Title XIV of the Dodd-Frank Act amends the residential mortgage portions of the Truth in Lending Act (“TILA”), the Real Estate Settlement Procedures Act (“RESPA”), and other federal housing statutes in important ways. TILA now covers more participants in the residential mortgage lending industry and imposes several new and substantial requirements. Among other things, mortgage originators now owe a duty of care to borrowers. Together with the risk retention requirements for the securitization of residential mortgage loans that are established in Title VII, Title XIV will have a significant impact on the mortgage industry. Finally, the Dodd-Frank Act directs the Consumer Finance Protection Bureau (the “Bureau”) to develop a combined disclosure that integrates RESPA and TILA requirements. For greater detail on the Title XIV provisions, please see our Residential Mortgage User Guide, available at http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf, and our Mortgage Servicing User Guide, available at http://www.mofo.com/files/Uploads/Images/100830User_Guide_Mortgage_Servicing.pdf.

Mortgage Originations

— The revisions to several TILA and RESPA provisions will require mortgage originators (including some originators not previously covered by TILA) to include new safeguards in their origination procedures.

- Under TILA as revised, a “mortgage originator” is any person who, for (or in the expectation) of direct or indirect compensation or gain: (i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; (iii) offers or negotiates terms of a residential mortgage loan; or (iv) any person who represents to the public that he/she can or will perform any of those services. This definition includes third-party brokers and mortgage loan officers who work for lenders. The definition of “residential mortgage loan” now excludes open-end plans (e.g., home equity lines of credit) and loans on certain time shares.

- TILA now imposes a new “duty of care” on all mortgage originators. The nature of this duty will require further rulemaking. The new statutory definition incorporates by reference the Secure and Fare Enforcement for Mortgage Licensing Act requirements for originators. The duty requires a mortgage loan originator to be “qualified,” but an explanation of that term will need to await implementing regulations. Presumably, this means that the loan originator must meet some basic standards of competence and integrity.

- Yield-spread premiums and other steering incentives are prohibited. Mortgage originators may not receive, and no person may pay, any compensation that varies based on the terms of a residential mortgage loan, other than the principal amount of the loan. With certain exceptions, if a mortgage originator receives any compensation directly from the consumer/borrower, it may not also receive any compensation from the lender or any other person. Detailed regulations implementing some, but not all, of Section 1403 were issued by the Board and became effective on April 1, 2011.
prohibit compensation to a loan originator based on the terms or conditions of a loan, prohibiting the receipt of compensation by a loan originator from the creditor or any other person if the originator is receiving compensation directly from the consumer, prohibits a creditor or other person from paying compensation to a loan originator if it knows or has reason to know that the originator is receiving compensation directly from the consumer, and prohibits a loan originator from steering a consumer to a particular loan on the basis that he/she/it will receive more compensation from the creditor in that transaction than would be received in other transactions that the originator offered or could offer to the consumer (unless the consumed transaction is in the consumer’s interest).

- Mortgage originators are not subject to civil liability under TILA. The maximum liability for a loan originator under this provision is the greater of actual damages or an amount equal to three times the total amount of direct and indirect compensation or gain accruing to the mortgage originator in the loan transaction in question, plus costs and reasonable attorneys’ fees. Certain minimums and maximums apply. For a violation of the high-cost loan, prohibition on steering incentives, or ability to repay rules, there is liability equal to all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply was not material. A different rule applies to assignees.

- Creditors are now required to make a reasonable and good faith determination that a consumer has a reasonable ability to repay a residential mortgage loan in accordance with its terms, including principal, interest, taxes, insurance, mortgage guaranty insurance, and assessments at the time the loan is consummated.

- A creditor and its assignees may “presume” that a loan meets the ability to repay requirements if the loan is a “qualified mortgage.” The Dodd-Frank Act identifies several factors that weigh in this determination, and the Bureau has proposed a definition.

- A consumer facing a foreclosure proceeding now has claims in recoupment against the lender for violations of either the anti-steering provision or the ability-to-repay requirements.

- Advance notice before the first reset of a hybrid adjustable rate mortgage is required.

- A number of new disclosures are required for closed-end credit.

- The provisions of TILA relating to high-cost mortgages have been revised in several respects to follow state laws that are more restrictive. These changes include new tests relating to the annual percentage rate and prepayment fees, authority for the Bureau to adjust the points and fees tests, expansion of the definition of points and fees, a new method for calculating points and fees in secured open-end credit, prohibitions on all prepayment fees and balloon payments, and limitations on late fees and modification fees. Certain bona fide discount points may be excluded in calculating points and fees.

- More stringent “super appraisals” are required in connection with these loans with higher-risk mortgages, and more specific independence requirements apply to appraisals.

- The Bureau is authorized to prohibit, by regulation, any mortgage practices that it finds to be abusive, deceptive, or predatory. “Abusive” is a new standard, and the Bureau’s new authority could lead to additional limitations on the mortgage industry.

The CFPB is considering rules to implement the provisions in Sections 1400-1403 of the Dodd-Frank Act relating to mortgage loan origination standards. The rules outlined by the Bureau would address dual compensation and up-front origination fees along with mortgage loan originator qualifications and compensation. They would require, among other things, that only bona fide discount points and flat origination fees be charged.
The CFPB has actively pursued its “Know Before You Owe” initiative in which it is designing a combined RESPA-TILA disclosure framework. It prepared and circulated several proposed disclosure formats and tested them in focus groups in cities across the country. The Bureau is now focusing on drafting new rules to implement the revised disclosure format.

**Mortgage Servicing**

- A creditor in a first mortgage transaction is required to establish, before consummation of the transaction, an escrow or impound account for the payment of taxes, hazard insurance, flood insurance, mortgage insurance, ground rents, and any other periodic payments relating to the property. A borrower may waive escrow, but certain disclosures are necessary.
- RESPA is amended to create several new obligations for servicers, relating to force-placed insurance, qualified written requests, responses to borrowers, and prompt refunds of escrow funds upon loan payoff.
- Servicers are subject to new requirements under TILA on prompt crediting of home loan payments and prompt responses to requests for loan payoff amounts.
- The Treasury Secretary is required to take several steps to improve the transparency of the Home Affordable Modification Program (the “HAMP”). First, a servicer that denies a modification request must provide to the applicant all data relating to the borrower and his or her mortgage that was used in the net present value (“NPV”) analysis. Second, a new website with an NPV calculator is necessary. Third, Treasury must disclose that a servicer may use an alternative NPV methodology. Finally, the website should include an application form for a modification.
- Treasury must provide a monthly report of the performance of servicers that participate in HAMP. Loan-level data also must be made available. Treasury has not yet proposed regulations.
- The Protecting Tenants at Foreclosure Act of 2009 is amended to extend protections to any bona fide tenant (regardless at the point in time in which the person became a bona fide tenant), to protect any leases entered into before the end (rather than before the beginning) of the foreclosure process, and to extend the sunset date by two years, to December 31, 2014.