At this year’s CFSC Winter Meeting in Park City, Utah, the Committee experimented with a new concept in programming – separate “tracks” for mortgage and non-mortgage issues. One full day of programming was dedicated to this “dual tracking” approach, with four programs held in each track. Thanks to the herculean efforts of Programs Chair Sandy Shatz and Vice-Chair Dave Wiese, as well as Committee Chair Andrew Smith, the experiment was a great success. This article includes a brief discussion on each of the four separate programs held as part of the mortgage track, which hosted an overflow crowd of attendees.

TRID: The View from Non-Lenders
By Dave Wiese, Hinckley, Allen & Snyder LLP

The Truth-in-Lending Subcommittee sponsored a program entitled "TRID: The View from Non-Lenders." Since the final "Know Before You Owe" rule was published more than two years ago, much of the public focus has been on lenders and their compliance responsibilities. However, lenders are not the only players in the home financing process. Other industry stakeholders, including settlement agents, mortgage brokers, and real estate agents, have all felt the impact of TILA-RESPA Integrated Disclosure rule (TRID).

With the effective date in the rear view mirror, and three months of implementation experience under their belts, a panel representing non-lenders offered their perspectives on how the home buying, loan origination, and closing process has changed since October 3, 2015. The panel included Charles ("Chuck") Cain, Executive Vice President, WFG National Title Insurance Company, Finley Maxson, Senior Counsel, National Association of Realtors, and Heather Hutchings, partner, Bradley Arant Boult Cummings LLP. As a general matter, the panelists largely agreed that consumers seemed to like the new disclosures. They suggested that consumers appeared to have a better understanding of closing costs and loan terms, because the disclosures are delivered earlier and are easier to understand.

Notwithstanding this apparent good news, the panelists did mention a number of concerns that have emerged under the new disclosure regime. For one thing, it was reported that the timeframe to close often takes longer (often 30 to 40 days longer). Perhaps this might change as industry participants become more comfortable with the new rules. Panelists also noted that there are still wide variations in TRID readiness across the country. In this regard, some lenders have apparently handled their interactions with settlement agents better than others. Many of the large lenders appear to have been well prepared to produce the Closing Disclosure and handle last minute adjustments in the midst of the closing process. They have been able to effectively use technology solutions to communicate with closing attorneys, title companies, and other stakeholders.

In contrast, many small creditors have apparently struggled with the new rules and often turn to settlement agents looking for assistance in preparing the Closing Disclosure. It appears that many of these small creditors lack the knowledge base and technology solutions available to larger creditors. At least one of the panelists suggested that settlement agents are not in a position to produce the Closing Disclosure and should not be called upon to do so by lenders. Given the demands of the new law, coupled with increased lender scrutiny over service provider relationships, there was speculation that there would be a contraction in the number of settlement agents looking to remain in the business. It was also observed that many mortgage brokers are now dealing with fewer lenders because of the logistical difficulties of producing timely and accurate Loan Estimates. And it appears that very few lenders are permitting mortgage brokers to produce Loan Estimates on their behalf. There were also a number of comments concerning the frustrations experienced by Realtors when they are unable to obtain copies of the relevant disclosures because of GLBA privacy concerns. All panelists agreed...
that it would be a long time before all the kinks can be ironed out. Concerns were also expressed regarding the inevitable exposure to civil liability risks as the industry continues to iron out the kinks.

**Mortgage Servicing and Bankruptcy Trustee Update**  
By Heather Thayer, Thayer Legal Services PLLC

On the morning of January 11, I had the pleasure of sharing the podium with a panel of breathtaking experience and insight, against which my inadequacy as moderator was all too stark a contrast. The panel discussed the recent enforcement actions and investigations by the Office of the United States Trustee related to servicing and bankruptcy deficiencies by mortgage servicers.

Gail Geiger has served as the Creditor Enforcement Coordinator of the Office of the US Trustee since 2010 and she laid out numerous concerns of that office:

- **Proofs of Claim:** Missing, inaccurate, or inconsistent information; missing or inaccurate attachments; excessive, unreasonable, or impermissible loan default fees and charges; or loan default calculation errors.
- **Payment Change Notices:** Failure to properly or timely file when homeowners’ mortgage payments changed post-bankruptcy; accuracy.
- **Notice of post-petition fees and charges:** Excessive or unreasonable loan default fees and charges; failure to file notices timely; and missing, incomplete, or inaccurate information or data.
- **Escrow accounting and statement issues.**
- **Asserting an inaccurate post-discharge default after a debtor emerges from bankruptcy.**
- **Robo-signing:** Personnel signing the documents did not actually review the documents for accuracy or were using “borrowed” CM/ECF credentials.

As might be expected, a lively discussion ensued. While all agreed that there have been deficiencies in bankruptcy mortgage servicing, Michael Bates of Lindquist & Vennum pointed out that complying with the complex and sometimes impossible rules is more challenging than it can seem on the face of it. For example, Mike noted that one large servicer he worked for had identified at least eighteen different scenarios that could result in a payment change, so Payment Change Notices are needed for more than the obvious escrow and ARM adjustments – requiring attention and coordination by many different areas. Mike also pointed out, and Gail agreed, that the rules do not work well for simple daily interest loans such as most home equity products and such products were not considered when the rule was enacted. Another issue is that it can be impossible to give prior notice of payment changes as a result of loan modification, since loan modifications are often retroactive. Mike suggested that creditors get more involved in the bankruptcy rulemaking process to provide early practical input.

Perry Napolitano of Reed Smith capped off the panel (again with animated input from all – seriously, maybe a little less caffeine next time) by talking about what a servicer should do if contacted by the US Trustee’s Office. First, and more importantly – take any inquiry seriously, but approach it with an attitude of cooperation. Gail emphasized that the US Trustee’s Office is prepared to litigate these matters and will do so if pressed; however, if the servicer approaches the office with open dialogue, investigation requests and deadlines can be negotiated to lessen the impact on the servicer’s day to day operations. Consensual settlements are better for everyone, particularly as the proper damages for violations of these bankruptcy provisions are not clear – if the parties can agree on the proper measure of damages it is best for all. In discussions before the presentation, Ms Geiger did say that enforcement of consumer bankruptcy requirements is likely to be a high priority for the Office of the US Trustee from now on. Therefore, anyone who represents creditors who service consumer loans in bankruptcy, particularly mortgage loans, should familiarize themselves with these issues, and ensure that their clients have strong compliance programs for bankruptcy.
The RESPA Update panel addressed the status of Marketing Services Agreements (MSAs) under the Real Estate Settlement Procedures Act in light of the CFPB’s Lighthouse order, the appeal by PHH of Director Cordray’s order in the PHH administrative proceeding, and the CFPB’s recent guidance regarding MSAs. In the CFPB’s enforcement action against PHH, the CFPB alleged RESPA violations in regard to captive reinsurance contracts. The Administrative Law Judge issued an order with an award of approximate $6 million against PHH. Both sides appealed that decision, and in his order from that administrative appeal, Director Cordray increased the amount of the award to approximately $109 million. PHH then appealed Director Cordray’s order to federal court in the DC Circuit Court of Appeals. To present a variety of perspectives about the PHH matter and the other recent developments in this area, the panel consisted of a litigator at a law firm that practices in the consumer space, a senior in-house counsel at a large mortgage originator, an in-house litigation counsel for a consumer association, and a senior regulatory counsel for a mortgage industry trade association.

Irene Freidel of K&L Gates LLP set forth the legal background, including the longstanding perception of RESPA Section 8(c) as an exemption to RESPA sections 8(a) and (b), the Lighthouse order, and the PHH appeal. She discussed possible impacts if the CFPB is able to reject longstanding regulatory interpretations and resulting industry practices without notice and comment in a formal rulemaking context.

Jeffrey Rodgers of Flagstar Bank discussed his perception as an in-house counsel that it is difficult for counsel to advise business managers what is now acceptable behavior in regard to MSA. He noted that many institutions have simply moved away from the use of MSAs.

Julie Nepveu of AARP Foundation Litigation expressed her disagreement that there was a long standing definitive regulatory position on RESPA Section 8(c). She commented further that she believes that the best reading of Section 8(c) is that it is not an exemption to the requirements of Sections 8(a) and (b).

The final speaker, Ken Markison of the Mortgage Bankers Association, noted the comments of the three previous speakers, stating that their remarks highlighted the need for clarity and certainty in statutory and regulatory interpretation and application by the regulators. He stressed that the regulators need to understand industry practices and legitimate industry concerns on regulatory issues, and stated that this is why notice and comment is a required part of rulemaking. He stated that his organization is more than willing to work with regulators to enhance dialogue on all key mortgage related regulatory issues.

The Revised HMDA Rule: Changes, Challenges and Litigation
By Christine Acree, Ellie Mae, Inc.

The Home Mortgage Disclosure Act (HMDA) was enacted by Congress in 1975 and implemented in 1976. The statute and the implementing regulation have been updated several times since then. The purpose of HMDA is to help show whether financial institutions are serving the needs of their communities, assist public officials in distributing public-sector investment to attract private investment where it is needed, and assist with the identification of possible discriminatory lending patterns and the enforcement of anti-discrimination laws.

The Dodd-Frank Wall Street Reform and Consumer Protection Act amended HMDA in 2010 to add new reporting requirements and other information that the Consumer Financial Protection Bureau (CFPB) chose to require. The CFPB issued the HMDA final rule on October 15, 2015 implementing provisions of the Dodd-Frank Act. The final rule includes modifications to the institutions and transactions covered as well as to the reporting requirements themselves over the next several years.

During the panel presentation, Elena Grigera Babinecz, Senior Counsel with the CFPB, gave a brief history of HMDA, a basic overview of the final rule including institutions and transactions covered, data reporting requirements, modifications and additions to the data points collected, and changes to the reporting requirements under the final rule. David Kogut, Principal with Charles River Associates, provided further detail on characteristics of additional HMDA reportable data,
underwriting/pricing factors, loan characteristics, and rates and fees. He also discussed fields that are currently problematic for some lenders. Joseph Lynyak, Partner with Dorsey & Whitney LLP, also briefly reviewed some of the new reporting and disclosure requirements. He discussed data reporting challenges, concerns with identification of the loan applicant, and privacy. Thomas J. Kearney, Partner with Akerman LLP, discussed big-picture issues with timing, privacy, pricing, and fair lending. He also discussed preparation necessary for changes to policies, procedures, forms, systems, and business lines, as well as other compliance challenges related to the property address and Automated Underwriting Systems that will be necessary before various parts of the new rule go into effect.