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Ruth Dillingham - The Dodd-Frank Act as it affects real estate attorneys/settlement agents/title insurance agents

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The Dodd Frank Act came into being on July 21st, 2010 and takes effect (for most provisions) on July 21st, 2011. The act itself is very lengthy and sweeping in scope, covering many topics and providing many detailed directives. The purpose of this article is to review one of the provisions of the act as it affects title and settlement (closing) agents and attorneys.

Under Title X of the Dodd Frank Act there are inclusions and exclusions from the definition of "covered person" which establishes which persons and entities are regulated by the Act and the Consumer Financial Protection Bureau (CFPB) in their capacity as providers and affiliates of providers of "consumer financial products or services" for use by "consumers." In general, the CFPB does not have authority over those persons or entities which are now regulated by a state insurance regulator nor does it have authority over attorneys in certain circumstances. The analysis below discusses when those entities are subject to the act.

First - all settlement agents are included:

While the bureau is to issue an initial rule to further define covered persons by July 2012, the act defines consumer financial products and services" to include providing "real estate settlement services" and the laws covered by the act include "RESPA" and "TILA". (Note, however consumer financial products and services does not appear to include providing title abstracting services to the settlement agent-as a standalone product- providing it meets the definition of "providing public records information retrieval")

What if the settlement agent is also an attorney?

"Attorneys licensed to practice law" are excluded from coverage of the act (as are accountants, real estate agents and auto dealers) but only to the extent that their activity is the practice of law and is not subject to the laws or authority transferred to the Bureau, which laws include RESPA and TILA. So, the attorney is covered by the Act when acting as a settlement agent. One commentator has suggested the following example: when the attorney is acting as buyer/seller counsel they are overseen by the Professional Standards (malpractice, license suspension/revocation) and when they are acting as settlement agent under RESPA they are overseen by the Bureau. And, a licensed attorney not practicing law, but providing a regulated service would be covered by the Act.

What if the settlement agent is also a title agent/What about independent title agents?

Recognizing the traditional deference given by the federal government to the states to be the primary regulator of insurance, the act excludes insurance from its coverage. Title insurance is excluded from coverage of the act as it is within the definition of the "business of insurance": "The term 'financial product or service' does not include the business of insurance." Business of insurance means the writing of insurance and all acts "necessary" and "related" by persons who are "employees" or "agents" of an insurer, or who are authorized to act on their behalf. (This would

seem to extend the exclusion to title abstractors, especially in light of the exception noted above). In most states, the activities of the title insurance underwriter, its employees, agents and their abstractors are not regulated by the act when they are providing title insurance. However, the bureau retains authority over those persons to enforce RESPA and TILA, and the limitation on enforcement authority extends only to the extent that the person is acting in the capacity of the business of insurance. Consequently, all of the above groups are still regulated by the CFPB to the extent that their activities are regulated by RESPA or TILA (kickbacks, referral fees and accounting for costs of services provided). Further, since the bureau's enforcement authority is limited with respect to a person "regulated by a state insurance regulator," an issue may arise as to what happens in a state where the regulator of insurance does not regulate title insurance, or the agents. As noted in the opening section, there will be much more to come in as the statute takes effect, and as regulations are written and implemented.

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