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To the Point!

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FFIEC Proposed Guidance on Social Media

On January 22, 2013, the Federal Financial Institutions Examination Council (*"FFIEC"*) issued a notice and request for comment on its proposed guidance entitled "Social Media: Consumer Compliance Risk Management Guidance" (the *"Proposed Guidance"*). Comments will be accepted until March 25, 2013.

Under the Proposed Guidance, all financial institutions are required to adopt a risk management program to identify, measure, monitor and control the risks related to social media. The guidance outlines minimum components to be included in the risk management program, which will vary based on the degree to which the financial institution uses social media. All financial institutions are required to adopt a risk management program even if they do not actively use social media to engage with customers and potential customers. Those financial institutions not actively engaged in using social media must be prepared to address potential negative comments or complaints that may arise in a social media platform and provide guidance for their employees' use of social media. Through this Proposed Guidance, the FFIEC aims to help financial institutions identify potential risks and impacts to a financial institution's risk profile associated with use of social media.

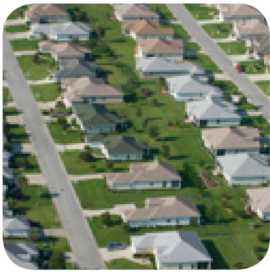
The FFIEC defines social media as online communication that is "more interactive," including the following forms of online communication in its definition:

- micro-blogging sites (Facebook, Google Plus, MySpace and Twitter);
- forums, blogs, customer review web sites and bulletin boards (Yelp);
- photo and video sites (Flickr and YouTube);
- sites that enable professional networking (LinkedIn);
- virtual worlds (Second Life); and
- social games (FarmVille and CityVille).

The FFIEC identifies the following as ways a financial institution may use social media to connect with customers and potential customers: marketing, providing incentives, facilitating applications for new accounts, providing loan pricing, inviting feedback from the public, and receiving and responding to complaints.

The Proposed Guidance includes a list of laws and regulations that may apply to a financial institution using social media (depending upon the activity and financial institution products involved), noting that the Proposed Guidance does not create any new compliance requirements but rather provides information on how consumer protections laws and regulations are applied within the realm of social media. Laws and regulations identified by the FFIEC include, but are not limited to, the Truth in Lending Act, the Truth in Savings Act, the Electronic Funds Transfer Act, fair lending laws, UDAAP, privacy, anti-money laundering, advertising FDIC membership, Community Reinvestment Act, CAN-SPAM and COPPA, among others.

While the FFIEC issued the Proposed Guidance to address financial institutions' use of social media to "attract and interact" with customers, the Proposed Guidance does apply to all financial institutions. Each financial institution is required to assess its use of social media and related risk profile and to review and revise its risk management program to ensure that social media is included, even if it does not actively participate in social media interaction with its customers or potential customers. We recommend that financial institutions consider filing a comment with the FFIEC describing how this Proposed Guidance will affect them.



Mortgage Servicing Rules

On January 17, 2013, the Consumer Financial Protection Bureau (*"CFPB"*) issued its final rules on mortgage servicing to implement various requirements of the Dodd-Frank Act amending the Truth in Lending Act and the Real Estate Settlement Procedures Act. The rules amend Regulation Z and Regulation X (individually and collectively, the *"Rule"*). The Rule mandates new disclosures and operational requirements, and prohibits certain conduct related to mortgage servicing. The Rule applies to creditors, their assignees and "servicers" responsible for "servicing" mortgage loans (terms defined in Regulation X) and is not limited to third-party servicers. The Rule also applies to creditors that service mortgage loans they and their affiliates have originated and to holders of mortgage loans if such person also services the mortgage loans. The Rule is effective January 10, 2014. We plan to provide more detailed analysis in future *To the Point!* publications on the various aspects of this Rule.

Mandatory Escrow Accounts for Higher-Priced Mortgages

The Consumer Financial Protection Bureau (the *"CFPB"*) has issued a final rule prohibiting the origination of a higher-priced mortgage loan secured by a first lien on a consumer's principal dwelling unless an escrow account is established before consummation for payment of property taxes and premiums for mortgage-related insurance required by the creditor. The final rule is effective on June 1, 2013.

A higher-priced mortgage loan is a closed-end consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set: (i) by 1.5 or more percentage points for loans secured by a first lien that does not exceed the limit set for the maximum principal obligation eligible for purchase by Freddie Mac; (ii) by 2.5 or more percentage points for loans secured by a first lien that exceeds the limit set for the maximum principal obligation eligible for purchase by Freddie Mac; or (iii) by 3.5 or more percentage points for loans secured by a subordinate lien. Average prime offer rate is an annual percentage rate that is derived from average interest rates, points and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics.

The rule does not apply to: (i) a transaction secured by shares in a cooperative; (ii) a transaction to finance the initial construction of a dwelling; (iii) a temporary or "bridge" loan with a loan term of twelve (12) months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve (12) months; or (iv) a reverse mortgage transaction subject to Regulation Z 1026.33(c).

Insurance premiums need not be included in escrow accounts for loans secured by dwellings in condominiums, planned unit developments or other common interest communities in which dwelling ownership requires participation in a governing association, where the governing association has an obligation to the dwelling owners to maintain a master policy insuring all dwellings.

In addition, an escrow account need not be established for a transaction if, at the time of consummation:

> (i) During the preceding calendar year, the creditor extended more than 50 percent of its total covered transactions secured by a first lien, on properties that are located in counties designated either rural or underserved by the CFPB;
>
> (ii) During the preceding calendar year, the creditor and its affiliates together originated 500 or fewer covered transactions secured by a first lien;
>
> (iii) As of the end of the preceding calendar year, the creditor had total assets of less than $2 billion (subject to an automatic annual adjustment); and

(iv) Neither the creditor nor its affiliate maintains an escrow account for any extension of consumer credit secured by real property or a dwelling that the creditor or its affiliate currently services, other than:

(a) Escrow accounts established for first-lien higher-priced mortgage loans on or after April 1, 2010, and before June 1, 2013; or

(b) Escrow accounts established after consummation as an accommodation to distressed consumers to assist such consumers in avoiding default or foreclosure.

A creditor or servicer may cancel an escrow account only upon the earlier of: (i) termination of the underlying debt obligation; or (ii) receipt no earlier than five years after consummation of a consumer's request to cancel the escrow account (subject to certain limitations).

For those creditors considering structuring higher-priced mortgages as open-end credit, the CFPB's final rule contains a cautionary note: In connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in Regulation Z 1026.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of this section.

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