



GSE Activity Report

Thursday, January 19, 2023

You Know Where to File That?

Summary

We will shortly send clients an in-depth analysis of the CFPB's latest controversial [proposal](#) which would establish a public registry on which supervised nonbanks would file a lot of data on any form contracts they require which includes covered provisions the Bureau thinks unfairly and even dangerously lead consumers to abandon important protections. These would not directly affect mortgage agency securitization, but the rule but could prove a significant compliance impediment to PLS.

Impact

The CFPB's focus here is on consumer-finance clauses that are take-it-or-leave-it propositions used by nonbank retail-finance companies as a condition of purchase for more than one consumer. Even website-use agreements are considered form contract and the provisions that trigger filing include any waiver of any legal right or the ability to complain about a product or post reviews. Mandatory arbitration would also be a filing trigger, surely followed at some subsequent point by CFPB enforcement on UDAAP or similar grounds.

This will surely be a huge headache for nonbank mortgage originators and services. However, the agency's proposal generally exempts form contracts if these are provided via a public website in order to offer a government or agency mortgage. However, any lender or servicer who enforced any form contract in court or arbitration proceedings would lose this exemption and need to file a mortgage contract. Further, although the agency contract is otherwise exempt, those associated with it – i.e., for servicing, debt collection, and MI – are not. The consumer needs to be a counterparty to any such contract for it to be filed, limiting at least some of this scope but nonetheless making it not just a nuisance, but also a possible source of previously-confidential market information along with additional legal and reputational risk. PLS contracts have no such exemption and thus will need to be released by an originating lender.

Another mortgage-securitization wrinkle is the equivalent of a holder-in-due-course requirement related to covered contract. Even if the loan or other contractual obligation seller is not a filing supervised nonbank, the supervised nonbank purchaser must file a notice with the CFPB if any contracts associated with the obligation triggers a filing requirement. Thus, agency paper passing through the secondary market would trigger filing requirements for some purchasers and covered nonbank would need to file if it bought a PLS based on form contracts even if this is done for investment purposes far afield from retail finance.

Outlook

We see nothing in this proposal that slows agency secondary-mortgage activities although much could be more than annoying for many supervised nonbanks. The same is not true for private-label paper because, as noted, any purchaser of anything including the mortgage needs to file if it's a covered nonbank and the loan agreements are the usual form contracts.

Federal Financial Analytics, Inc.
2101 L Street, N.W., Suite 300, Washington, D.C. 20037
Phone (202) 589-0880
E-mail : info@fedfin.com www.fedfin.com

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Comment is due by the later of March 13 or sixty days after this enormous NPR finds its way into the *Federal Register*. House Republicans are already opposed to this, along with the Bureau's companion proposal creating a public registry of [enforcement actions against covered nonbanks](#). However, they will not be able to enact anything to slow down an agency that won't stop until a new president puts someone else in the director's office.