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Red Flag Regulations to Prevent Identity Theft

By: Allison S. Zangrilli, Esquire

Congress enacted the Fair and Accurate Credit Transition Act (FACTA) on December 4, 2003. FACTA adds two new sections to the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., that are designed to protect against the growing problem of identity theft. The regulatory agencies mandated by Congress to develop regulations and guidelines for compliance with FACTA have issued the final rules for compliance known as the Red Flag Regulations. On October 22, 2008, the Federal Trade Commission announced that the original enforcement date of November 1, 2008 for the Red Flag Regulations would be suspended until May 1, 2009.

The Red Flag Regulations apply to financial institutions and creditors that offer or maintain covered accounts. Covered accounts are those used mostly for personal, family, or household purposes that involve multiple payments or transactions such as credit card accounts, mortgage loans, car loans, utility accounts, cell phone accounts, checking accounts and savings accounts. The Regulations also apply to users of consumer credit reports. This means that not only banks and mortgage lenders are affected, but also educational institutions, health care providers, and other businesses or entities that use consumer credit reports for employment, insurance and other credit purposes.

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Refinancing a Mortgage?

Protect your Interests by Retaining the Services of an Experienced Real Estate Attorney

By: Allison S. Zangrilli, Esq.

Homeowners are taking advantage of declining interest rates by refinancing their mortgages. Refinancing provides many benefits to homeowners, including the opportunity to improve their mortgage rates, lower monthly payments, build equity by converting their loan to a shorter term, consolidate debt, and facilitate major home improvement projects. However, many homeowners do not realize that retaining an attorney to represent their interests in a refinance is equally as important as retaining an attorney when buying or selling real estate. Refinancing a mortgage is a legal transaction with significant legal consequences. An experienced real estate attorney will make the homeowner aware of the refinancing process and the costs involved, explain the many documents involved in the transaction, identify any overcharges, make sure that deadlines are not missed, handle any problems that may arise, ensure that the closing is completed promptly and efficiently, and make certain that post-closing matters are finalized.

The Lender has an Attorney and so Should You

The lender you choose to refinance your mortgage with will have an attorney. The lender's attorney does not in any way represent the interests of the borrower. Neither a mortgage broker nor a title agency can offer you legal advice. If a lender or title company closes your transaction, you will pay a fee for that service (sometimes called a "document preparation fee" or "closing service fee"), but you will not receive the benefit of legal counsel.

Your Attorney will Make you Aware of Costs and Guide you Through the Refinance Process

When refinancing your mortgage, it is recommended that you contact an attorney before submitting a mortgage application. Your attorney will explain the process to you and may be able to guide you in negotiating some of the typical lender-related fees. Your attorney may also provide you with referrals to various lenders. During the application process, your attorney will explain the Good Faith Estimate provided to you by the lender. Once you obtain a mortgage commitment, your attorney will discuss any loan conditions with you and will work with you to meet the time frames and loan requirements. This includes conditions such as obtaining a title commitment or submitting proof of homeowner's insurance. It also may include obtaining payoff statements for mortgages or other liens being paid off upon refinance, including equity loan or lines of credit which are required to be canceled even if no money has been advanced.

Your Attorney will Explain the Closing Documents

At closing, you will be required to sign numerous documents which place legal obligations on you and affect your rights as a homeowner. An attorney familiar

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with these documents will explain them to you in terms that are easy to understand, answer any questions you may have, and identify any errors in the documents. Your attorney will also prepare the HUD-1 Settlement Statement, review the title commitment, prepare the required borrower's affidavit of title, and review the survey (if required). Following closing, your attorney will ensure that the lender's closing instructions are followed and the documents are promptly returned to the lender. Your attorney will also address other post-closing items such as immediately sending payoffs, making any other disbursements, forwarding the new mortgage for recording, making sure that all open judgments and recorded liens are properly cancelled, as well as following up on the title policy to be issued after closing and forwarding it to the lender.

Considering the significant long-term financial effects of your refinance transaction, engaging an experienced real estate attorney with a reputable law firm will be money well spent. It will give you peace of mind, protect your interests, avoid unnecessary expense, and make your refinance as smooth and worry-free as possible.

Allison S. Zangrilli, Esq. is an associate with Mason, Griffin & Pierson, P.C. She is admitted to practice law in New Jersey, Pennsylvania and New York. She is a member of the Mercer County Bar Association and the Board of Trustees of the Megan Nicole Kanka Foundation. Ms. Zangrilli is a member of the firm's Local Government Law and Real Estate and Land Use Practice Groups. She can be reached at a.zangrilli@mgplaw.com or 609-436-1214.

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The Red Flag Regulations require covered institutions to develop and implement comprehensive written policies and procedures to identify and prevent identity theft. Compliance programs must include the following elements: (1) identify red flags such as address discrepancy or change of address notice from a consumer reporting agency, suspicious or seemingly altered or forged documents, unusual use of a covered account, or notice of a "credit freeze" on a consumer credit report; (2) detect red flags with a process for verifying identity and monitoring account activity; (3) respond to red flags to prevent and mitigate identity theft with procedures such as contacting consumers, reopening accounts with different numbers, changing passwords or contacting law enforcement; and (4) periodically update the program to reflect changes in risk to customers as criminals evolve and expand their methods of identity theft. A proposed Identity Theft Prevention Program must be approved by the entity's board of directors or an appropriate committee of the entity. Either the board, a committee, or a management level employee must be involved in the development, implementation, management and administration of the plan. Staff training, annual reporting and oversight of the plan are also required by the Regulations.

Covered institutions that fail to comply with the Red Flag Regulations are subject to penalties, including civil liability under the Fair Credit Reporting Act and fines imposed by the FTC or the appropriate regulatory agency having authority over the institution.

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