ARE ANY REGULATIONS APPLICABLE TO COMMERCIAL LENDING?

A number of our clients have inquired about the applicability of various regulations to their commercial lending activities. Here are a few of your favorite regs and the good/bad news.

EQUAL CREDIT OPPORTUNITY ACT
The Act (ECOA) and Regulation B apply to all types of lending arrangements. This means that commercial borrowers must all be treated with the fair lending practices that are applied to consumer borrowers. There are, however, some variations in providing copies of appraisals and adverse action notices.

Providing Appraisal Reports
Regulation B requires lenders to supply a copy of the appraisal (or the notice of the right to receive a copy) to all applicants for credit to be secured by a lien on a dwelling. Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. This means that commercial loans that will be secured by a dwelling must have the same right to receive a copy of the appraisal as consumer loans.

Adverse Action Notices
A notice of adverse action to a business applicant may be formal or informal, oral or written. A telephone call is an adequate notice of adverse action on a business loan application. This notice must be given within a "reasonable time" after the adverse action was taken and the applicant must be notified of his right to seek a written statement of the reasons for the adverse action upon a written request within 60 days after the date of the original notice.

Exceptions:
A business applicant with gross revenues of $1 million or less in the preceding fiscal year is entitled to the full consumer credit adverse action notice, including the statement of reasons for the adverse action. The notice of adverse action may be still be delivered orally, however, and the notice of right to receive a statement of the reasons may be given at the time of application, so long as it contains the ECOA notice that creditors are prohibited from discriminating.

Signature Rules
The signature of a spouse cannot be required when he or she is not a co-applicant, except to the extent necessary to perfect a lien on property being used as collateral. You may wish to seek a legal opinion regarding your state’s law of spousal property rights, such as community property and/or homestead.

RESPA and TRUTH IN LENDING ACT
The Real Estate Settlement Procedures Act business purpose loans in the same manner as such loans are defined under Regulation Z. The following loans are therefore exempt from compliance with both RESPA and Truth in Lending requirements.

- Business, commercial, agricultural or organizational credit, and any credit to an entity other than a “natural person.” Loans to trusts are considered business purpose unless the borrower is a land trust. Credit to a land trust owned by an individual is still covered by the regulation; however, if the land trust is owned by a business entity it is considered business credit.

- Loans secured by non-owner-occupied rental property are exempt from both RESPA and Reg Z.

- Owner-occupied rental property:
  Loans to acquire or construct owner-occupied rental property are exempt if they contain more than two units.
  Loans to improve or maintain owner-occupied rental property are exempt if they contain more than four housing units.

- Other factors: Mortgages on owner-occupied property may still be considered business-purpose loans if other factors are present, such as a loan secured by the borrower’s home, taken for the purpose of opening a restaurant.

FLOOD INSURANCE REGULATIONS
The flood insurance regulations apply to any loan secured by a property with a structure. The structure must have walls and a roof and therefore insurance is only required on new construction when the building is under roof. The new requirement to create an escrow for premiums, when taxes or other payments are being made from escrow, applies to loans secured by residential real estate, including multi-family housing, but not other commercial loans. The escrow rules from RESPA still only apply to consumer loan borrowers.

The requirements to use the standard flood hazard determination form, to notify borrowers whose properties are in SFHAs and to force place insurance when the borrower fails to make the premium payments, all apply equally to commercial as well as consumer credit.

HMDSA
The Home Mortgage Disclosure Act applies to loans secured by residential property. The loan application register should include any loans to purchase, refinance or improve multifamily properties.

COMMUNITY REINVESTMENT ACT
Large institutions (with assets over $250 million for two consecutive years) must report any loan, purchased or originated, to a small business or small farm, whose revenues were $1,000,000 or less in its last fiscal year, based on the revenues the bank considered in making its credit decision.

ENVIRONMENTAL LIABILITY
Institutions should have an environmental risk policy to evaluate the risks of taking commercial property as security for a loan. Phase I, II or III assessments may be required to protect the bank from possible loss of collateral should risk factors be present.

AMERICANS WITH DISABILITIES ACT
The ADA requires accommodation of handicapped employees and customers when a business contracts for construction or improvement of its facilities. Business borrowers should be obligated to comply with the requirements of the ADA so that the collateral property is in compliance if it is taken back in a foreclosure.