.<sup>34</sup> Under S. 2452, however, borrowers may try to sustain that type of claim.

In addition, S. 2452 may impose a fiduciary-duty type standard on an originator to look out for a borrower’s interests.<sup>35</sup> The bill, for instance, would require a lender to “make reasonable efforts to secure a home mortgage loan that is appropriately advantageous to the borrower.”<sup>36</sup> S. 2452 would prohibit steering a borrower “to a loan with rates, charges, principal amount, or prepayment terms that are more costly than that for which the consumer qualifies.”<sup>37</sup> The anti-steering provision would also require lenders to disclose to borrowers if the lender is unable to offer a “loan that is not more expensive than that for which the consumer qualifies” and to disclose that other lenders may offer a less expensive loan.<sup>38</sup> In the case of

“subprime” or “nontraditional” home loans,<sup>39</sup> S. 2452 would impose even more stringent requirements on lenders. Lenders would have to “verify the reasonable ability of the borrower to pay the principal and interest on the loan.”<sup>40</sup> Lenders also would not be able to refinance a prior home loan “unless the new loan will provide a net tangible benefit to the consumer.”<sup>41</sup>

Furthermore, S. 2452 would impose an express fiduciary duty on mortgage brokers. The bill would require brokers to “act in the best interest of the borrower and in the utmost good faith toward the borrower, and refrain from compromising the rights or interests of the borrower in favor of the rights or interests of another.”<sup>42</sup> The fiduciary requirements of S. 2452 would be in addition to any existing federal or state laws governing mortgage brokers.<sup>43</sup> This aspect of the bill would produce an appreciable change in jurisdictions that do not impose a fiduciary duty on mortgage brokers by the mere existence of a broker-borrower relationship.<sup>44</sup>

## **2. The Proposed Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915**

Representative Barney Frank (D-Mass.), Chairman of the House Committee on Financial Services, has introduced a bill that, if enacted, would be known as the Mortgage Reform and Anti-Predatory Lending Act of 2007 (“H.R. 3915”). Like S. 2452, H.R. 3915 seeks to amend TILA to reform consumer mortgage practices in response to the subprime mortgage crisis.<sup>45</sup> H.R. 3915 would impose a duty of care on “mortgage originators” that is in addition to the duties imposed under existing federal or state law.<sup>46</sup> The duty would require that originators “diligently work to present the consumer with a range of residential mortgage loan products for which the consumer likely qualifies and which are appropriate to the consumer’s existing circumstances.”<sup>47</sup> Furthermore, the duty would mandate that originators make complete and timely disclosures to a borrower of the comparative costs and benefits of each product offered, the nature of the originator’s relationship to the borrower, and any relevant conflicts of interest.<sup>48</sup> The duty to offer “appropriate” loans would be presumed to be satisfied if the originator determines in good faith that the borrower has a reasonable ability to repay, and in the case of a refinance, that the borrower will receive a “net tangible benefit.”<sup>49</sup>

While H.R. 3915 expressly states that the bill shall not be construed to “create an agency or fiduciary relationship between a mortgage originator and a consumer if the originator does not hold himself or herself out as such,”<sup>50</sup> the bill might muddy the common-law fiduciary-duty waters. For instance, H.R. 3915 would prohibit lenders from making mortgage loans “unless the creditor makes a reasonable and good faith determination ... that the consumer has a reasonable ability to repay the loan, according to its terms.”<sup>51</sup> This requirement would be in direct contrast with common-law holdings, articulated in such cases as *Ruiz v. Decision One Mortgage Company* (discussed above), that a lender has no duty to investigate a borrower’s ability to repay a loan.<sup>52</sup> In addition, H.R. 3915 would forbid a creditor from refinancing a borrower’s loan “unless the creditor reasonably and in good faith determines ... that the refinanced loan will provide a net tangible benefit to the [borrower].”<sup>53</sup> Again, this provision would be in direct contrast with common-law precedent that lenders do not owe borrowers a duty to look out for their interests.<sup>54</sup> H.R. 3915 does not address the fiduciary relationship between a mortgage broker and a borrower.

Unlike S. 2452, H.R. 3915 does not address a lender’s duty to act in good faith. Nor would H.R. 3915 mandate that it is an originator’s duty to “act with reasonable care, skill, and diligence” as S. 2452 would. Thus, it remains unclear what effect H.R. 3915 may have on common-law claims that turn on a standard of reasonable care, including negligence-based claims such as misrepresentation.<sup>55</sup> The “ability to repay” and “net tangible benefits” provisions of H.R. 3915, however, may give rise to negligence claims against lenders alleging that lenders owe borrowers a duty to make a reasonable determination about a borrower’s ability to pay the loan or whether a refinance provides a net benefit to the borrower. The bill would also impose a damages framework (including, among other things, statutory damages, enhanced damages, costs, rescission, assignee liability, and attorney’s fees) that bears no relationship to the damages available at common law.<sup>56</sup>

### 3. The Proposed Amendments to TILA/HOEPA Regulations

On January 9, 2008, the Board published proposed amendments to Regulation Z, which implements TILA and the Home Ownership and Equity Protection Act (“HOEPA”). The Board proposed these amendments

in response to the rising number of delinquencies and foreclosures involving subprime mortgages and the perception of “abusive and unaffordable loans” in the subprime market.<sup>57</sup> The proposed regulations, if adopted, would extend current HOEPA protections to newly-designated “higher-priced” mortgage loans, whereas current HOEPA protections generally only extend to refinancings and home equity loans.<sup>58</sup> Higher-priced loans would be defined as consumer-purpose, closed-end loans secured by a consumer’s principal dwelling and having an annual percentage rate that exceeds the comparable United States Treasury security by three or more points for first liens or by five or more points for subordinate liens.<sup>59</sup> Notably, the proposed regulations would cover home-purchase loans in addition to refinancings.

The proposed regulations would not impose an express fiduciary duty on mortgage originators or lenders but would extend HOEPA’s “repayment-ability” provision to higher-priced loans. As discussed above in the context of proposed federal legislation, a requirement that a lender reasonably investigate a borrower’s ability to repay a loan is a duty unknown at common law.<sup>60</sup> This repayment-ability provision may be construed as a fiduciary-like duty.

The proposed regulations differ significantly from H.R. 3915 and S. 2452 in that they would only prohibit a creditor from “engaging in a *pattern or practice* of making higher-priced mortgage loans ... without regard to repayment ability.”<sup>61</sup> The Board has proposed the “pattern or practice” requirement so as to balance the potential costs and benefits of the ability-to-pay provision.<sup>62</sup> The Board states that whether a “pattern or practice” exists depends on the totality of the circumstances in a particular case. The official commentary indicates that a “pattern or practice” would not be established “by isolated, random, or accidental acts” but could be established without statistical analysis.<sup>63</sup> Further, by making a single loan pursuant to a lending policy (written or unwritten), a pattern or practice might be established.

From a litigation standpoint, the proposed amendments to Regulation Z as to repayment ability would likely be less disruptive than those proposed by Congress.<sup>64</sup> The “pattern or practice” requirement would make it more difficult for borrowers to establish a TILA violation. Unless borrowers could establish that their loans were made pursuant to a general lending policy, borrowers would not be able to rely solely on the circumstances of

their individual loans to recover damages or to rescind their loans. Under the current HOEPA repayment-ability regulations, there has been very little reported case law, and thus the extent to which the expansion of the proposed regulations to higher-priced mortgages would engender increased litigation is uncertain.

### C. Conclusion

The proposed federal legislation, and to a lesser extent the proposed amendments to Regulation Z, signal a marked shift in the expected relationship between mortgage lenders and borrowers. No longer would the relationship be confined to contractual obligations absent special circumstances. Instead, particularly under S. 2452, consumers might clog the courts with codified care claims any time they felt the slightest insult. It is hard to believe that any final law could look like the proposal; let's hope we are right.

1. Home Ownership Preservation and Protection Act of 2007, S. 2452, 110th Cong. (2007); Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (2007); Federal Reserve Board, Truth in Lending Proposed Rule, 73 Fed. Reg. 1672 (Jan. 9, 2008).

2. See, e.g., *Silver Hill Station L.P. v. HAS/Wexford Bancgroup, LLC*, 158 F. Supp. 2d 631, 640 (D. Md. 2001); *Int'l Minerals & Min. Corp. v. Citicorp N. Am., Inc.*, 736 F. Supp. 587, 597 (D.N.J. 1990); *Ruiz v. Decision One Mortgage Co.*, 2006 WL 2067072, at \*3 (N.D. Cal. July 25, 2006); *Davis v. JP Morgan Chase Bank*, 2004 WL 526921, at \*3 (N.D. Ill. Mar. 11, 2004); *United States v. Wells*, 1998 WL 47799, at \*4 (D. Kan. Jan. 30, 1998); *In re Fordham*, 130 B.R. 632, 646-49 (Bankr. D. Mass. 1991); *Birt v. Wells Fargo Home Mortgage, Inc.*, 75 P.3d 640, 659-61 (Wyo. 2003); *Fuller v. Banknorth Mortgage Co.*, 788 A.2d 14, 17 (Vt. 2001); *Huntington Mortgage Co. v. DeBrotta*, 703 N.E.2d 160, 167-68 (Ind. App. 1998).

3. See *Ruiz*, 2006 WL 2067072, at \*3.

4. See *id.* at \*1-2.

5. See *id.* at \*3.

6. See *id.*

7. See *id.*

8. See *id.* at \*4; see also *In re Greenberg*, 212 B.R. 422, 428 (Bankr. D. Mass. 1997); *Hopewell Enters., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996).

9. See, e.g., *In re Fordham*, 130 B.R. at 649; *Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 192-93 (S.D. Tex. 2007).

10. See *Wells*, 1998 WL 47799, at \*4; *Winston v. Lake Jackson Bank*, 574 S.W.2d 628, 629 (Tex. App. 1978).

11. See *Restatement (Second) of Torts* §§ 874, cmt. b, 903.

12. See *id.* § 914(1). Punitive damages may sometimes be available as a common-law tort remedy but only under more extreme circumstances. See *id.* § 908(2).

13. See, e.g., *In re Greenberg*, 212 B.R. at 429; *Birt*, 75 P.3d at 650.

14. *In re Greenberg*, 212 B.R. at 429.

15. See, e.g., *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank*, 662 N.E.2d 1074, 1083 (Ohio 1996).

16. *Birt*, 75 P.3d at 650.

17. *Id.*

18. See, e.g., *Thompson Pac. Const., Inc. v. City of Sunnyvale*, 155 Cal. App. 4th 525, 541 (2007).

19. See *Restatement (Second) of Contracts* § 347, cmt. a.

20. *See id.* § 355; *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W. 2d 405, 422 (Minn. 2003). Even if a breach of the duty of good faith is deemed to have been tortious in nature, the remedies available generally are not materially different. *See, e.g., Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1108 (Okla. 2005) (no common law recovery for attorney's fees for tortious breach of duty of good faith and fair dealing).

21. *See, e.g., Anderson v. Wells Fargo Home Mortgage, Inc.*, 259 F. Supp. 2d 1143, 1151 (W.D. Wash. 2003) (finding that the mortgage broker relationship itself does not give rise to a fiduciary duty).

22. *Id.*

23. *See, e.g., In re Barker*, 251 B.R. 250, 259 (Bankr. E.D. Pa. 2000); *Reese v. Hammer Financial Corp.*, 1999 WL 1101677, at \*4 (N.D. Ill. 1999); *Wyatt v. Union Mortgage Co.*, 598 P.2d 45, 50 (Cal. 1978).

24. *Wyatt*, 598 P.2d at 50.

25. The existing private right of action under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1640, would extend to alleged violations of the provisions of S. 2452. S. 2452, § 703. For violations of the duties owed by mortgage originators and of the protections afforded with respect to subprime loans, S. 2452 would extend the statute of limitations for damages from one to three years. *Id.* The bill would increase the amount of statutory damages available in individual TILA actions (to a range between \$500 and \$5,000) and TILA class actions (to \$5,000,000 or one percent of the creditor's net worth, whichever is less). *Id.* The bill would extend the rescission period, for loans eligible for rescission under 15 U.S.C. § 1635, to six years from the date of consummation of the transaction or in defense of a foreclosure, among other things, to ten years from the date of the consummation. *Id.*, § 702.

26. S. 2452 defines "mortgage originator" very broadly to mean "any creditor or other person, including a mortgage broker, who for compensation or in anticipation of compensation, engages either directly or indirectly in the acceptance of applications for home mortgage loans, solicitation of home mortgage loans on behalf of consumers, negotiation of terms or conditions of home mortgage loans on behalf of consumers or lenders, or negotiation of sales of existing home mortgages to institutional or noninstitutional lenders." S. 2452, § 2.

27. "The term 'home mortgage loan' means a consumer credit transaction secured by a home, used or intended to be used as a principal dwelling, regardless of whether it is real or personal property, or whether the loan is used to purchase the home." *Id.*

28. *Id.*, § 301.

29. *See, e.g., Birt*, 75 P.3d at 659-60 (affirming dismissal of negligence claims because lender owes borrower no duty of care beyond standard contractual obligations); *Ruiz*, 2006 WL 2067072, at \*3 (same); *Nymark v. Heart Fed. Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1100 (1991) (same); *Wells*, 1998 WL 47799, at \*4 (same); *In re Fordham*, 130 B.R. at 648 ("the decisions are legion which deny a cause of action for negligent underwriting of a loan").

30. *See* 2006 WL 2067072, at \*1-2.

31. *See* notes 11 and 12, above.

32. *See, e.g., Birt*, 75 P.3d at 650.

33. *Id.* at 646-47.

34. *Id.* at 650.

35. *See In re Barker*, 251 B.R. at 260 (fiduciary duty requires looking out for best interests of borrower).

36. S. 2452, § 301.

37. *Id.*

38. *Id.*

39. S. 2452 defines a subprime loan as a loan in which the annual percentage rate exceeds the yield on comparable U.S. Treasury securities by three percentage points for first liens or by five percentage points for subordinate liens. *Id.*, § 2. Nontraditional loans are loans "that allow[] a consumer to defer payment of principal or interest." *Id.*

40. *Id.*, § 201.

41. *Id.*

42. *Id.*, § 301.

43. *Id.*

44. *See, e.g., Anderson*, 259 F. Supp. 2d at 1151.

45. The existing private right of action under TILA, 15 U.S.C. § 1640, would extend to alleged violations of the provisions of H.R. 3915. H.R. 3915, §§ 124, 204, 210. H.R. 3915, however, limits damages for violations of the bill's mortgage origination standards to "[three] times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in connection with the residential mortgage loan involved in the violation, plus the costs to the consumer of the action, including a reasonable attorney's fee." H.R. 3915, § 124. For TILA violations generally, the bill would increase the amount of statutory damages available in individual TILA actions (to a range between \$400 and \$4,000) and TILA class actions (to \$1,000,000 or one percent of the creditor's net worth, whichever is less). *Id.*, § 210. H.R. 3915 would extend the right of rescission to violations of the bill's ability-to-repay and net-tangible-benefit requirements. *Id.*, § 204.

46. H.R. 3915, § 122.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*, § 201.

52. *See Ruiz*, 2006 WL 2067072, at \*3; *Davis*, 2004 WL 526921, at \*3.

53. H.R. 3915, § 202. Regarding the ability to repay and net tangible benefit requirements, the bill provides a safe harbor provision for prime mortgages and for subprime mortgages that meet certain conditions. *Id.*, § 203.

54. *See, e.g., In re Greenberg*, 212 B.R. at 428-29; *Birt*, P.3d at 661.

55. *See, e.g., Birt*, 75 P.3d at 659-60 (affirming dismissal of negligence claims because lender owes borrower no duty of care beyond standard contractual obligations); *Ruiz*, 2006 WL 2067072, at \*3 (same).

56. *See* notes 11 and 12, above.

57. Federal Reserve Board, Truth in Lending Proposed Rule, 73 Fed. Reg. 1672, 1673-77 (Jan. 9, 2008).

58. *Id.* at 1681.

59. *Id.* at 1673. These thresholds are significantly lower than the current thresholds for HOEPA of eight and ten points respectively for first and subordinate liens. *See* 12 C.F.R. § 226.32(a)(1). The Federal Reserve Board states that it believes it wise to err on the side of covering somewhat more than just the subprime market. 73 Fed. Reg. at 1682.

60. *See, e.g., Ruiz*, 2006 WL 2067072, at \*3; *Davis*, 2004 WL 526921, at \*3.

61. 73 Fed. Reg. at 1685 (emphasis added).

62. *Id.* at 1688. The Board recognizes that the proposal may reduce credit availability for borrowers who cannot demonstrate sufficient current and expected income. *Id.*

63. *Id.*

64. Consumers would have a private right of action to pursue violations of the proposed Regulation Z amendments. *Id.* at 1716; 15 U.S.C. §§ 1639(l)(2), 1640(a).

K&L Gates' Mortgage Banking & Consumer Finance practice provides a comprehensive range of transactional, regulatory compliance, enforcement and litigation services to the lending and settlement service industry. Our focus includes first- and subordinate-lien, open- and closed-end residential mortgage loans, as well as multi-family and commercial mortgage loans. We also advise clients on direct and indirect automobile, and manufactured housing finance relationships. In addition, we handle unsecured consumer and commercial lending. In all areas, our practice includes traditional and e-commerce applications of current law governing the fields of mortgage banking and consumer finance.

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