

# InfoBytes

September 2, 2011

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## Federal Issues

**FTC Updates Telemarketer Fees for Do Not Call Registry.** On August 26, the Federal Trade Commission (FTC) announced updated fees for telemarketers accessing phone numbers on the National Do Not Call Registry. All telemarketers making calls to consumers in the United States are required to download phone numbers on the Do Not Call Registry to ensure they are not calling consumers who have registered their telephone numbers. Effective October 1, 2011, telemarketers will pay \$56, an increase of \$1, for access to Registry phone numbers in a single area code, up to a maximum charge of \$15,503 for all area codes nationwide, an increase from the previous maximum of \$15,058. Telemarketers will pay \$28 per area code, an increase of \$1, for numbers they subscribe to receive during the second half of a 12-month subscription period. The first five area codes are free, and certain organizations, such as some charitable organizations, may obtain the entire list for free. [Click here for a copy of the announcement.](#)

**HUD Issues Mortgagee Letter Regarding Revisions Made to HECM Counseling Certificates.** On August 26, the Department of Housing and Urban Development (HUD) issued Mortgagee Letter 2011-31, which provides guidance to counselors and lenders regarding changes made to the layout and administration of Form HUD 92902, HUD's Certificate of HECM Counseling. With respect to the form's layout, HUD (i) inserted a specific data field for the name and signature of attorneys-in-fact holding a power of attorney, (ii) added HECM Saver as an option that counselors may present their clients, (iii) replaced the box for Agency Tax Identification Number with a box for Agency Housing Counseling System Identification Number, and (iv) appended a HECM for Purchase Certification to the Certificate. Additionally, the Mortgagee Letter provides updated guidance for counselors regarding the (i) proper method for documenting the name of an attorney in fact, (ii) parties who must execute the form, (iii) specific dates that Counselors must capture on the form, (iv) time window during which revisions to the form may be made, and (v) process by which HECM Certificates may be associated with new case numbers or transferred between approved FHA lenders. The guidance contained in the Mortgagee Letter goes into effect September 25, 2011. [Click here for a copy of Mortgagee Letter 2011-31.](#)

**SEC Seeks Input on ICA Treatment of ABS Issuers/Mortgage-Related Pools.** On August 31, the Securities and Exchange Commission (SEC) issued a notice seeking comment on amendments it may propose concerning how asset-backed securities (ABS) issuers and mortgage-related pools (such as real estate

investment trusts (REITs)) are treated under the Investment Company Act (ICA). Currently, Rule 3a-7 excludes certain ABS issuers from having to comply with ICA requirements provided, among other things, that they achieve an acceptable credit rating from a rating agency. Acting in accordance with requirements established under the Dodd-Frank Act, the SEC seeks comment on whether it should remove the "existing rating condition" of Rule 3a-7, and replace it with other appropriate standards of credit-worthiness such as conditions relating to an (i) issuer's structure and operations, (ii) independent review of the issuer to protect investors from self-dealing, and (iii) issuer's assets and cash flow, and, in particular, their preservation and safe-keeping. The SEC also seeks comment on (i) whether Section 3(c)(5) of the ICA should be amended to limit the ability of ABS issuers to rely on that Section (instead of Rule 3a-7) for ICA exclusion, and (ii) interpretive issues related to reliance by some REITs and other mortgage-related pools on Section 3(c)(5)(C) to support their exclusion from the ICA. In this latter instance, the Commission issued a companion concept release specifically eliciting comments on (i) whether real estate and mortgage banking business can be differentiated from 'traditional investment companies,' and (ii) what factors the SEC should consider in establishing such a distinction. In the same notice, the SEC withdraws its 2008 proposal to amend Rule 3a-7. [Click here for a copy of the press release.](#)

## Courts

**Bankruptcy Panel Holds Unsecured Junior Lien Strip-offs Permissible.** On August 29, the U.S. Bankruptcy Appellate Panel for the Eighth Circuit held that a borrower ineligible for a Chapter 13 discharge may nevertheless strip off junior liens on his mortgage where the junior liens are wholly unsecured. *Fisette v. Keller*, No. 11-6012 (B.A.P. 8th Cir. Aug. 29, 2011). In this case, the appellate court considered whether a debtor was prevented by the anti-modification provisions of the Bankruptcy Code from modifying the rights of junior lienholders on a principal residence, if the value of the residence was insufficient to satisfy the amount owed to the first lienholder. The lower court had ruled that a debtor could not strip off a junior lien, either partially secured or completely unsecured, without violating Section 1322(b). On appeal, the appellate bankruptcy panel reversed and adopted the view of all other circuit courts that have addressed the issue that where a junior lien on a principal residence is completely unsecured, the anti-modification provision in 1322(b)(2) is inapplicable. Once a claim is classified under Section 506(a) as an unsecured claim, the debtor may modify the rights of the unsecured claim consistent with 1322(b)(2). The court further held that the debtor is still able to avoid the wholly unsecured junior liens even where he is not eligible for a Chapter 13 discharge under Section 1328(f) of the Bankruptcy Code (here, because the borrower had a recent Chapter 7 discharge). The court found that the ability to strip-off the unsecured lien was not contingent on receipt of a Chapter 13 discharge, and would instead be effective upon completion of the debtor's obligations under the bankruptcy plan. [Click here for a copy of the opinion.](#)

## Miscellany

**FHFA Files Suits Alleging Violation of Securities Laws in Sale of Mortgage-Backed Securities.** On September 2, the Federal Housing Finance Agency (FHFA) filed lawsuits against 17 financial institutions and certain of their officers and various unaffiliated securities underwriters. The suits allege violations of federal securities laws and common law in the sale of residential private-label mortgage-backed securities to Fannie Mae and Freddie Mac. The suits were filed in federal or state court in New York or federal court in Connecticut. The FHFA, as conservator of Fannie Mae and Freddie Mac, is seeking compensatory damages and civil penalties under the Securities Act of 1933 for alleged misrepresentations and other improper actions by the defendants. The complaints also seek compensatory damages for negligent misrepresentation, and certain complaints also allege state securities law violations or common law fraud. [Click here for more information and copies of the complaints.](#)

**DOJ Announces Settlement in Housing Discrimination Suit Against New Orleans Landlords.** On August 29, the Department of Justice (DOJ) announced a settlement with Betty Bouchon, the Bouchon Limited Family Partnership, and Sapphire Corp., in which the defendants agreed to pay \$70,000 to resolve allegations that they violated the Fair Housing Act by discriminating against African-Americans seeking to rent apartments at the defendants' 16-unit apartment building in New Orleans. According to fair-housing testing conducted by the Greater New Orleans Fair Housing Action Center (GNOFHAC), the building manager, Bouchon, treated African-American testers differently from other testers, falsely told an African-American tester that an available apartment was not, in fact, available for rent, and made statements indicating that she would not rent to African-Americans. The settlement funds will be split between the DOJ and the GNOFHAC. The proposed settlement (which is subject to court approval) also requires the defendants to adopt non-discriminatory procedures, keep records of prospective tenant inquiries and transactions, and submit periodic reports. The defendants did not admit liability in the settlement. [Click here for a copy of the DOJ press release.](#)

### Firm News

[Andrew Sandler](#) is scheduled to be on the Tuesday, [September 6 edition of the Diane Rehm Show](#) to discuss the FHFA's pending multi-billion dollar lawsuit against major banks.

[James Shreve](#) will speak at the International Association of Privacy Professionals' Privacy Academy in Dallas on September 14-16. Mr. Shreve will lead the "Protecting and Securing a Moving Target: NFC, RFID and Mobile Payments" panel and participate in the panel "Who Am I? Understanding Multi-Factor Authentication in Online Environments."

[Jeff Naimon](#) will be participating in a panel titled "The Future of Lending" at the National Mortgage News Mortgage Regulatory Forum which will be held at the Washington Marriott in Washington, DC from September 19-20. Mr. Naimon will be discussing the effect of recent regulatory and enforcement developments on the direction of the mortgage market, including QM/QRM, Loan Officer Compensation rules, and Federal Housing Administration and fair lending enforcement efforts.

[Benjamin Klubes](#) will be moderating a panel focusing on Preparing for and Responding to New and Emerging Federal and State Enforcement Actions at the ACI's Residential Mortgage Litigation and Regulatory Enforcement Conference on Tuesday, September 20 in Dallas, Texas.

[Andrew Sandler](#), [Benjamin Klubes](#), and [Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Regulatory Compliance Conference which will be held in Washington, D.C. from September 25-27. Mr. Sandler will be addressing enforcement priorities. Mr. Klubes will address litigation and enforcement trends relating to loan originations and Ms. Tucker will speak on developments in mortgage servicing.

[James Parkinson](#) will be speaking at two International Bar Association training sessions as part of the IBA's Anti-Corruption Strategy for the Legal Profession (<http://www.anticorruptionstrategy.org/>) on September 27 (Sao Paulo, Brazil), and on September 29 (Caracas, Venezuela).

[Benjamin Klubes](#) will be speaking at the 2011 PCI CRA and Fair Lending Colloquium on November 7 in Baltimore, MD on "Hot Compliance Topics: Reform Impact, Oversight Trends, Enforcement Actions and More!"

[David Krakoff](#) will be participating in a panel at the International Association of Defense Counsel program on worldwide anti-corruption laws in Palm Springs in February 2012.

## Firm Publications

[Jonathan Cannon](#) was quoted in an article titled *Proposal for Foreclosed Homes as Rentals Raises Questions* published in the August 19 issue of *Daily Journal*.

## Mortgages

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.

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