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06-EV-030

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December 22, 2006

VIA U.S. MAIL

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice
& Procedure of the Judicial Conference
of the United States
Washington, D.C. 20544

Professor Daniel J. Capra
Reporter, Judicial Conference Advisory
Committee on the Federal Rules of
Evidence
Fordham University School of Law
140 West 62nd Street
New York, New York 10023

Re: Proposed Federal Rule of Evidence 502

Dear Mr. McCabe and Professor Capra:

I am writing to comment on proposed Federal Rule of Evidence 502, which was offered for public comment in August 2006. I recently learned of the detailed provisions of Rule 502 while preparing to lecture on waiver of the attorney-client privilege and the work-product doctrine.

My specific comments are on proposed Rule 502(c), which addresses the aptly-titled "selective waiver" of the privilege or the work-product doctrine. After reviewing the text of the proposed Rule, as well as the Committee note, I am at a loss to understand why this Rule has been proposed, and respectfully request that the Committee consider whether any such provision is necessary or appropriate. In particular, I can address the Committee's request for "any statistical or anecdotal evidence" on the likely effect of the proposed rule.¹

Under present law, with the possible exception of the Eighth Circuit, disclosure of an internal investigation would generally result in waiver of the privilege or the work-product protection for the materials actually disclosed; whether a broader waiver results would depend on a case-by-case analysis of the facts.

Having represented targets, subjects, and witnesses in federal white-collar investigations, I can tell you that the risk of broader subsequent waiver for non-government parties has never been a factor in the ultimate decision whether or not to disclose

¹ See Committee footnote to proposed Rule 502(c).



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information to a prosecutor or regulator. At most, the fact of waiver has caused the disclosing party -- typically a corporation or other business entity -- to request (but not to demand) assurances by the government that the information will not be subsequently disclosed.

The reason is simple: the threat of prosecution or adverse regulatory action (including debarment proceedings and similar actions) to a public company or a company in a regulated industry, or indeed most business entities, is so great that the business' first priority is always to attempt resolution of the criminal investigation or regulatory proceeding. No further incentive is necessary to "promote cooperation with government regulators"²; the business is already fully incentivized to cooperate.

Nor would such a limitation on waiver "decrease the cost of government investigations and prosecutions."³ Because businesses are already willing to make disclosures about their own internal investigations, in my experience the government is already the recipient of a "free" look at what the company has uncovered.

This cost-benefit calculus routinely employed by businesses is evident in a pending case in the District of Columbia. In that case, a qui tam plaintiff previously employed by M&T Mortgage Corporation filed suit alleging that M&T's residential mortgage unit had forged the signatures of both sellers and buyers on loan documents for federally-insured mortgage loans. (When certain loans went into default, HUD paid on the mortgage insurance, even though the insurance had been procured by the submission of false signatures -- hence the qui tam claim.) Immediately after the lawsuit was unsealed in the spring of 2004, M&T launched an internal investigation for the express purpose of mollifying its regulator (HUD) to insure that HUD would not suspend M&T from the residential mortgage underwriting process.

As part of its investigation, M&T's counsel took most of the steps usually associated with an internal investigation, including employee interviews, document review, and the like. M&T then submitted a comprehensive disclosure of its "investigation methodology, findings and conclusions to date." See M&T Mortgage Corporation Meeting With HUD,

² See id.

³ See id.



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June 10, 2004, attached hereto.⁴

The incentive for M&T's disclosure was obvious: under HUD's mortgage insurance program, M&T had the right to act as a "direct endorser" of a residential mortgage loan. That meant that M&T could guarantee federal insurance of a loan without a time-consuming underwriting review by HUD. Revelation of the fraud threatened that privilege.

In discovery proceedings before the District Court (Kessler, J.), M&T disclosed the fact of its meeting with HUD, but contended that the report of its investigation was subject to the attorney-client privilege or the work-product protection. The trial judge found that there was a waiver at least as to this item, but left open whether M&T had committed a subject-matter waiver as to all of the underlying investigative materials. In subsequent proceedings before the magistrate judge (Facciola, J.), the court ruled that there had been no subject-matter waiver as to the underlying investigative materials.

The result in this case was that the disclosing party was able to avoid adverse regulatory action (at least in the short run) while making a partial disclosure to the plaintiff in the qui tam proceeding. M&T required no further incentive, such as proposed Rule 502's selective waiver provision, in order to make this disclosure to its regulator, HUD. Changing the Rule to eliminate any follow-on waiver for private parties such as civil plaintiffs is therefore unnecessary to "promote cooperation with government regulators." On the other hand, limiting the waiver in the way proposed would provide a windfall to companies who are under investigation or are the targets of regulatory proceedings. Such businesses would be permitted to resolve their regulatory or criminal matters while fending off claims and subsequent civil proceedings - - including claims such as those advanced by qui tam plaintiffs, who provide direct benefit to the government.

I have also been involved in cases on the other side of the table, for the defense, in which the target of a regulatory or criminal matter has been required to make decisions about disclosing information to investigators or prosecutors. Although it would certainly be a benefit in such cases to know that there will be no subsequent waiver of the attorney-client privilege or the work-product protection, the risk of waiver has not been a factor in my experience in the decision to make disclosures to government bodies.

⁴ Although the attachment summarizes a supposedly confidential internal investigation, it is not under seal or subject to a protective order. Indeed, the report of the investigation is presently available on PACER from the D.C. federal court.



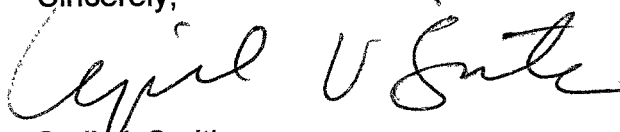
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I hope that this information is helpful to you in evaluating proposed Rule 502, which otherwise performs several valuable functions in dealing with truly inadvertent disclosures of privilege or protected material, and brings the Federal Rules of Evidence into conformity with modern electronic discovery and the like. Please note that this letter expresses my individual views only, and not the views of Zuckerman Spaeder LLP or any of its clients.

Please do not hesitate to give me a call if I can provide any further information.

Sincerely,



Cyril W. Smith

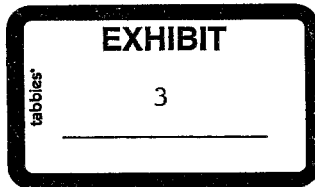
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Enclosure

M&T Mortgage Corporation Meeting with HUD

June 10, 2004

MT 010853



Discussion Overview

- Background - M&T Mortgage Corporation
- Details on Post Closing allegations
- Investigation methodology, findings and conclusions to date
- Next steps

Who is M&T Mortgage Corporation

- Subsidiary of M&T Bank – 18th largest commercial bank in the country
- M&T Mortgage has been an approved FHA lender since 1992
- High quality government lender
 - 43% compare ratio on Neighborhood Watch
 - 0.9% default rate
- Strong cultural focus throughout M&T on “doing things the right way”
- CRA----highest rating (Outstanding) since 1989
- Consumer compliance----highest rating (Strong) since 1998

Post-Closing Allegations

Lawsuit filed by former post-closing employee (received by M&T 3/23/2004):

- “Supervisor” allegedly encouraged her to cut and paste signatures, white out mistakes, create and sign missing documents
- Such practices were allegedly also employed directly by the accused “Supervisor” and one other employee
- Same employee raised concerns in April 2003
 - M&T’s HR department conducted internal review
 - No corroboration in staff interviews
 - Employee viewed as “disgruntled”

Immediate Actions Taken by M&T

Allegations taken very seriously – M&T respects and values the authority entrusted to it by HUD. Specific actions taken:

- Notified HUD
- Retained outside law firm (Buchanan Ingersoll “BI”) to conduct thorough and independent investigation
- Took action to preserve all files, memos, documents, e-mails, etc.
- Reviewed other areas and procedures to ensure problem was not more widespread
- Reiterated M&T policy prohibiting such activities to all originations and post closing staff
- Placed accused employee on administrative leave to assure no influence in the investigation process

Investigation Activities

- BI reviewed organization structure, process and compensation practices in the post closing area
- BI identified all management, supervisory and staff employees in post closing area between 1997 and present, the entire tenure of the targeted supervisor's tenure in the post closing area
- BI conducted 36 interviews with current and former employees from M&T's post closing area between 1997 and current
- BI reviewed all available performance evaluations and exit interviews of all current and former employees in the government post closing area
- BI oversaw file review activities to identify the "potential universe" of loans
- BI retained additional outside third party expertise to assist in the investigation process

Investigation Findings

Conclusion: Improprieties appear to be isolated – 3 employees, limited occurrences

33 of 36 interviewed had no knowledge of any improprieties

- 1 employee admitted to signing or dating non-critical documents with supervisor's knowledge "less than 5 times" over her entire 3-year tenure in the post-closing area
- 1 former employee reported that the supervisor had requested she sign or date non-critical documents on about 24 occasions, but she did not do so
- 1 employee admitted to signing or dating non-critical documents "once a month"
 - She did so without the supervisor's knowledge
 - She took these actions due to "her frustration at the age of some documents and the difficulty in resolving the deficiency "in view of signer intent"
- **Employee has subsequently been placed on Administrative leave**
- Based on interviews potential universe estimated to be very small – No employee had specific recollection of impacted files

Investigation Findings

Conclusion: No evidence (based on files reviewed so far) that any of the alleged improprieties resulted in any losses to the FHA

- Absent specific employee recollection if affected files, M&T estimated the “potential universe” for loans where claims paid by FHA
 - Files where issues “could theoretically exist” based only on the fact that they were handled in the Buffalo Post Closing group
 - Universe limited to 86 files
 - Based on reviews completed to date no irregularities have been found in any of these files
- Internal file review to be complete over next few weeks
- BI is retaining a handwriting expert to validate results

Investigation Findings

Total M&T Serviced FHA Foreclosures 1/1/97 – 3/1/2004 → 3,852 loans

Exclude Correspondent loans – Binder submitted by correspondent → (2,260)

Exclude West & Horsham loans – Binder submitted by LPO staff → (7)

Exclude loans where no claim submitted → (1,215)

Add Chase serviced loans where claim submitted → 528

Exclude binders where deficiency did not involve a signature, date or other authorization by non-M&T employee → (63)

“Potential Universe” of loans where claims were paid → 86 loans 9

Investigation Findings

- Conclusion: Improprieties appear to be limited to non-critical documents submitted with HUD insurance binder**
- Interview results universally confirm the non-critical nature of documents in question
 - HUD-1 addendums, builder certifications, termite inspections
 - No specific allegations of altering legal documents (i.e. notes, deed of trust, mortgages, etc)
 - Creates no issues relating to enforcement of legal documents
 - No customer impacts – no complaints received; no defenses to foreclosure raised

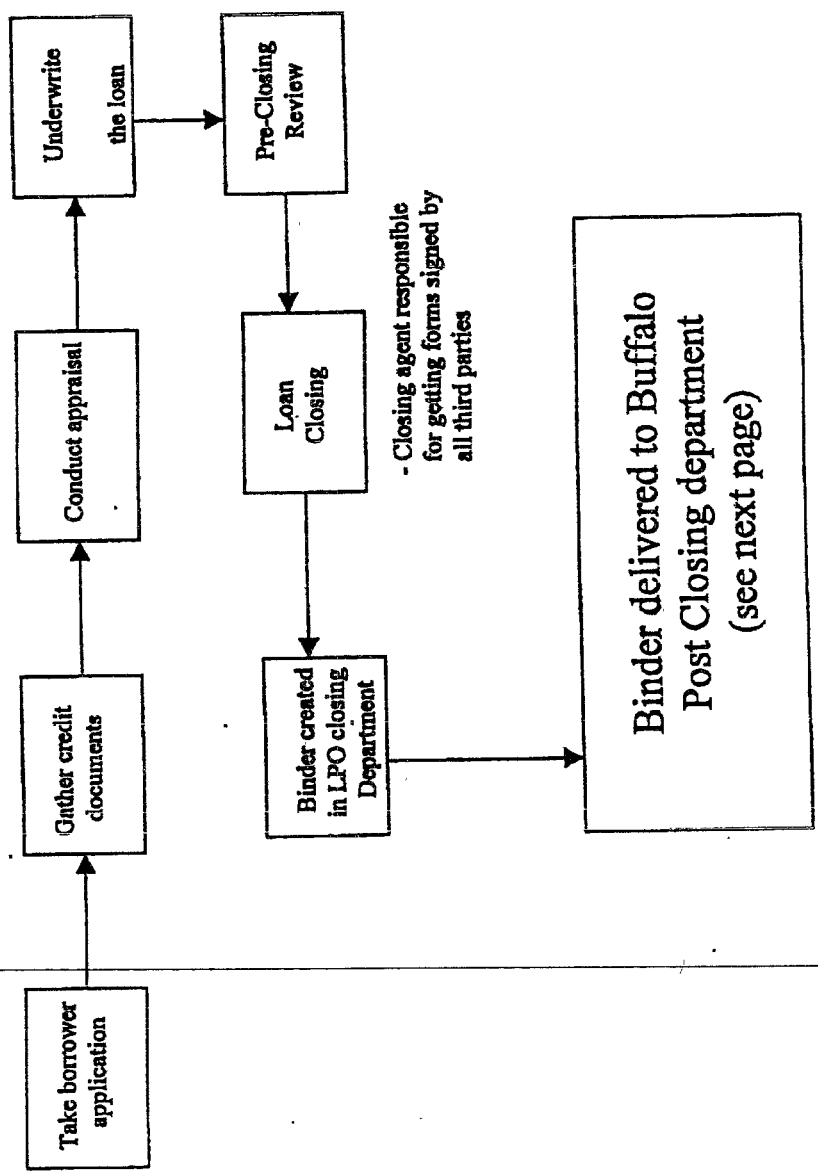
Investigation Findings

Conclusion: Occurrences limited to isolated staff in Buffalo Post Closing operation

- Interview and audit results for other areas that prepare HUD binders confirm that any potential issue is limited to Buffalo post closing group
- No similar issues discovered in other areas beyond Post Closing
- Interviews indicate no involvement in or knowledge of improprieties by any management personnel
- No improprieties relating to the credit approval process

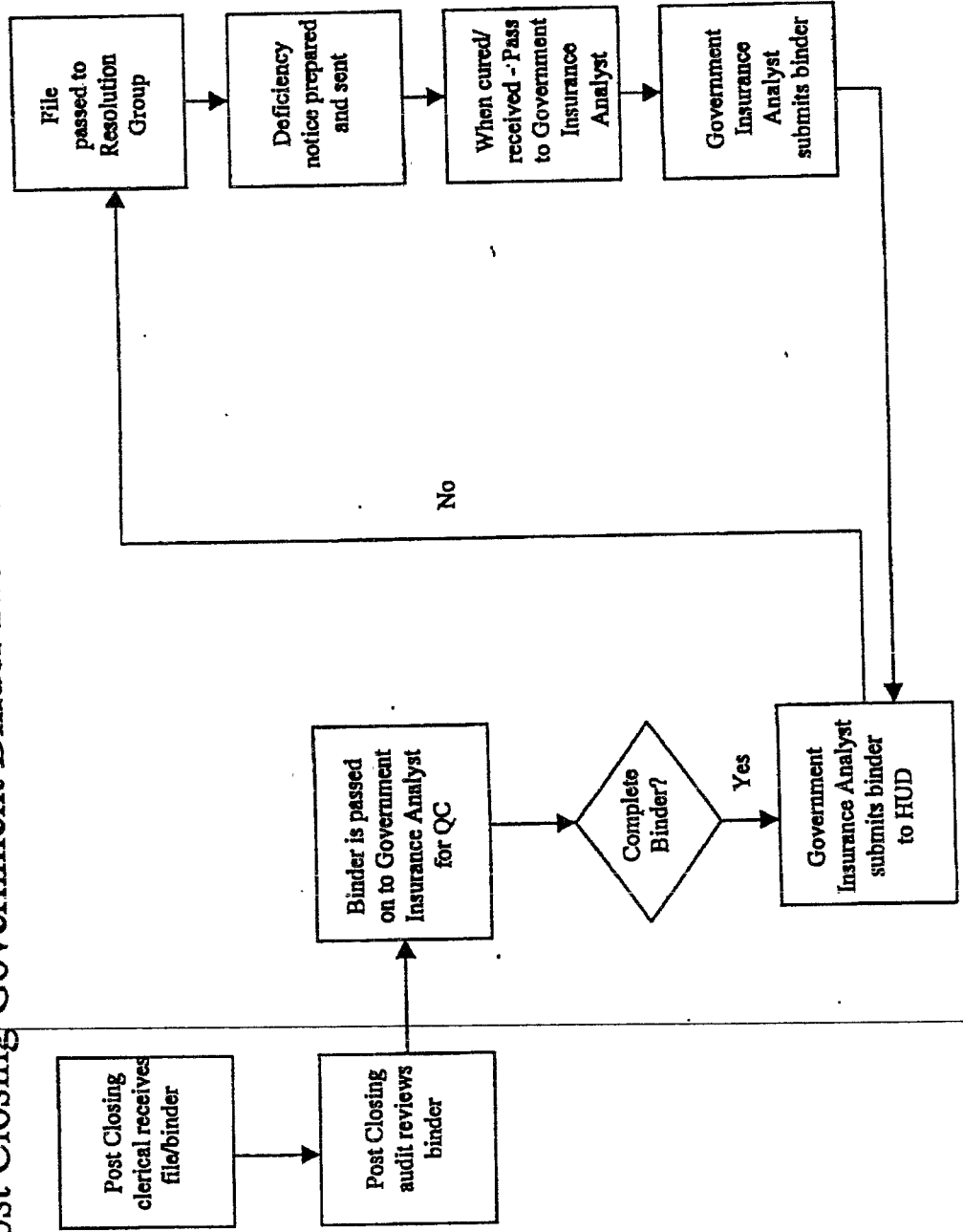
Investigation Findings to Date Process Review

Government Loan Credit Approval & Initial Binder Delivery Process Flow



Investigation Findings to Date Process Review

Post Closing Government Binder Process Flow



Investigation Findings

Conclusion: Issues resulted from employees' isolated violation of policy rather than any systemic process problem

- Proper segregation of duties and process management
 - Ultimate accountability for deficiency resolution rests with LPOs - separate from Post Closing auditors
 - Strong automated deficiency tracking in place
 - Independent QC performed weekly on 5-10% of files
- Compensation practices provided no incentive to violate M&T policy
 - Post closing staff on straight salary plus overtime
 - Supervisor on straight salary
- Price Waterhouse Coopers 2002 re-engineering review
 - Implemented recommendations further enhanced process
 - No findings of any improprieties
- 2003 Internal Audit of Post Closing found no deficiencies
- M&T's regular QC process found no similar deficiencies

Next Steps

- Complete file audits including handwriting reviews
- M&T to provide process and ethics training around this and similar issues to all operations staff in Origination and Servicing
- Conclude litigation process with former employee